

EXPERT Antitrust law

A GAME-CHANGER?

The implementation of the EU antitrust directive reinforces the independence of the Polish antitrust authority and changes the penalization system for breaching the law.

Poland will soon implement the ECN+ Directive, which seeks to harmonize the positions and powers of national competition authorities, the so-called NCAs. The amendment will significantly change the Polish antitrust landscape.

THE UOKiK

One of the directive's main goals is to ensure the independence of NCAs, especially from political interventions. Currently, the prime minister can appoint and dismiss the chairperson of the Polish competition authority, the UOKiK, at any time. This leaves the door open for exercising political pressure.

With the amendment, UOKiK's chairperson will be appointed for a 5-year tenure. The prime minister will be able to discharge the chairperson only in quite limited circumstances, for instance, if he/she becomes a convicted criminal. While this limitation will offer more political independence to the UOKiK head, there are, however, some caveats.

First, the chairperson, after his/her tenure, can be reappointed one more time. This, some experts say, might result in the chairperson being susceptible to political pressure during the first term in hopes of being reappointed.

Second, some of the circumstances justifying dismissal are drafted rather vaguely and can be subject to broad interpretation. For example, the prime

minister must dismiss the UOKiK chairperson in the case of illness or other obstacles that make it permanently impossible to perform his/her tasks.

INFORMATION REQUEST

As with other NCAs across the European Union, the most frequently used tool for the UOKiK to gather information is a request for information. Non-compliance with an information request from the UOKiK is currently subject to a fine of up to EUR 50 million, regardless of the company's size. After the amendment, the maximum fine will be more proportionate to the size of the penalized organization, set at the level of 3 percent of its annual turnover. However, it is worth noting that the limit under the EU law is set at 1 percent.

The solutions implemented in Poland based on the ECN+ Directive will also differ from the EU law in another way: under the obligation to respond to a UOKiK information request will be not only companies and organizations but also natural persons. In the latter case, for not complying with the request, they will be subject to a fine of up to 50 times the average salary.

In contrast, the European Commission cannot fine natural persons for non-compliance with its information requests. Finally, the directive provides that an information request cannot compel the addressee



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to admit an antitrust infringement. Unfortunately, this has been reflected in the draft amendment only with regard to natural persons and not companies. Companies will thus likely need to look for protection against self-incrimination in case law.

IN-HOUSE LAWYERS

The amendment will also clarify some issues around UOKiK's access to legally privileged materials, and in particular to correspondence between a company and its legal advisors. Legal professional privilege (LPP) is especially important in the context of UOKiK's right to conduct dawn raids. After all, it makes little sense to ask for antitrust advice if that advice can then be seized by the UOKiK. Arguably, the amendment will limit the current scope of the LPP. Under EU law, LPP only applies to communication between a company and its external (not in-house) legal advisors. With the amendment, the Polish law will adopt the EU approach. For Polish general counsels, this may come as a surprise and as uncharted territory.

PARENTAL LIABILITY

Currently, the UOKiK can only fine companies which are found to have been directly involved in an infringement. In other words, UOKiK's fining powers do not extend to parent companies or subsidiaries. Meanwhile, under EU law, the liability of the parent company for antitrust infringements committed by its subsidiary is a well-established concept. It will become a part of the Polish system as well with the amendment. Fining the parent company for infringements committed by its subsidiary will be possible if the parent

had "decisive influence" over that subsidiary—regardless of whether it was at all involved in the wrongdoing. "Decisive influence," in turn, will be presumed if the parent had more than 90 percent of the subsidiary's share capital.

The UOKiK will also be able to take into account the annual turnover of the entire holding, not just the turnover of the infringing subsidiary, in setting fines. The maximum fine it will be able to set may amount to 10 percent of the holding's annual turnover. For multinationals with subsidiaries, this will be a real game-changer.

TRADE ASSOCIATIONS

Another big change concerns the liability of trade associations and their members. Today, a fine imposed on a trade association cannot exceed 10 percent of that association's annual turnover. After the amendment, the limit will be 10 percent of the sum of annual turnovers of the trade association's members active in the market concerned. If the trade association will not be able to cover the fine, members who had their representatives in the association bodies, and then other members too, can be required to pay instead. To date, Polish companies did not consider participating in trade associations a high-risk activity. Clearly, this may now change.

CONCLUSION

The implementation of the ECN+ Directive will change the Polish antitrust landscape significantly. The UOKiK will come out more independent and significantly stronger. Perhaps, the biggest change is the increase in the maximum fines for multinationals, who will now need to be extra careful.