



Legal Alert

Competition and Antitrust Law

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AN AMENDMENT TO THE COMPETITION AND CONSUMER PROTECTION ACT

Financial penalties for individuals managing the enterprise

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On 23 July 2013, the Government approved the bill amending the Competition and Consumer Protection Act. The bill envisages many amendments to the binding provisions of law, *inter alia*, within the scope of the procedure for controlling concentrations between undertakings, implementing the procedure for voluntary submission to a penalty, change in the *leniency* procedure (including establishing a new institution, the so-called *leniency plus*), and also those regarding the rights of the President of the Office of Competition and Consumer Protection within the scope of protection of collective consumer interests.

The greatest amount of controversy has been stirred up by introducing the sole liability of individuals for certain violations of competition law, in particular due to harsh financial penalty (up to PLN 2,000,000).

Who may be held liable?

Pursuant to the bill, a “managing person” shall not be liable for violation of competition law. The Act defines a managing person as a person “managing the enterprise, in particular a person performing a managerial position or being a member of the enterprise’s supervisory body”.

Therefore, management board members of capital companies, partners managing partnerships, and directors of state enterprises can in particular be liable. A person appointed by the management board to manage the enterprise can also be subject to liability (e.g., if the management board of the Polish company permanently resides abroad and has appointed a managing director to manage the company’s operations on a daily basis).

The proposed definition of a managing person raises concerns which have been reported during works on the bill, *inter alia*, by the Ministry of Justice. In particular, the scope of responsibility of persons managing a part of the business activity of the enterprise is not clear (e.g., sales department manager). Such person performs a managerial function, however he/she may not be qualified as a “person managing the enterprise”. Therefore, such person should not be qualified as being subject to liability, in particular due to a prohibition of extended interpretation of provisions of law stipulating penalties of a criminal character.



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[Interview with Mr. Krzysztof Zięba on TVN CNBC:](http://www.tvncnbc.pl/kara-dla-menedzera,342086.html)

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What actions can one be held liable for?

In the course of the bills development, the scope of actions for which liability has been envisaged has been limited in comparison to the initial suggestions. The approved bill envisages liability for entering into an agreement limiting competition, of which the aim or result is:

- determining, directly or indirectly, the prices and other terms and conditions of purchase or sale of the goods;
- limiting or controlling production or sale, and technical or investment progress;
- dividing the sale and purchase market;
- applying arduous or non-uniformed contract conditions in similar agreements concluded with third parties, resulting in establishing diverse competition conditions;
- making the conclusion of an agreement contingent upon the other party taking over or fulfilling another benefit not having any subject or customary relation with the subject matter of an agreement;
- limiting access to the market or eliminating the entrepreneurs, not included in the agreement, from the market.

Personal liability can be imposed if horizontal cooperation agreements have been concluded (between competitors), as well as agreements between the entrepreneurs on various levels of trade, e.g., between a supplier and a distributor (vertical supply and distribution agreements).

The amendment in its subjective scope has not included an agreement in the form of bid rigging, however one should bear in mind that now there is a risk that a penalty shall be imposed on such action, based on the Criminal Code.

The bill does not stipulate however the personal liability of a managing person imposed for the entrepreneur's actions constituting an abuse of a dominant position.

What are the premises for liability?

The possibility of imposing a penalty on the individual may occur if (the premises are jointly met):

- a managing person allowed the entrepreneur to violate a prohibition of entering into the above-mentioned prohibited agreements;
- a violation has been deliberately made (i.e., a managing person was willing to enter into an agreement being similar to anti-competitive agreements or was aware that its action may result in concluding such agreement, and agreed to do so);
- a managing person has to commit an action within the scope of its positions being subject to a penalty;
- a financial penalty has been imposed on the entrepreneur which is managed by a managing person.

Violating a prohibition may occur by an act or omission. Therefore, a managing person, who in fact did not know on entering into an agreement, however after being informed, did not take any actions aiming at ceasing its performance (e.g., withdrawal from performing a price agreement) may be subject to liability.

Limiting the liability only to deliberate actions results that a managing person will not be responsible for actions carried out by his/her subordinates beyond his/her knowledge. Contrary to the initial assumptions of the bill, the liability for omissions within the scope of supervision has not been stipulated.

It should be emphasized that being unaware that a certain agreement is contrary to binding law does not prove the lack of "deliberate intent". In principle, being unaware of the illegal character of an agreement will not exempt a managing person from liability.

The bill is still going to be examined at each stage of the legislative procedure. Given the six-month period for entering into force, specified in the bill, the new provisions will enter into force in the middle of 2014.

Should any issues relating to new regulations raise your concerns or require more explanation in detail, the lawyers from Kochański Zięba Rapala & Partners remain at your disposal.