Poland: Amendment to the Polish Act on Competition and Consumer Protection

Poland’s government is currently working on the draft amendment to the Polish Act on Competition and Consumer Protection (the “Amendment”) proposed on 14 March 2013 by the president of the Office of Competition and Consumer Protection (“OCCP”). The Amendment, whose adoption in the near future is highly probable, is meant to simplify and accelerate proceedings under the Act on Competition and Consumer Protection. This Legal Insight looks at the key proposed changes in the Amendment.

Merger control

The Amendment introduces a two-stage procedure for merger control issues. Transactions that do not raise any competition concerns will be cleared within a month in stage one. Merger control experts expect that approx. 80% of transactions will be covered by this stage. More complex transactions will be dealt with in the second stage, which lasts at most an additional four months.

The Amendment also foresees the OCCP presenting any concerns it may have regarding a transaction before issuing the clearance. The involved companies will therefore get a chance to take a stance towards these concerns and e.g. offer some modifications to the planned concentration in order to avoid anti-competitive consequences. The presentation of OCCP’s concerns will be deemed as a phase preceding the establishment of conditions, in the event that the clearance is supposed to be granted under certain conditions.

The Amendment also aims at eliminating the loopholes concerning multi-stage transactions (subsequent acquisitions of relatively small parts of a business/subsidiaries by one entity over a certain period of time not longer than two years), which currently fall outside the scope of the obligation of clearance due to the modest turnover associated with the involved parts of a company’s business/certain subsidiaries. After the Amendment’s adoption, if the entire transaction exceeds the given threshold, it will be subject to clearance.

Inspection and search

The Amendment also aims to introduce a clear division between control and investigation – the Amendment provides provisions which shall apply to the search itself. The inspectors’ authorization will cover also access to other devices containing IT data or IT systems, including access to IT systems owned by other entities that contain the inspected firm’s data connected with the subject of control, in particular email correspondence. Inspectors will be entitled to prepare notes regarding the content of such materials and receive copies. The inspected undertaking will be obliged to ensure access to abovementioned devices. The Amendment will also specify provisions of the Criminal Proceedings Code that shall apply analogously to inspection and search, respectively. An inspected undertaking or a natural person whose rights were infringed during the search will be entitled to file a complaint to the court of competition and consumer protection. However, the filing of a complaint will not suspend the search.

Fines

The most controversial proposal in the Amendment relates to fines. The Amendment
envisages that the liability for an infringement of the prohibition against anti-competitive activity will be borne not only by an undertaking, but also by its managers, whose actions or omissions led to such an infringement. The envisaged maximum fine that may be imposed on individuals amounts to PLN 2 million (ca. EUR 500,000). The fines imposed on the undertaking and its managing persons will be imposed in the same decision.

**Remedies**

Under the Amendment, a new competition tool, i.e. the application of remedies, will be introduced to Polish competition law. If an infringement of prohibition of anti-competitive agreements or abuse of a dominant position is found, the OCCP in its decision recognizing the practice as restricting competition may impose not only an order to refrain from illegal practice, but also an obligation to apply certain measures (remedies), explicitly indicated by the OCCP, in order to cease the restricting competition practice or remedy its effects. The Amendment provides an open catalogue of remedies, which are either of a behavioral or structural nature. The structural ones will be implemented only if (i) reliance on behavioral measures is ineffective, or (ii) other measures, though equally effective, would be more cumbersome for the undertaking. If the OCCP imposes an obligation to apply a certain measure, it can also set a period of time for that measure’s realization, as well as impose a reporting obligation.

**Settlements**

The settlement procedure is another new tool provided by the Amendment, which aims at simplifying and speeding up the proceedings regarding competition-restricting practices. According to the Amendment, if a certain infringement is found, in exchange for a 10% fine reduction, an undertaking and/or its manager will be expected to admit guilt before the OCCP and waive its right to appeal. However, the settlement will not end the investigation, the OCCP will be still be obliged to conduct an investigation until every issue is resolved. Moreover, the OCCP will have the right to withdraw from the settlement procedure at any stage, if in the OCCP’s opinion, the settlement will not speed up the proceedings. Therefore, the undertaking that admits its guilt before the OCCP will not have any guarantee that the settlements procedure will be successfully finished.

**Leniency program**

The leniency program will be supplemented by a so-called leniency plus program. The latter will apply if an undertaking that files a leniency application discloses to the OCCP information regarding another anti-competitive practice that hitherto had been unknown to the OCCP. In return, an additional reduction in the fine will be granted. The application of this tool is supposed to lead to an increase in the detection of anti-competitive agreements.