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2. QUESTIONNAIRE FOR ANTITRUST PROCEDURES (MAÏTE OTTES)

2.1 General issues

2.1.1 Does your jurisdiction provide for settlement procedures with the competent competition authority?

The competition law rules in Poland are enforced by the President of the Office of Competition and Consumer Protection (Polish Competition Authority or “PCA”).

Currently, the Polish Competition and Consumers (Protection) Act of 16 February 2007 (the “Act”) does not provide for a settlement procedure in the case of public enforcement of competition rules.

However, the lower house of the Polish Parliament is, through a committee, working on proposals to amend the Act¹ (“**Draft Amendment**”). One of the projected changes is to introduce a settlement procedure to the competition law enforcement system². According to this proposal, the competition fine may be reduced by a fixed 10% in exchange for the undertaking's voluntary acceptance of the fine. It is not explicitly a guilty plea, but in practice it is at least a no contest plea. That is because it will be possible to appeal from the fine after the settlement, in which case however the fine reduction will be automatically withdrawn. The fixed 10% reduction does not seem encouraging enough for undertakings in non-obvious cases where the fine might well be lowered or quashed by the court on appeal. However, the PCA may in such cases “offer” a lower basis fine than usual, which combined with the 10% off may be an acceptable solution for the undertakings concerned.

For an outline of other changes proposed in the Draft Amendment, see below.

2.1.2 If your jurisdiction does not provide for settlement procedures, does your jurisdiction provide for commitment decisions?

The Act empowers the PCA to issue commitment decisions. A commitment decision may be issued by the PCA only on an application of a party in the antimonopoly proceedings, and is applicable in cases of both alleged agreements restricting competition and alleged abuses of dominant position.

The legal basis for a commitment decision is provided by Article 12 of the Act.

¹ The Bill to amend the Competition and Consumers (Protection) Act and the Code of Civil Procedure Act. Version of 6 February 2014, available in Polish at: <http://orka.sejm.gov.pl/Druki7ka.nsf/0/E76374C5477F37CFC1257C7B002FB8E6/%24File/2124.pdf> [Access on 2014-02-27]

² Additional Article 89a in the Act.

- If your jurisdiction does not provide for settlement procedures, please answer the following questions from the perspective of such commitment decision procedure.

Since the current law does not provide for a settlement procedure in antitrust cases and the final shape of the future regulations is still unclear, our answers are presented from the perspective of the commitment decision procedure.

However, we also point out the most important facts about the settlement procedure proposed in the Draft Amendment.

2.1.3 What is the general stance towards settlement procedures in cartel matters? Are these generally considered to be a preferred route?

Theoretically, it is possible to apply for a commitment decision in cartel cases. However, in practice it is rather unlikely for the PCA to accept such an application where naked cartels are concerned or even in cases related to vertical pricing restraints (such as Resale Price Maintenance). PCA's approach changed significantly in July 2012 when the new Guidelines on Commitment Decisions were published. Before that date, commitments were acceptable in cases involving fixed or minimum resale price maintenance in vertical relations.

But, according to the Guidelines, the commitment procedure should have a very limited ('exceptional') applicability to hard-core agreements that have as their object, inter alia, price fixing or market sharing, tender collusion or limiting or controlling production, sale, technical development or investments³. In consequence, commitment proposals in such cases will be very closely scrutinised by the PCA, and the Guidelines suggest that a leniency application will be the preferred way to escape fines.

Therefore, commitment decisions are applicable to anticompetitive agreements which do not constitute a hard-core restriction. As a result the commitment decision is not considered to be a preferred route for the PCA in cartel cases.

The settlement procedure proposed in the Draft Amendment is a solution dedicated to all competition restrictions (both unilateral and collective practices). The procedure is therefore planned to cover cases of both horizontal and vertical agreements as well as cases of abuse of dominant position. We believe that, in cartel cases, the PCA should be far more willing to negotiate and finalize a settlement than to issue a commitment decision.

³ See: Stawicki A., Turno B., Feliszewski T. in: Christine A Varney (ed.), *The Cartels and Leniency Review second edition*, MA: Law Business Research: 2014, p. 272.

