

Poland – Decision No DOK-7/09 of the President of the Polish Office of Competition and Consumer Protection (hereinafter Decision) The highest fine ever imposed by the Polish Office amounting to EUR 100 000 000 on the producers of cement

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Summary

This cartel case is worth examining due to many interesting antitrust issues. The most spectacular is the amount of fines that was imposed by the President of the Polish Office of Competition and Consumer Protection – PLN 411 million (Polish zlotys) which is about EUR 100 million - on the producers of cement in Poland. Other aspects of the case are also notable such as the leniency procedure that enabled two producers to escape from being fined and the legal basis of the proceedings that were Polish (national) and European Laws.

Case facts

The President of the Polish Office of Competition and Consumer Protection (hereinafter POCCP) undertook the market research inspection from 2003 until 2006 on the Polish market of production and trade of cement. Gathered information indicated that there might be collusion between the producers of cement in the form of price fixing cartel in the cement market.

Accordingly, the POCCP instituted preliminary proceedings on 26 April 2006 followed by the biggest dawn-raid in the history² of the Polish Office of Competition and Consumer Protection (hereinafter OCCP).³

Two applications for leniency were filed in the meantime: the first by Lafarge Cement S.A.⁴ (hereinafter Lafarge) and the second by Górażdże Cement S.A. (hereinafter *Górażdże*) in June 2006.

On the basis of the established information during the preliminary proceedings, the POCCP instituted antimonopoly proceedings on the matter of alleged anticompetitive agreement between Lafarge, Górażdże, Ekocem Sp. z o.o.⁵ (hereinafter Ekocem), Grupa Ożarów S.A. (hereinafter Ożarów), Cementownia Rejowiec S.A. (hereinafter Cementownia Rejowiec), Cemex Polska Sp. z o.o. (hereinafter Cemex), Cementownia Chelm S.A.⁶, Cementownia Nowiny Sp. z o.o. (hereinafter Dyckerhoff⁷) Cementownia Warta Sp. z o.o. (hereinafter Cementownia Warta), Cementownia Nowa Huta S.A. (hereinafter Cementownia Nowa Huta) and Cementownia Odra S.A. (hereinafter Cementownia Odra) on 28 December 2006 (all the companies hereinafter referred to as Parties).

Moreover, in 2008 the POCCP developed the basis of the proceedings to the European Law (hereinafter EU Law) beside the Polish Antimonopoly Law.

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² See at: http://www.uokik.gov.pl/aktualnosci.php?news_id=172 (in Polish).

³ The news about Polish Competition Law can be reached at the website of OCCP: <http://www.uokik.gov.pl> (last visited 7 March 2010).

⁴ S.A. (Polish name – Spółka Akcyjna) Polish short name of the joint-stock company.

⁵ Sp. z o.o. (Polish name – Spółka z ograniczoną odpowiedzialnością) – Polish short name of limited liability company.

⁶ Since 2008 lacked the legal personality according to the Polish law and it was no party of the proceedings anymore.

⁷ In 2007 Cementownia Nowiny Sp. z o.o. changed its company name to Dyckerhoff Polska Sp. z o.o.

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Legal Basis

The Parties of the proceedings were charged for the infringements of: the Act of 15 December 2000 on Competition and Consumer Protection⁸ (hereinafter Polish Competition Law) and the Article 81 of the Treaty Establishing the European Community⁹ (hereinafter European Competition Law).

The POCCP found that the anticompetitive agreement began in 1998 and lasted for over 11 years. As a result, Polish Competition Law is applicable to the whole period of infringements, while European Competition Law is applicable since 1 May 2004.¹⁰

Relevant Market

According to the Polish Competition Law, the relevant market consists of the relevant product and the geographical area.¹¹ The study concluded that the relevant product market was the production and trade of grey cement. Two main arguments for that were:

- a) There are no known products that could be used as the substitutes to the grey cement from the consumers' point of view,
- b) There is no need to divide the grey cement into subcategories.¹²

Furthermore, the relevant geographical market was found to be the area of the Republic of Poland. The POCCP concluded that the trade of grey cement is based on the national level. Moreover, the imports and exports of the cement were on a very low level – they ranged from about 1% to 3 %.

Effect on Trade between Member States

The POCCP stated that the factual backgrounds of the case indicated that the agreement concluded between the cement producers in Poland could affect the trade between Member States. Moreover, the Parties' (excluding Cementownia Nowa Huta) total grey national cement market production shares amounted to almost 100 %, the Parties (excluding Ekocem) colluded in order to control the selling amounts by the new entrant to the relevant market. Moreover, the Parties belonged to the international holding companies, acting in various Member States of the EU.

Infringement of Competition Laws

The POCCP concluded that the participants of the prohibited collusion were: Lafarge, Górażdże, Grupa Ożarów, Cemex, Dyckerhoff, Cementownia Warta and Cementownia Odra (hereinafter Participants). The Participants colluded *inter alia* through fixing the markets shares for each market Participant, maintaining minimal resale prices for the cement, the timetables, the amounts and the order of applying the increases in prices for cement and exchanging sensitive information. The Cartel operated through numerous multilateral and bilateral meetings, talks, exchanging the statements including the confidential commercial information.

