



## Competition law in the face of a pandemic

The ongoing state of epidemic poses a major challenge to all market players. The problems that businesses currently face include not only the risk of losing liquidity due to their inability to fulfil orders, but also the demands of customers challenging their contractual obligations, unforeseen costs and lower income from their business activities.

In this unusual situation, it is necessary to remember that competition law applies in full. Both international and national antitrust authorities have pointed out that the COVID-19 pandemic does not justify infringements (crisis cartels will not be tolerated). At the same time, the new, broad powers granted to antitrust authorities allow them to interfere with the business activities of entrepreneurs to a large extent.

The only positive news for entrepreneurs in the current situation is that they can benefit from numerous forms of state aid.

### STATE AID

- » Given the limited European Union budget, **the main aid will come from national budgets**. Companies wishing to benefit from such support will have to do so within the processes defined by the relevant national authorities.
- » What state aid measures can Polish entrepreneurs currently expect?
  - > **The Bank Gospodarstwa Krajowego may grant sureties and guarantees for the repayment of loans** taken out by entrepreneurs, with the exception of micro and small entrepreneurs, to ensure financial liquidity. Such sureties and guarantees will cover no more than 80% of the outstanding loan amount. Companies which were not in arrears with social security (ZUS) contributions and tax payments as of 1 February 2020 may benefit from such guarantees. The range and availability of guarantees should be checked with the lending banks;
  - > **A municipal council may extend the payment deadlines or grant an exemption from property tax** (for real estate related to business activities). Such exemptions are contingent on the municipal council adopting a resolution specifying the conditions under which entrepreneurs can be included in the class of persons whose liquidity has deteriorated in connection with COVID-19;
  - > **A district governor may provide a subsidy** to micro, small and medium-sized enterprises **for part of the costs of their employees' salaries and social security contributions** due on those salaries. To be eligible for support the enterprise must have suffered a minimum 30% reduction in turnover (with the amount of aid available depending on this value), have no grounds declare bankruptcy and not be in arrears in the payment of taxes and social security contributions;
  - > **A district governor may provide co-financing** to entrepreneurs, being natural persons and not employing personnel, to cover **part of the costs of running a business**. To be eligible for support the enterprise must have suffered a minimum 30% reduction in turnover (with the amount of aid available depending on this value), and not be in arrears in the payment of taxes and social security contributions;
  - > **A district governor may grant micro-entrepreneurs a one-time loan of up to PLN 5,000** to cover the ongoing costs of running a business. The maximum repayment period 12 months (with repayments beginning after a 3-month grace period).
- » In the near future, we can expect that **the list of state aid measures may be extended**, if the draft law on state aid for the rescue or restructuring of entrepreneurs is adopted. **Amendments** have already been introduced to the act on the **system of development institutions**, strengthening the powers of the Polish Development Fund to combat the effects of COVID-19 by granting financial support to entrepreneurs.

## MAXIMUM PRICES

- »» The minister competent for the economy may issue a regulation setting **maximum prices** or maximum wholesale and retail margins applicable to the sale of goods or services **essential for the protection of human health or safety or significantly impacting household living costs**. The broad criteria for interpreting the nature of goods and services, as well as related discretionary powers, create the risk of significant state interference in the pricing policies of entrepreneurs in many sectors.
- »» Entrepreneurs applying prices or margins higher than the designated maximums may be subject to financial penalties of between **PLN 5,000 to PLN 5,000,000** imposed by way of an administrative decision. The power to issue such decisions is vested in the: voivodship pharmaceutical inspectorate, voivodship inspector of agricultural and food quality, voivodship branch of the state sanitary inspection, and voivodship inspector of the Trade Inspection. Such an extensive list of competent authorities may give rise to **inconsistency in their actions and the lack of a uniform sanctions policy**.
- »» The minister competent for health matters may establish, by way of a notice, the **maximum official sales prices** including value added tax, and official wholesale and retail margins (the resultant price) for: 1) certain **medicinal products**, 2) **medical devices**, 3) **foodstuffs for particular nutritional uses**; 4) **biocidal products**, 5) **pharmaceutical raw materials**; which may be used in connection with counteracting COVID-19 or if there is a risk of their being unavailable in the territory of the Republic of Poland. Reimbursed products constitute an exception.
- »» For both types of maximum prices, the President of the Office of Competition and Consumer Protection (UOKiK) may impose a fine of up to **10% of the annual turnover** on an entrepreneur who has committed multiple infringements, or has committed infringements in relation to many goods and services or on a large scale. An entrepreneur who fails to provide information when requested or obstructs an inspection may be fined up to **5% of their annual turnover**, but not more than **PLN 50,000,000**.
- »» It should be noted that the provisions of the Act of 15 December 2016 on counteracting unfair use of contractual advantage in trade in agricultural and food products remain in force. There is a risk that these regulations may be used to permit state interference in the food market. This applies to all levels of trade and a wide range of practices, including pricing policies and consumer protection regulations, which the President of the UOKiK may in turn wish to use to combat price speculation.