2.2 Procedural issues

2.2.1 At what stage can a settlement be reached? E.g.: (i) only in the investigative procedure, (ii) before publishing a statement of objections, (iii) at any stage before an infringement decision has been taken, or (iv) at any time?

In Poland there are two major types of proceedings concerning competition infringement issues. Those are:

- a. investigative proceedings, and
- b. antimonopoly proceedings;

The former type are proceedings on a matter and not against an undertaking, and are always commenced *ex officio*, even if a complaint was filed. During those proceedings the PCA investigates the matter, such as by carrying out an inspection (dawn raid) or requesting the undertaking(s) to submit specific information or documents. The “suspected” undertaking is not party to the proceedings. Investigative proceedings are always concluded with a procedural ruling ('resolution') and not with a decision on the merits ('administrative decision'). Therefore, the commitment decision cannot be issued at this stage.

If investigative proceedings prove that a competition infringement is highly probable, PCA commences antimonopoly proceedings and officially communicates objections to the undertaking by way of a formal notification.

According to the Act, an application for a commitment decision can be filed in course of antimonopoly proceedings, meaning after delivery of the formal notification.

In theory, commitments may be proposed by undertakings until the final decision is issued and the infringement is finally proven. That is because the Act allows commitments if the infringement is demonstrated as likely, which is less than proven. In practice, the opportunity for an effective filing of commitments by the undertaking exists only at the initial stage of antimonopoly proceedings. PCA's Guidelines on Commitment Decisions⁴ make it clear that an application for a commitment decision should be filed in the first written brief on the merits after commencement of antimonopoly proceedings. The first brief on the merits is filed in response to the formal notification. Although the PCA generally tends to follow the Guidelines, there are exceptions.

There is a controversy whether, as the law is, a commitment decision may be issued where the antimonopoly practice has already been stopped. According to the PCA Guidelines, it is possible if effects of the practice continue and the

⁴ Office of Competition and Consumer Protection, *Guidelines on commitment decisions in cases of practices restricting competition and practices harming collective consumer interests*, Warsaw 2012, available in Polish at: <http://www.uokik.gov.pl/download.php?plik=12033>, p. 4.

proposed commitments are going to eliminate the negative impact the practice⁵. The Draft Amendment expressly makes commitment decisions available in cases of ceased practices.

According the Draft Amendment, the settlement procedure may be commenced in course of antimonopoly proceedings, i.e. after delivery of the formal notice of proceedings. The settlement procedure will be composed of several stages:

- a. The PCA invites all the parties to settle, acting *ex officio* or on application by a party;
- b. Then the parties have 14 days to decide whether or not to enter into the settlement procedure;
- c. The parties which decide to enter into the procedure are then informed by the PCA about its initial findings, its expected decision and the estimated amount of the fine after the 10% reduction;
- d. The parties are given 14 days to send in their responses to PCA's position;
- e. The PCA analyses the first round of the parties' responses and sends them modified settlement proposals (the same kind of information as in c.);
- f. The parties have further 14 days to submit their second responses;
- g. Having analyzed the parties' second responses, the PCA requests them to submit their final statements of acceptance within a time that is not less than 14 days from delivery of the request;
- h. The final statement of a party must consist of: (1) a clearly stated voluntary acceptance of the fine; (2) an acknowledgement of the amount of the fine, and (3) an acknowledgement of receipt of information on the alleged infringements, on the right to be heard and on the possible unfavourable results of appealing from the decision.
- i. The PCA issues its decision consistently with the proposals accepted by the parties (letter h.).

Both the PCA and the party will be able to withdraw from the settlement procedure at any stage, except that the PCA may do so only if the procedure does not contribute to accelerating the antimonopoly proceedings. This is a rather ambiguous restriction and, for all practical purposes, PCA will have an almost unlimited discretion here.

⁵ Office of Competition and Consumer Protection, *Guidelines on commitment decisions in cases of practices restricting competition and practices harming collective consumer interests*, Warsaw 2012, available in Polish at: <http://www.uokik.gov.pl/download.php?plik=12033>, p. 8-9.

2.2.2 Is it possible to settle with only one, or several parties involved in the alleged cartel, or do all accused parties need to be involved? Are there any constraints with whom a settlement can be reached (cartel leaders, recidivists, etc.)?