⁸ Journal of Laws 2005 No. 244, item 2080. On 21 April 2007 New Antimonopoly Act came into force – Act of 16 February 2007 on Competition and Consumer Protection, Journal of Laws 2007 No. 50, item 331 as amended – which is not applicable to the Noted Case because of Polish Proceedings Rules. Nonetheless, the text of the new Act is available at http://www.uokik.gov.pl/competition_protection.php (last visited on 7 March 2010).

⁹ Before the Decision was made, the Lisbon Treaty came into force as of 1 December 2009, but the Case Comment refers to the Treaty Establishing the European Community.

¹⁰ The date of accession Poland to the European Union.

¹¹ Article 4 of the Polish Competition Law.

¹² Conclusion based on the European Commission decision in Skanska/Scancem case from 11 November 1998 (IV/M.1157).

Evidence

The factual findings in the Decision were based mainly on: a) the leniency application submitted by Lafarge with the supplemental documents and the answers to the POOCP questions; b) the leniency application filled by Górażdże with the supplemental documents and the answers to the POOCP questions; and c) other documents provided by the Parties and gained by the POOCP itself. The gathered evidences were found consistent and with minor differences that would not affect its certainty.

Charges

The Participants were found to collude in the following manner:

a) Price-fixing and other trading conditions-fixing for the cement.

Article 5 (1) (1) Polish Competition Law as well as Article 101 (1) (a) TFEU prohibit the agreements of price fixing, directly or indirectly and other trading conditions. The Parties at least from 1998 fixed prices for the cement, the purpose of which was to maintain the *status quo* among them.

b) Production and trade of cement market sharing.

Article 5 (1) (3) Polish Competition Law as well as Article 101 (1) (c) TFEU forbid market sharing agreements of sale or purchase. The Parties reached the conclusion as to the production and trade of the grey cement market shares for each company. The conclusion was based on the historical data of the relevant market shares.

c) Exchanging confidential commercial information.

Although, Polish Competition Law does not prohibit exchanging confidential commercial information, the Polish Courts rulings and interpretations of Polish Competition Law expanded on the list of prohibitions stipulated therein and ruled that it is not exhaustive. The POOCP invoked EU cases and decided that the character and scope of the exchange between the Participants were sufficient to find the practice as anticompetitive.

Final Outcome

As a result, the Decision was issued on 8 December 2009 where the practices of the Parties were found to restrict competition and infringes both, Polish Competition Law and EU Competition Law. The POOCP issued an order to the Parties to cease these practices and refrained from imposing fines on the first leniency applicant and a partial fine on the second amounting to 5 % of the total revenue earned in 2008.¹³

¹³ Polish Competition Law provisions state that the maximum fine that can be imposed on the undertaking amounts to 10% of the revenue earned in the accounting year preceding the year within which the penalty is imposed.

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The other Participants - Grupa Ożarów, Cemex, Dyckerhoff, Cementowania Warta and Cementownia Odra – were fined an amount of PLN 411 586 477 (Polish zlotys) (about EUR 100 000 000). The fine is the maximum penalty possible according to Polish Competition Law as well as the highest fine ever imposed in Poland. Finally, Ekocem and Cementownia Rejowiec were acquitted.

Since the Decisions of the POOCP are appealable to the Court of Competition and Consumer Protection (hereinafter Court of Appeal), all the fined Participants decided to appeal that Decision.

Interesting Issues

Following the legal proceedings launched by the OSCP in 2006, the POOCP ordered Grupa Ożarów to pay fine of PLN 2 000 000 (Polish zlotys) for withholding information and obstructing the inspection process. This is only the second case where the POOCP has decided to enforce this measure.

Reflections and Observations

Having in mind that the Decision is not final yet, it includes many interesting issues for many reasons. The POOCP addressed many complex legal aspects in a reasonable manner, a few of which should be highlighted: the leniency applications which enabled two of undertakings to escape from the fines (a Polish leniency program has been introduced to the Polish legal system as of May 1, 2004, as for now there has been little practice regarding the leniency program), the interaction of national and EU Competition Law (the decision was based on both what seems to develop the future trend and practice of the POOCP in applying EU Competition Law to the national cases), the amount of fines imposed on the Participants – PLN411 000 000 (For instance, the total amount of fines imposed on undertakings by the POOCP in 2009 reached PLN 556 000 000). It is expected that the Court of Appeals will uphold the Decision as there are sufficient legal arguments that were presented.

In any event, for final decision by the Court of Appeals, the Participants will have to wait for few years, while the POOCP seems to continue its high –fine politics and anti-cartel actions.

All things considered, the Cement Cartel case proved that Polish Competition Law is up to date and no major further amendments should be made. The only suggestion that may be made in this regard is that private enforcement should be encouraged under Polish Competition Law to increase the efficiency of the competition regime.

¹⁸ Decision DOK - 3/2008 *Xella*, p. 24.

¹⁹ Although in all cases regarding RPM the Polish competition authority stresses that pricing agreements are considered to be hardcore restriction, one can notice that even in Polish guidelines on the method of setting fines, RPM is qualified only a “serious” and not “very serious” infringement. Guidelines are available at Polish competition authority’s website at: http://uokik.gov.pl/leniency_programme.php.

²⁰ See the decision of FTC in *Nine West* case regarding RPM practices: <http://www.ftc.gov/opa/2008/05/ninewest.shtm>. Also, the Spanish competition authority has applied in December 2009 *de minimis* rule to RPM practice in *El Corral de las Flamencas* case