Kluwer Competition Law Blog

Antitrust penalties for individuals in Poland

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2021 – the year of first decisions – the law, the practice, and the facts

1. **The law**

The possibility to impose financial fines on individuals in case of undertaking anti-competitive agreements by companies was introduced into the Polish competition law in 2015.

It is a responsibility of a subsidiary nature – firstly, an undertaking must be in breach of Polish or EU prohibitions of anti-competitive agreements. Subsequently, the President of the Office of Competition and Consumers Protection ("**PCA**") may impose a fine on a "managing person" that may amount up to PLN 2 000 000 000 (i.e. approx. EUR 500 000). The fine is a risk when the managing person intentionally allowed the infringement of antitrust rules.

Just to be clear – other fines may be imposed on individuals for breach of competition law provisions in Poland. These are: (i) bid-rigging cases – where criminal charges may be pressed, and a person may be convicted with imprisonment sentence – up to 3 years, (ii) *dawn-raids* obstructions, (iii) lack of merger filings, when such action is required.

Here, however, I focus on the fines imposed for anti-competitive agreements.

2. **The persons covered**

There is no closed list of (managerial) functions held by natural persons that may be subject to personal liability for breaching competition laws in Poland. The definition of a managing person is very broad, and it covers not only members of managing bodies (management boards), but all persons who are administering the company, in particular, those who hold "managerial positions" – also outside of managing bodies (e.g. proxies, directors, etc.).

3. **The statistics**

Between 2015 and the end of 2020, there was no decision based upon which the Polish watchdog would impose a fine on an individual for anti-competitive agreements. The situation changed drastically at the end of 2020, i.e. with the first fine imposed.

Until the end of 2021, three decisions have been issued with fines for ten managers in total. **Just on 10 January 2022, the PCA informed about the imposition of fines on eight additional managers in the alleged *truck-dealer cartel***.

4. **The case law**

At the end of 2020, the Polish watchdog imposed a fine for the alleged horizontal division of markets between two companies in the heating sector concerning the Warsaw area (*the heating sector case*). The PCA found two managers involved in the allegedly illegal cooperation between companies and stated that they had breached antitrust rules. One of them escaped liability based upon leniency application. In 2021 the PCA imposed fines for horizontal market allocation between nationwide fitness chains, fining six managers (*the fitness chains case*). In this case, a fine for one of the managers was decreased *inter alia* based upon leniency application. Interestingly, one of the managers in *the fitness chains case* was fined because his company had been recognized as a cartel facilitator in a hub-and-spoke anti-competitive exchange of sensitive information.

However, the most interesting decision for the competition law practitioners should be the one where a dietary supplement manufacturer has been fined for vertical agreements with pharmacies – allegedly setting fixed prices of products (*the dietary supplement case*). Two managers have faced fines in this case. Unfortunately, the text of this decision has not been published yet.

All these cases are currently under appeals to courts having jurisdiction over the PCA's decisions.

5. **The crucial prerequisites for finding managers guilty of antitrust violations**

In the text of publically available decisions, some findings of the PCA repeat themselves and may create an initial roadmap for situations in which managers may be subject to fines for anti-competitive behaviours in Poland.

Firstly, in each decision, the text of which is publically available, the PCA indicated that **a manager** who had been fined **had directly led to a breach of competition law provisions by his company**. In this scope, PCA indicated that a manager had been **actively involved** in carrying out works on the coordination of activities between competitors (*the fitness clubs case*), or that one of the managers fined had **provided competitor with a draft of an agreement** between the companies that allegedly breached competition laws (*heating sector case*). Other actions of managers that were recognized as *smoking guns* in antitrust proceedings conducted by the PCA were:

- agreeing on the terms of an understanding between competitors,
- issuing an order to abandon sales in a certain geographic area,
- simply agreeing on market behaviours during meetings with competitors.

In the *fitness clubs case*, the PCA found that one manager had **conducted negotiations** on cooperation, where it was agreed that one local market would be surrendered to a competitive fitness chain. In the same case, another manager admitted in an e-mail correspondence that there was a *gentlemen's agreement* to avoid geographic collisions between the fitness chains.

Interestingly, the PCA also indicated what kind of actions are recognized as contrary to competition law provisions being *hub-and-spoke* cartel facilitation – that causes fines for individuals. These are: support of understandings between competitors, transferring sensitive information between them, or simply facilitating arrangements.

Secondly, in each decision, the text of which is publically available, the PCA indicated that **a manager was aware of the illegal character of his actions**. In the *heating sector case,* the PCA indicated that the mere proof of the manager being aware that undertaking's actions will breach competition laws should be the fact that he stated in an e-mail correspondence that the details of cooperation with a competitor had to be discussed orally only. On the other hand, in the *fitness clubs case,* the PCA underlined that one of the managers had been informed by his employees that market allocation raises doubts from a competition law perspective, but continued to allocate the market.

Thirdly, in each decision, the text of which is publically available, the PCA found that **a manager had an intent to undertake actions that will breach competition law provisions**. The Polish watchdog indicated that managers sought to limit competition on the market by establishing contacts directly with competitors or by providing them with relevant information *via* the cartel facilitator. Importantly, PCA had also pointed out that one of the managers had not taken any steps to withdraw from the market division, even though he was aware that his company participates in an illegal practice.

6. **The foreigners as individuals subject to fines in Poland**

The current case law shows that a manager may not escape liability for antitrust violations in Poland even in case he does not fluently speak Polish and is not a Polish citizen. As indicated by the PCA: *when starting to work for a company operating in Poland, one has to take into account the fact that some communication within this company, between this company and external entities, as well as the legal regulations and conditions for conducting business activity in Poland, will be in Polish.*

For now, fines for foreigners were imposed in two out of 5 decisions issued.

7. **The usage of external advisors**

The case law also states that using the services of external advisors as part of professional duties does not guarantee to escape liability either. Educating managers is therefore very important.

8. **The effectiveness of leniency applications**

Escaping liability is possible through leniency applications. The current case law confirms this. In the *fitness clubs case,* the fine for one of the managers was decreased by 50% because of leniency and an additional 10% for voluntary submission to a penalty. A similar situation took place in the most recent *truck-dealers cartel* decision.

In the *heating sector case* – one manager fully escaped liability – by way of leniency program, even though the PCA had recognized that his influence on the anti-competitive behaviour of his company was high and decisive.

9. **The fines calculation**

In the scope of calculation of the exact amount of fines imposed, the PCA took into account several aspects, some of them being:

- **The character of the breach**, finding very serious character of anti-competitive behaviours in cases concerning market allocation and practices concerning prices.
- **The degree of influence of the individual fined on the undertaking allegedly violating antitrust rules**.
- **Aggravating circumstances such as** acting as the organizer of the infringement.

In each case, the PCA also analyzed the adequacy of the penalty in light of the earnings of particular managers.

10. **The conclusions**

2021 and the very beginning of 2022 show that fines imposed on managers in Poland for anti-competitive behaviours of their companies are high antitrust risk. In almost all proceedings concerning illegal horizontal practices, charges are pressed towards individuals – to the best of my knowledge. **Importantly, as indicated above, fines may also concern vertical restrictions**.

The risk described in this article will be even higher as the **current draft of amendments to the Polish Competition Act** – concerning the implementation of ECN+ rules – **states that mother companies, as well as their managers, will be subject to antitrust fines in Poland – based upon the same rules that apply to these who directly violate the law**.

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