As mentioned above in point 2.1.3, commitment decisions are practically available in cases of non-hard-core restrictions, horizontal or vertical, and those cases inherently involve multiple parties. A commitment decision may be issued only if it would be sufficient to effectively prevent the infringements. That said, an application for a commitment decision should be filed by all parties to the forbidden agreement. From the practical point of view, acceptance of the commitments by all parties may sometimes be difficult as contradictory interests are involved. According to PCA case law, in the case of vertical restrictions, a commitment application should be filed by the supplier and the major distributors.

There are no formal constraints for initiators and recidivists, but because PCA has a wide scope of discretion, those factors, especially recidivism, may significantly lower the chance for a commitment decision.

The settlement procedure proposed in the Draft Amendment will apply to each party separately. Therefore, the regulation will formally allow a situation where some participants decide to settle the case (and get the 10% reduction in the fine) whereas others decide to defend the case on the merits and appeal the final decision to the court. Such “hybrid” proceedings may pose procedural difficulties and challenges to the PCA, especially if the court annuls the finding of infringement on appeal of only some of the parties. We believe that the PCA will, within its discretion, be willing to settle the case when all parties enter into a settlement procedure. In the event of “hybrid” proceedings, the PCA may always withdraw on the basis that the procedure will not accelerate conclusion of the case.

2.2.3 Could you elaborate on the possible settlement arrangements. Are these only pecuniary measures or could these involve behavioural measures as well? How are the terms of a settlement being determined?

The whole concept of a commitment decision in Poland is based on the idea that no payment of a monetary fine is made. Commitments accepted and imposed by PCA in commitment decisions are purely behavioural. They often consist of an obligation to amend contracts with other parties to the antimonopoly proceedings (cases of vertical agreements) or with third parties not involved in the proceedings (mostly cases of abuse of dominant position).

The final shape of commitments is negotiated with the PCA (see below at point 2.2.4).

2.2.4 Which party can take the initiative for a settlement: is this the administrative authority only, or the suspected parties as well?

As mentioned above, the suspected party, which has been served with a formal notification, is always the initiator of commitment negotiations. After an application for a commitment decision is filed, the PCA may present its opinion on the proposed commitments and may also propose changes. Sometimes, especially when sophisticated contract relations are involved, the negotiations may last for a couple of rounds. During negotiations, communications are exchanged in writing, sometimes by e-mail.

2.2.5 Are there any other institutions involved other than the competition authority? Does a settlement, e.g., require any court approval? Please elaborate on the relevant procedure.

Sometimes, where a regulated sector (e.g. energy, telecommunications) is concerned, the PCA consults its decision with the relevant regulatory authority, but such consultations are not mandatory for or binding on the PCA.

The PCA accepts commitments and requires undertakings to comply with those commitments. In theory, a commitment decision may be appealed to court. But in practice, it is difficult to imagine such a situation as no fine is imposed and the negotiated commitments are approved by the undertaking and subsequently accepted (in the form of a decision) by the PCA. The decision becomes final, binding and enforceable two weeks⁶ after issuance, if not appealed within that time. As such, a commitment decision which has not been timely appealed does not require any court approval.

2.2.6 Is it necessary for reaching a settlement to admit being guilty?

An application for a commitment decision is not formally an admission of guilt, but in practice it is treated that way. It is a practice widely used among businesses to make sure the first written brief to the PCA contains both:

1. sound legal arguments to defend the alleged practice, and
2. an application for a commitment decision.

As a result, even if PCA, in its broad discretion, is not willing to accept the proposed commitments at the beginning, it would be obliged to address the legal arguments presented, which may also convince it to consider a more flexible approach.

⁶ According to the Draft Amendment, the time will be extended to 1 month.

Although there are no formal restrictions on availability of commitment decisions, in some cases (especially hard-core restraints) the chances are so low that there is no point in even applying.

2.3 Enforcement of settlement

- 2.3.1 Are there any rules as to the enforcement of a settlement? E.g. in monitoring any possible behavioural measures? What are the consequences if a settlement agreement is breached?

A commitment decision will always impose a reporting obligation on the undertaking. As a result, the undertaking is given a fixed deadline to send progress report(s) with evidence on how it complies with its commitments. For example, where the commitments include an obligation to amend any contract, the PCA will often wish to be sent a certified copy of the amended contract.

