The Polish Competition Act – a year after substantial reform

A year has passed since major amendments to Polish Competition Law came into force on 18 January 2015 ("the Amendment"). The reform introduced significant changes, not only to the merger control regime, but also in the area of antimonopoly practices (anti-competitive agreements and abuse of a dominant position).

It is accordingly about time that we provide a summary of the effects of the Amendment's application by the Office for Competition and Consumer Protection (the "OCCP").

Merger control

The Amendment introduced a two-stage procedure in merger control cases. Concentrations that do not raise competition concerns should now be cleared within a month from submission of the complete notification in a stage one procedure ("Phase I").

More complex transactions are dealt with in a second stage ("Phase II"). In Phase II cases, the OCCP has an additional four months (ie, altogether five months) to decide whether to clear a concentration (with or without conditions), or whether to prohibit it.

According to the statistics published by the OCCP recently, the duration of merger control proceedings has been shortened to an average of 34 days in 2015, as compared to 56 days in 2014. This is as a result of the vast majority of concentrations being cleared in Phase I.

To date the OCCP extended the time frame for concluding the proceedings by four months in 10 cases (of which seven extensions took place during the first 12 months of the Amendment being in force). In all of those cases the commencement of Phase II proceedings were justified by a need to conduct a market study. In some cases this was because the verification of the data provided by the parties was necessary, in others there was no reliable third party data regarding the relevant market, or additional information to define the scope of the affected markets was required.

Phase II can also be commenced in particularly complicated cases and in concentrations that can be expected to significantly impede the competition.

In three out of 10 Phase II cases, decisions were already issued. The overall duration of the proceedings in those three cases (Phase I + Phase II) was: two months eight days; five months 10 days; and eight months 11 days.

Additionally, one Phase II case was discontinued by the OCCP due to a withdrawal of the notification by the notifying party.

Another vital change in the merger control procedures introduced a year ago is the "statement of objections". In cases where there is a reasonable probability that a
concentration will lead to a significant restriction of competition in the market, the OCCP presents its justified objections regarding the concentration to the notifying party(ies). Such statement of objections is issued in practice during Phase II after the OCCP completes the market study.

An undertaking may comment on the objections within 14 days from the date of its receipt. This term may be extended by not more than an additional 14 days on a justified request of an undertaking. The OCCP presented the statement of objections in merger cases twice so far. In one of them, after receiving the OCCP’s objections an undertaking decided to withdraw its notification.

The OCCP recently announced that since the Amendment came into force it issued 212 concentration decisions in 2015, of which only one was a conditional clearance. No prohibition decisions were taken in 2015.

**Restrictive practices**

Some essential changes were also introduced in the domain of antimonopoly practices.

The most controversial change granted the OCCP powers to impose financial penalties on managers of up to PLN 2 million (ca. EUR 500,000). Another vital amendment concerned the extension of the time bar for investigating practices restricting competition from one to five years. The Amendment also introduced a settlement procedure which in essence is a 10% reduction in fines in the event that an undertaking voluntarily accepts a sanction. The possibility to impose remedies in decisions recognising the practices as restricting competition, is also a new tool to be used by the authority. The President of the OCCP in its decisions now sets behavioural (for instance the obligation to grant the license of IP rights or to enable access to specified infrastructure on non-discriminatory terms) or structural (e.g. the obligation to perform a specified business activity by a separate entity in a capital group) remedies if a prohibited practice is ascertained.

Certain benefits of the new tools can be expected. The settlement should lead to a reduction in the duration and complexity of antimonopoly proceedings. Remedies imposed by the OCCP should give an indication to undertakings as to how to implement decisions that order anti-competitive practices to be discontinued.

On the other hand, extension of the time bar for investigating practices restricting competition to five years and granting the OCCP the power to impose fines for managers should, in the long run, enhance the efficiency of the OCCP detecting efforts. A one year time bar for investigating cartels and abusive practices applicable so far is extremely short in comparison to other European jurisdictions.

The OCCP recently announced that since the Amendment came into force it has commenced 32 antimonopoly proceedings and 179 explanatory proceedings in 2015. The effects of the reform in the domain of antimonopoly practices are yet to be seen.
Conclusion

Effects of the Amendment are visible in practice mainly in the merger control domain. A substantial reduction in the duration of merger proceedings (22 days fewer on average) can be seen as a success for the OCCP.

An increase in transparency in Phase II proceedings should also be noted. A decision extending proceedings by four months is reasoned, so the notifying party knows why Phase II proceedings are launched and may try to anticipate additional data that the authority is going to require. Furthermore, the introduction of the statement of objections enables undertakings to address the authority’s concerns more accurately and to consider presenting some solutions to address them.

The positive effects of the reform in the domain of combating restrictive practices need some more time before becoming truly noticeable.