



COVID-19 AND ANTITRUST – POLISH PERSPECTIVE

Coronavirus outbreak is having a significant influence on commercial conduct. Both businesses and consumers may face unusual market situations. Below we present some guidance concerning the impact COVID-19 is having on particular areas of Polish competition law and the scope of powers of the Polish Competition Authority¹ („PCA”).

Merger control

So far, no extraordinary measures related to merger control have been introduced. Thus, it is still possible to file a notification which should be reviewed within the statutory deadline of 1 month (1st phase cases) or 5 months (2nd phase cases). However, it should be noted that merger control proceedings may last longer than usual even for simple cases (although the PCA is still obliged to issue the decision within the statutory deadline). Also, market investigations (conducted in more complex cases) may be difficult to conduct. Unlike the European Commission or Autorité de la concurrence in France, the PCA has not called on businesses to refrain from notifications which may be filed later. Nevertheless, given the gravity of the current situation, such recommendation seems reasonable. Perhaps, the PCA would be more eager to engage in pre-notification contacts (which are rarely used in Poland) in order to initially review the case before formal notification².

Antitrust

The ongoing crisis may reshuffle the legal qualification of agreements or dominant companies' unilateral conduct. In particular, some types of horizontal agreements (between competitors), which would violate Article 101(1) TFEU³ or Article 6(1) of the Competition Act⁴, may be considered legal under the ongoing circumstances. Such agreements may benefit from individual exemption laid down in Article 101(3) TFEU or Article 8(1) of the Competition Act. Nevertheless, it should be noted that under these provisions the

¹ Prezes Urzędu Ochrony Konkurencji i Konsumentów.

² For instance, the U.S. Federal Trade Commission forced all parties to file merger notifications electronically (no hard copies are accepted from 17 March 2020). See: <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus>

³ Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47–390).

⁴ Act of 16 February 2007 on competition and consumers protection, consolidated text – Journal of Laws 2019 item 369 as amended (ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, tekst jednolity – Dz.U. 2019 r. poz. 369 z późn.zm.).



anti-competitive agreement may “become” legal once four conditions are jointly met, namely efficiency, pass-on to consumers, necessity and non-elimination of effective competition. Also, it is the business which is obliged to provide evidence for individual exemption. Hence, despite the dynamic situation, given the 5-year limitation period, it is recommended to collect evidence (such as market data or correspondence) in order to prove that certain forms of cooperation with competitors has been necessary. There would be a similar situation of unilateral conduct of dominant companies which would e.g. refuse to supply existing customers because of the ongoing crisis.

On the other hand, competition authorities are closely monitoring business conduct during the crisis. For instance, the PCA has initiated proceedings concerning terminating wholesaler’s contracts which supply hospitals with protective equipment (including surgical masks). According to the press release, such abrupt termination might be due to the possibility that existing customers (hospitals)⁵ may be forced to accept significantly higher prices for such supplies. There are currently two pharmaceutical wholesalers which the PCA have singled out. The authority is investigating as to whether an antitrust infringement (anticompetitive agreement or abuse of dominant position) has taken place. As part of this a special telephone hot-line dedicated to hospitals has also been launched by the PCA.

Secondly, some businesses may be forced by public authorities to adopt extraordinary measures of an anti-competitive character. A good example of this may be Article 11(2-5) of the Polish COVID-19 Act⁶ which provides the legal basis for the Prime Minister to issue binding orders or force the execution of agreements by non-public entities, including businesses. Some of such measures may be of an anti-competitive character. However, they could benefit from so-called state action defence under which the conduct of businesses which would be forced by public authorities would not qualify as an infringement of Article 101(1) or 102 TFEU / Article 6(1) or 9(1) of the Competition Act. A good example could be the Prime Minister’s decision to prohibit Allegro and OLX online services to market certain medical, pharmaceutical or paramedical products. However, it should be noted that state action doctrine – being an exception from the general prohibitions laid down in the provisions invoked – are narrowly interpreted by EU courts. Therefore, prior consultation with antitrust counsel would be recommended.

⁵ https://www.uokik.gov.pl/news.php?news_id=16277 (in English)

⁶ Act of 2 March 2020 on specific solutions concerning prevention, counteraction and combat of COVID-19, other contagious diseases and crisis situations resulting therefrom, Journal of Laws 2020 item 374 (ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych, Dz.U. 2020 r. poz. 374).



Consumer relations

The COVID-19 crisis may constitute an incentive for some forms of conduct which may result in consumers being harmed. These are inter alia:

- refusal to reimburse price of services paid up-front;
- misleading consumers in relation to characteristics of some products, e.g. antibacterial effects;
- excessive prices of some products.