In the event of a failure to comply with any commitment (including a reporting obligation), the PCA may fine the undertaking for up to the equivalent of EUR 10,000 per each day of the delay.

Moreover, in the event of non-compliance, the PCA may also *ex officio* revoke the commitment decision, restart the antimonopoly proceedings and issue a decision that declares the practice anticompetitive and sets a monetary fine of up to 10% of the overall annual turnover earned by the undertaking in the accounting year preceding the year in which the fine is imposed.

In practice, undertakings almost universally comply with commitment decisions on a voluntary basis. Although some minor problems with proper reporting can occur, we are not aware of any fines for non-compliance with commitment decisions.

- 2.3.2 Is a settlement subject to appeal? Can the parties agree to waive the right of appeal?

The Polish constitution guarantees the right to appeal from administrative decisions to courts (judicial review). Accordingly, a commitment decision may formally be appealed to the Court for Competition and Consumer Protection and this right cannot be waived. However, such a decision is usually treated as a “win-win“ situation so an appeal is unlikely.

- 2.3.3 Would it e.g. be possible for a party reaching a settlement with a public authority to be prosecuted for the same behaviour by a criminal prosecutor?

Under Polish law, tender collusion (bid rigging) is the only competition infringement that is subject to criminal liability. The punishment is imprisonment up to 3 years. It is theoretically possible for PCA to issue a commitment decision with respect to an undertaking in a bid rigging case and, at the same time or

subsequently, for the individuals involved to be criminally prosecuted for bid rigging. As a result, undertakings do not apply for commitment decisions in such cases.

2.4 Confidentiality and privilege

2.4.1 Is a settlement arrangement made public? What information is made public? Does this, e.g. include the settlement agreement itself, any documents and/or statements leading to such settlement?

Case files are available only to parties to the proceedings. Business secrets marked as such for the PCA are protected and they are never disclosed to the public. That applies also to the judicial review proceedings.

The PCA publishes all its decisions, including commitment decisions, on its website, indicating the names of the undertakings involved. The commitments are fully set out in the dispositive part of the decision. Sometimes commitments may involve also an obligation for the undertaking to publish a notice about the decision (e.g. on its website or in a newspaper). The statement of reasons for the decision often contains recapitulation of all the proposals and applications filed in course of proceedings. However, the public version of the decision does not contain any business secrets or the personal data of any individuals other than parties to the proceedings.

2.4.2 If the parties do not reach a settlement, can statements and/or documents used in trying to reach a settlement, be used against the accused (or other) parties?

As mentioned above at point 2.2.6, the filing of an application for a commitment decision is not formally an admission of guilt. Any commitment proposals made (even if later rejected) constitute a part of the case files. In practice, the fact that a commitment proposal has been submitted and ultimately rejected is generally rather neutral for the final decision. However, we are aware of cases where a rejected application for a commitment decision was used against the undertaking in a final decision.

The Draft Amendment will also introduce formal restrictions on access to statements and documents filed with the PCA by the parties in course of settlement procedures. Those documents may not be copied or used by third parties in other proceedings.

Moreover, if the PCA or a party withdraws from a settlement procedure, no information and evidence obtained by the PCA during the procedure can be used in the proceedings in question or in any other proceedings. In other words, without the undertaking's consent, such evidence will be inadmissible.

2.4.3 Do parties who have settled their case get any protection from any possible follow-on damage claims in civil proceedings?

Being an administrative authority, the PCA does not have powers to decide on civil claims. Therefore, no immunity against civil claims for damages may be granted. The civil court will have full competence to independently hear civil claims, if any are raised. Moreover, the court will not be bound by the commitment decision (even if final and legally valid).

As mentioned above at point 2.4.2, the Draft Amendment does provide for certain safeguards for parties entering into settlement procedures. No evidence collected during such procedures may be used in civil proceedings without a written consent of the relevant party to the settlement procedure. However, the decision that concludes a settlement procedure will be of the same kind as a decision declaring a practice anticompetitive. As such, it may be used as a precedent for any follow-on damages claims that may be raised in civil proceedings.