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EXPERT

Andrzej Bundyra from Łaszczuk & Partners writes
about new regulations governing joint liability
under the competition law.

EVER SINCE ITS INCEPTION 31 YEARS AGO, ONE OF THE MOST FUNDAMENTAL FUNCTIONS OF AMCHAM HAS BEEN TO MAINTAIN PLATFORMS FOR SHARING PROFESSIONAL KNOWLEDGE AND EXPERIENCE BETWEEN ITS MEMBERS. THERE ARE SEVERAL SUCH PLATFORMS, INCLUDING AMCHAM MONTHLY MEETINGS, THE AMCHAM COMMITTEES, AND THE EXPERT SECTION OF THE CHAMBER'S MAGAZINE.

EXPERT Competition law

A PRICE TO PAY

Parent companies to pay for the infringements of competition law by their subsidiaries.

The implementation of the ECN+ Directive [Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market] has provided an opportunity to change some far-reaching aspects of Polish antitrust law. In January 2021, a bill amending the Competition and Consumer Protection Act was presented for public consultation in Poland. Apart from implementing Directive (EU) 2019/1, the bill also aims to extend liability under Polish competition law.

How would this be done? Most importantly, parent companies would pay for infringements of competition law by their subsidiaries.

So far, this topic has been a key difference between Polish and EU competition law. In general, Polish law has recognized discrete natural or legal persons only as an undertaking, regardless of their real autonomy, in determining the course of their business. Consequently, only the specific undertaking could be held liable for breach of competition law and subjected to fines.

However, the EU has formulated the concept of a "single economic unit," under which multiple persons could be treated as a single undertaking if they do not experience autonomy in pursuing their business. In practice, parent

companies and subsidiaries are often treated as a single economic entity under EU competition law. Thus, undertakings forming a single economic unit might share responsibility for infringements of the competition law.

DECISIVE IMPACT

According to the bill, an infringement of competition law by a single undertaking would also be treated as a breach by undertakings having a decisive impact on that undertaking. Consequently, an undertaking in immediate breach of competition law and one or more undertakings having a decisive impact on that undertaking could be held jointly liable for the breach.

According to the bill, a decisive impact is exercised when economic, legal, and organizational links between undertakings cause the undertaking on whom a decisive impact is exerted to execute or comply with instructions given by the undertaking exerting a decisive impact, limiting or preventing independent determination of behavior on the market. A decisive impact is presumed if the parent company holds over 90 percent of the capital of the undertaking over which it has a decisive impact.

The explanatory memorandum to the bill states that this provision should also be understood to mean that in the case of a subsidiary, the parent company, "grandparent" company, or further companies along the

line could exert a decisive impact on the company and thus might be held jointly liable for a breach of competition law.

PENALTIES

In general, an undertaking that violates the most serious provisions of competition law is subject to a fine of up to 10 percent of its turnover generated in the financial year preceding the year in which the fine is imposed.

The adoption of the proposed amendment will mean that the Polish competition authority will, in a single proceeding, prosecute the single undertaking for a breach of competition law as well as its affiliates having a decisive impact over it. However, the explanatory memorandum to the bill suggests that the Polish competition authority may, at its discretion, select the parties to be pursued in the proceeding, depending on the circumstances of the specific case and the nature of the violation. In the event of a violation by an undertaking exercising a decisive impact over another undertaking, the Polish competition authority will be able to impose a total fine on that undertaking and the undertakings over which it exerts impact. As the amount of the fine depends on the undertaking's annual turnover, the fine would be calculated according to the combined turnover of all of the undertakings. The liability of the undertakings would be joint and several, which means that all or any one of them would be liable up to the full amount of the penalty.

MANAGING PERSONS' LIABILITY

Currently, a managing person of an undertaking may face a fine of up to PLN 2,000,000 if,

in the identified infringement of competition law, the person intentionally allows the undertaking to infringe competition law through an act or omission.

The bill also provides for liability of managing persons of parent companies, but this only applies in case of the most serious infringements of the competition law—the prohibited agreements.

In late 2020, the Polish competition authority imposed its first penalties on managing persons of undertakings for competition law infringements. It seems likely that it may also impose penalties on managing persons of undertakings exercising a decisive impact in the future over another undertaking.

SUMMARY

Infringement of competition law can be subject to very high fines. Taking the amendment under consideration would mean that the undertaking in immediate breach of law, and its parent companies would face the same penalties. The penalty might also apply to managing persons of the company in breach and its parent companies.

If adopted, the proposed changes to the Competition and Consumer Protection Act will have a great impact on the market, including on foreign investors in Poland operating as parent entities of Polish-based companies. The adoption of the amendment in its current form would establish the basis for a significant increase in penalties imposed by the Polish competition authority in the future.



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