In its official communication, the PCA declared that, pursuant to sector-specific legislation, travellers (customers of tour operators) are entitled to full reimbursement of costs if they are forced to withdraw as a result of these extraordinary events. The situation of passengers (airline customers) is somewhat unclear due to scarcity of specific regulations. However, Mr. Tomasz Chróstny (Head of PCA) expressed his expectation that *“airlines should also behave responsibly and monitor the current situation to avoid endangering passengers' health”*⁷. We may expect that the PCA would be inclined to open proceedings against businesses which refused to reimburse consumers the costs of services which were not provided during the state of epidemiological threat.

When it comes to the misleading information, such communication to consumers may constitute unfair market practice which is also a violation of collective consumer interests under Article 24(2)(3) of the Competition Act. Such practices may be subject to fines of up to 10% of company's' annual turnover which are imposed by the PCA.

The most difficult is the situation of price rises. Although competition authorities normally refrain from intervening into pricing policies, the PCA communicated that unfair price rises in the retail sector would be treated as charging margins contrary to principles of social coexistence (*zasady współżycia społecznego*)⁸ Such legal assessment may result in the PCA opening proceedings concerning violation of collective consumer interests. Therefore, retailers should be able to provide evidence that significant price rises were necessary in the current circumstances (e.g. because of higher input prices).

The ongoing situation is thoroughly monitored by the PCA which established a task force which is dedicated to combat unfair business practices during the COVID-19 crisis. Hence, we may expect that the PCA will open proceedings concerning such practices in the following years.

⁷ <https://www.gov.uk/government/topical-events/coronavirus-covid-19-uk-government-response> (in English)

⁸ https://www.uokik.gov.pl/aktualnosci.php?news_id=16322 (in Polish)



The approach adopted by the PCA is no different from measures taken by competition authorities in Italy⁹, the UK¹⁰ or Australia¹¹.

Contractual advantage

Given the importance of the food supply chain during the COVID-19 outbreak, the practices of large entities (suppliers or purchasers) vis-à-vis their smaller contractors may be assessed under the Act on Contractual Advantage¹². According to Article 6 of this Act, it is prohibited to use contractual an advantage the prohibition of which is addressed to suppliers and purchasers. The contractual advantage is defined as the situation of significant disproportion between the economic potential of the parties. So far, the Act served as a tool giving the PCA power to intervene against large businesses which are allegedly exploiting their smaller contractors, e.g. relationships between large food processors supplied by individual farmers¹³ or supermarkets operators and their smaller suppliers¹⁴. Given the situation caused by the COVID-19 outbreak and vagueness of underlying definitions laid down in the Act, this piece of Polish legislation may be used by the PCA especially in order to fight against significant rises of wholesale or input prices. Such policy was also announced by the Head of the PCA in its official communication¹⁵.

Payment gridlocks

As of 1 January 2020, the PCA gained another power to intervene against businesses which fail to regulate its financial obligations if the number of non-payments and/or late payments exceeds PLN 2 million in 3 consecutive months¹⁶. The PCA is competent to impose a fine (proportional to the amount and interest due) if the late payment is found during the infringement proceedings. However, in relation to the gridlock caused by COVID-19 the debtor may argue that non-payment was caused by the force majeure. According to the Code of Administrative Procedure¹⁷, the administrative fine cannot be imposed in such circumstances. However, the company should be able to provide evidence that the delay was caused by the COVID-19 outbreak.

⁹ <https://en.agcm.it/en/media/press-releases/2020/3/ICA-Coronavirus-the-Authority-intervenes-in-the-sale-of-sanitizing-products-and-masks>

¹⁰ <https://www.gov.uk/government/topical-events/coronavirus-covid-19-uk-government-response>

¹¹ <https://www.accc.gov.au/consumers/consumer-rights-guarantees/covid-19-coronavirus-information-for-consumers>

¹² Act of 15 December 2016 on counteracting unfair use of contractual advantage in trade of agricultural and food products, consolidated text – Journal of Laws 2019 item 517 as amended (*ustawa dnia 15 grudnia 2016 r. o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi, tekst jednolity – Dz.U. 2019 r. poz. 517 z późn.zm.*).

¹³ E.g. PCA decision of 1 October 2019 No. RGB-15/2019; PCA decision of 5 March 2018 No. RBG-3/2018.

¹⁴ https://www.uokik.gov.pl/news.php?news_id=15802&news_page=8 (in English)

¹⁵ See footnote 8.

¹⁶ Article 13b(2) of the Act of 8 March 2013 on counteracting excessive gridlocks in commercial transactions, consolidated text – Journal of Laws 2019 item 118 as amended (*ustawa z dnia 8 marca 2013 r. o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych, tekst jednolity – Dz.U. 2019 r. poz. 118 z późn.zm.*).

¹⁷ Article 189e of the Act of 14 June 1960 – Code of administrative Procedure, consolidated text – Journal of Laws 2020 item 256 as amended (*ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego, tekst jednolity – Dz.U. 2020 r. poz. 256 z późn.zm.*).



I am at your disposal for further questions!



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