

Competition & Compliance Bulletin

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1. Antitrust: OCCP's New Guidelines on Commitment Decisions

A commitment decision in the Polish antitrust law is the national equivalent of the Commission's decision under Art. 9 (1) of Regulation (EC) 1/2003. In the light of a scarce statutory regulation, the Polish Office for Competition and Consumer Protection ("OCCP") recently published the Guidelines ("Guidelines") on Issuing of Commitment Decisions, which provide a practical insight into the OCCP's approach in this regard.

The advantage of a commitment decision lies in the simple fact that the OCCP is **not permitted to impose a fine** on an undertaking when adopting a commitment decision. The logic of the commitment decision is that it is issued only when an infringement has been made **probable** and thus it is not required that the infringement has been proven.

An undertaking may offer commitments at any stage of the proceedings. However, the Guidelines encourage undertakings to offer the commitments **as soon as feasible**, possibly already in the reply to official charges of the OCCP. The reason for it is to avoid reaching the stage in which the infringement could be regarded as being proven. It is also crucial that the commitments are proposed **in writing** as in the absence of a written proposal the commitment procedure cannot be triggered.

According to the Guidelines the offered commitments shall be **precise and closely related** to the alleged infringements; a general declaration to stop the infringements would not suffice. What is more important, the relevant undertaking is expected to **identify the anticompetitive effects** of the alleged infringements and to propose how to **remedy** these effects. The OCCP may modify the proposed commitments and submit them to the undertaking for acceptance within a given deadline.

The Guidelines provide for an optional **market sounding** to be conducted by the OCCP. During the market sounding, the opinions from other market players and consumers as regards the proposed commitment(s) shall be collected. No confidential information may be disclosed during the market sounding and the relevant undertaking will have the right to **access the results** of the market sounding.

It should be noted that the OCCP is not legally obliged to accept any commitments. Although not explicitly provided by the statutory regulations, the Guidelines provide that the most **serious infringements** of the competition law will in principle **not be eligible** to benefit from the commitment decisions. Thus before engaging into discussion on commitments with the OCCP, the undertakings are encouraged to seek legal guidance to find the most suitable way of defence (eg. leniency).

A commitment decision will usually contain a deadline for implementing the remedies and a deadline for reporting on their fulfilment to the OCCP. Delayed implementation of the remedies may trigger a **penalty payment** of up to EUR 10,000 per day of delay. The OCCP can also **annul** the commitment decision, if the relevant undertaking does not fulfil the commitments. In case of an annulment, the proceedings continue and may lead to issuing of a “regular” cartel decision by the OCCP.

2. Antitrust: MFN clauses / Internet booking platforms – preliminary proceedings closed

The OCCP has confirmed that it closed the preliminary proceedings in case of the alleged application of the MFN clauses by internet booking platforms: hrs.pl, expedia.com, booking.com and hotele.pl.

The OCCP **objected** the so called “broad” MFN clauses according to which the internet booking platforms were guaranteed that their prices, room availability and other conditions would not be less (or equally) favorable than in any other **online** or **offline** sales channel(s). At the same time the OCCP **did not object** the “narrow” MFN clauses which guaranteed that the prices, room availability and other conditions offered by a platform must not be less favorable than those offered **only online** on the webpage of the hotel, hostel or an apartment. According to the OCCP, all four Internet booking platforms **voluntarily agreed to withdraw** from the clauses, which the OCCP questioned. The proceedings ended without a fine or a commitment decision.

3. Compliance: Will the new OCCP’s President continue his/her predecessor’s approach to compliance

Since the dismissal of Mr. Adam Jasser from the post of the President of the OCCP end of January 2016, it remains to be seen whether the OCCP will continue Mr. Jasser’s approach towards compliance management systems (“CMS”).

In Mr. Jasser’s view the last year’s introduction of the personal liability of managers for infringements of competition law may incentivize undertakings to implement the compliance procedures. Mr. Jasser stated that the OCCP **may reward** introduction of compliance systems, which are aimed at preventing breaches of competition law in the future. However undertakings cannot treat the CMS as a **fig leaf** for infringements. Entrepreneurs cannot expect from the OCCP to reward the mere existence of a CMS, in particular, if it has proven to be ineffective, ie. infringements of competition law occurred despite CMS being implemented. However, if in the course of cartel proceedings an undertaking introduces a CMS or remedies the deficiencies of an existing CMS, such circumstances **may be taken into account** while imposing a financial penalty.

In Mr. Jasser’s view it takes **five elements** to establish an effective CMS: (i) adoption of CMS rules by the management; (ii) CMS trainings for the staff; (iii) whistleblowing mechanism; (iv) periodical review of CMS; (v) sanctions for compliance trespassers. If these five elements are fulfilled, it may be possible to **decrease** the fine.