## TIME LIMITS AND DEADLINES

- »» An important piece of information for entrepreneurs subject to pending antimonopoly proceedings is the **suspension of time limits** provided for in administrative law, as well as procedural and judicial time limits, **which have either not yet begun to run or which have already commenced** for the duration of the state of epidemic threat or the state of epidemic due to COVID-19. In proceedings before the President of the UOKiK, the suspension of already running time limits also applies to parties to the proceedings, while time limits only apply if the President of the UOKiK clearly substantiates them in the relevant request (special cases). The proceedings remain pending, but the President of the UOKiK is not bound by deadlines, so we may expect significant delays in the issue of decisions.
- »» **The suspension of deadlines** also applies to **merger control** proceedings. During a state of epidemic threat or a state of epidemic, the President of the UOKiK may only issue decisions that take a party's request into account in full. Therefore merger control proceedings may be significantly prolonged.

## OUTLOOK

- »» **Competition law norms remain fully in force** and competition authorities around the world continue to issue statements reminding companies of their full application. In this context, many decisions concerning agreements, price rises or aid applications should be preceded by an **in-depth legal analysis**.

»» The persistence of difficult market conditions may lead to **more frequent abuses of competition law**. Losses incurred will incentivise the “adjustment” of these conditions through unlawful agreements and acts of unfair competition.

It's worth recalling that:

- > **a refusal to supply** constitutes a breach of competition law only if the entrepreneur has a dominant position (or in the case of a collective boycott - a refusal to sell to a given contractor, in agreement with other entrepreneurs). Changes in consumer behaviour resulting from the COVID-19 pandemic may alter existing market definitions and the attribution of a dominant position;
- > **price rises** (excessive prices) will be assessed in the context of the maximum prices specified in the Anti-Crisis Shield, potentially the President of the UOKiK may consider such a rise as an abuse of a dominant position (if applicable), or a violation of consumers' collective interests;
- > **there is no place for “crisis cartels”** - entrepreneurs in various sectors are currently cooperating within their industries in order to **ensure the secure supply** of essential products and services and to reduce the risk of business failure in the face of declining revenues.

**More flexibility** can be expected from antitrust authorities in recognizing the **justifications** for certain agreements restricting competition, such as:

- **research and development** (R&D) agreements in the context of a potential vaccine, as well as in other industries in terms of innovative production methods, new uses of substances/products;
- **production** agreements, including **subcontracting** and **specialisation** agreements, **purchasing** agreements (joint purchasing);
- **exchange of sensitive information** - there is an opportunity (although not yet used in practice) to allow, for example, the exchange of information on stocks and distribution to ensure the supply chain's continuity through individual or block exemptions from the prohibition of anti-competitive agreements.

Nevertheless, it should be borne in mind that **the most serious infringements of competition law** (the so-called *hard-core restrictions*), such as: fixing or coordinating purchase or sales prices, setting the level of production/sales, market partitioning by territory or by customer, bid rigging, limiting the production or import/export of goods, etc., **will continue to be met with immediate reactions from the antitrust authorities**.

## CONSUMERS

### »» CONSUMER-ALIKE PROTECTION FOR ENTREPRENEURS POSTPONED

**New rules** were to apply from 1 June 2020, **extending consumer protection to natural persons conducting business activities (sole proprietors)**. This protection was to be extended to include consumer rights such as protection against unfair contract terms, warranty for defects, and the right to withdraw from a distance or off-premises contract. The Anti-Crisis Shield **postpones the date of entry into force of these rules until 1 January 2021**, giving businesses more time to adapt their contract forms and practices, among others, to the new requirements.

### »» NON-INTEREST COSTS OF CONSUMER LOANS

The new rules set the **maximum value of non-interest costs for consumer loans**:

- > for loans with a repayment term of no less than 30 days – **15%** of the total loan amount + **6%** for each year of the loan's term,
- > for loans with a repayment term of less than 30 days – **5%** of the total loan amount.

»» The non-interest costs of a consumer loan **may not exceed 45% of the total loan amount**.

»» Exceeding the acceptable levels of non-interest costs may constitute a practice violating the collective consumer interests, and thus carries the risk that the President of the UOKiK may initiate proceedings and impose a fine of up to **10% of annual turnover** on the entrepreneur.