Kluwer Competition Law Blog

Polish competition authority launches a pilot program for the whistle-blowers

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Let me get this straight from the beginning. I am not a big fan of the trend among the competition authorities to introduce whistleblowing programs. For me this seems to be rather a sign of weakness and not of strength. If other available tools (and especially the leniency program) worked well there would probably be no need to extend the toolbox.

Whether the whistleblowing programs can offer significant advantages and result in increased enforcement is another question. I would, however, personally assume those who really "know things" will rather use the leniency program and will use it only if there is a significant risk of detection. And this brings us back to square one – you need to detect a sufficient number of infringements with "standard" good techniques (market screening & monitoring, market inquiries, reacting to publicly available information about potential anticompetitive behaviour, etc.) to make your leniency or whistleblowing hotline busy.

From that perspective I will be watching the results of the whistleblowing program very recently introduced by the Polish competition authority – Urz?d Ochrony Konkurencji i Konsumentów (the "Authority") with great interest. Here are my first impressions on its current design, based on the information that is available of the Authority's website.

Nihil novi sub sole (as yet)

The first, quite striking observation is that there have been no accompanying changes in the legislation, which means that the program is in principle based on the general rule allowing any interested person to pass their opinions or any sort of information to the Authority. This means that the current version of the program only creates an "infrastructure" (i.e., a dedicated website, hotline, etc.) for whistleblowing attempts and allows to start more intensive promotional efforts (a media campaign is now being run by the Authority).

At the same time, the fact that it is called a "pilot" program clearly suggest that the Authority will be ready to make a step forward (i.e., introduce such program to the existing legislation) if only there is a positive response from the market (which would probably mean that there is a good quality rather than quantity of information received via this tool). This could mean for example introducing some sort of reward for those that come forward and provide useful information (at the moment, the Authority is not able to make any contribution to the whistle-blower – it can count only on those people who will have other motivation to cooperate).

How does the program work?

Basic information about the organisation of the program is available on a specially designed website. It allows to determine some of its key elements, as well as to make some initial comments:

• The program is not limited to hard core offences (cartels), but applies to any restriction of competition (including abuse of dominance). In practice, any sort of market distortion can be reported to the Authority.

• The Authority allows to provide the relevant information via anonymous letter or e-mail, via a legal independent advisor, over a phone or during a face-to-face meeting (during such a meeting, the employees of the Authority will not make any attempts to get to know who the whistle-blower is). At the same time it encourages the whistle-blowers to provide further evidence, documents, etc. so that it is easier to decide if there is a need for a follow-up action.

• The information can be provided both to the headquarters of the Authority in Warsaw (mostly if the case is significant, relates to the entire Polish market, etc.) or to one of the local branches of the Authority (for cases of local significance).

• The Authority offers protection to any person who „in good faith and in the public interest" informs it about an anticompetitive practice. That opens some interesting questions on how the Authority will interpret those conditions. For civil law system lawyers the first one is probably a bit easier to understand, even if in principle, „good faith" is not known to the administrative law under which the Authority operates. One could assume that the whistle-blower should have a genuine intention of protection of competition (that should be the main objective of making a report). In particular, he or she should also not act in order to simply hurt another individual or undertaking. This makes it quite close to the second condition (acting "in the public interest"), as it should probably mean that the whistle-blower should not pursue any individual interest but act for the benefit of public or social good (which also means that the reported problem should not have an impact on individual interest only). To put it in practical terms, by the foregoing references the Authority seems to make an attempt to protect itself against depositions made with any sort of a hidden agenda. Therefore, even if it is not made clear, it seems that the foregoing criteria will be used mainly to judge whether there is any need for action (in other words – if there is a risk that the notification is not made in good faith or it is made in the interest of an undertaking or an individual, the Authority is free not to make any use of the information provided).

• One could also say that – a contrario – if the forgoing conditions are not met (e.g. the whistle-blower acts – in the opinion of the Authority – in breach of good faith obligation) the protection will not apply. There is of course the open issue of what such "protection" amounts to. It seems that it is solely protection against identification of the whistle-blower, especially as the Authority provides potential cooperants with clear information about its leniency program (which is also available to individuals – managers of infringers) stressing that this is the only way to avoid liability for infringements.

It is yet to be seen whether the initial pilot program will bear any significant fruit (i.e. result in increased enforcement). Even if the first comments from the Authority suggest that there have been a lot of complaints as soon as the program went live, its final success will depend on quality and not on quantity of information received. So for the time being, this move can only be seen as

another indication that the Authority wants to look for new cases more actively and that there might be much more going on in the near future. In this context, this new initiative adds nicely to some other activities we are witnessing (e.g. a growing number of dawn raids). But for the time being, we need to wait and see.

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