

THE PRESIDENT OF THE OCCP ANNOUNCES LEGISLATIVE CHANGES PROVIDING FOR A MORE INTERVENTIONIST APPROACH TO FINANCIAL SERVICES AND REFORM OF THE SYSTEM OF CONTROL OF ILLEGAL CONTRACT CLAUSES

On 16 March 2015 the President of the Office of Competition and Consumer Protection (the "President of the OCCP") asked that work begin urgently on a bill amending the act on competition and consumer protection (the "Proposal").

The Proposal is intended, among other things, as a more effective means of combating the unfair market practice of misselling, i.e. offering products not suited to consumers' needs.

The President of the OCCP has stated that the Proposal was inspired by similar solutions adopted in other EU countries, in particular the United Kingdom, where the Financial Conduct Authority has adopted the so-called "new approach to financial services" to prevent misselling.

The Polish Ministries of Finance and Justice support the Proposal. If the Proposal is reviewed in the fast track legislative procedure, as the President of the OCCP is requesting, the new legislation might even come into force this summer or autumn. To date there has been no official reaction from the Polish Financial Supervision Authority (PFSA), but it is our understanding that it might support the Proposal.

Below are some of the key elements of the Proposal and likely implications for the financial sector in Poland.

Executive summary

Under the Proposal, the President of the OCCP will adopt a new, more interventionist approach towards the financial services market. The President of the OCCP has said that he intends to take measures to stop financial institutions from offering, on a large scale, products not suited to their customers' needs and which entail substantial investment risk (the Proposal mentions unit linked insurance plans, so-called "payday" loans and foreign currency denominated mortgage loans as examples of such products).

If the Proposal is implemented this could have serious implications for financial institutions, leading to restrictions concerning certain distribution channels, or even eliminating certain products which entail significant investment risk from the market entirely.

Misselling as a new defined consumer-related tort

The Proposal would introduce a new category of practice violating the collective interests of consumers¹, which is referred to collectively as misselling, and which includes, in particular:

- offering products which are not suited to consumers' needs (for example, selling investment products to the elderly, who due to their age will not be able to benefit from them); and
- employing sales methods which are not appropriate to the nature of the product being offered (for example, selling complicated investment products over the telephone).

According to the President of the OCCP, misselling in Poland concerns primarily financial products which, due to their complexity, cannot be assessed properly by the average consumer. Examples are:

- life and endowment insurance combined with an investment element (unit-linked insurance plans);
- mortgage loans denominated in foreign currencies; and
- short-term low-value loans granted at high cost (so-called "payday" loans).

Procedural measures to achieve the objectives of the Proposal

The Proposal provides for the following measures aimed at, among other things, combating misselling in the financial services sector:

- Interim decision

The President of the OCCP would have the power to issue, while proceedings concerning violation of collective interests of consumers were pending, a decision ordering a business to cease the practice being challenged. Such decision could be issued if it was highly probably that allowing such practice to continue posed a serious risk of harm to the collective interests of consumers and such harm would be difficult to rectify. An appeal against an interim decision would not result in a stay of execution. At the moment it is not clear whether there would be a deadline for the courts to review an appeal. This means that an interim decision could remain in effect even until the decision concluding the case was issued (i.e. in practice for a number of months if not years).

- Issuing warnings and making announcements in the mass media

The President of the OCCP would have the power to make, free of charge, through public radio and television stations, public service announcements about disturbing trends in the financial services market. Such announcements and warnings could also target specific businesses

¹ By way of a reminder, if a given business practice is deemed to violate the collective interests of consumers, the business entity may, among other things, be fined up to 10% of its turnover generated in the previous year. Consumers who suffer due to that practice will also be entitled to bring civil claims, and, in certain cases, repudiate the consequences of the acts in law performed as a result of the practice.

■ Searches

After obtaining court permission, the President of the OCCP would have the power to search the premises of a business suspected of violating collective consumer interests. The purpose of the search would be to discover evidence of a violation in the form of hard copy and soft copy documents. Effectively, the President of the OCCP would have means at his disposal similar to those envisaged for combating cartels and other major violations of competition law.

■ Test purchases

The President of the OCCP would have the power to make test purchases. OCCP officers could pose as customers and review agreements and the manner in which products were offered to check for violation of collective consumer interests. In justified cases it would be possible to record an operation without the target's knowledge.

■ Extending the time limit under the statute of limitations

Time limit under the statute of limitations for acts which violate the collective interests of consumers would be extended from one year to three years. This would mean that proceedings concerning violations of the collective interests of consumers could start at any time up until three years had passed from the end of the year in which the practices ceased.

■ Administrative procedure for inspection of template agreements with consumers

At the moment the Court of Competition and Consumers Protection reviews template agreements with consumers in an abstract manner. Under the Proposal, this role would be taken over by the President of the OCCP. In addition, the review would only concern a specific clause in the template agreement used by a particular business (so, consequently, such decision would not be enforceable against similar templates used by other businesses). In a decision, the President of the OCCP would also have the power to fine the business up to 10% of its turnover generated in the previous year. Decisions issued by the President of the OCCP in this manner would be subject to judicial review.

Potential implications for the financial services sector

- Banks, insurance companies and other financial entities might need to adjust their sales policies with regard to products which entail substantial investment risk. It will not be possible to sell products of this kind on a large scale to a broad group of customers. It will only be possible to offer them to a narrow group of appropriately selected consumers.
- In the most extreme scenario, the measures taken by the President of the OCCP could lead to particularly risky investment products disappearing from the market.
- Financial institutions might also need to change the way in which products entailing the greatest investment risk are distributed.
- Depending on the procedural regulations that will apply to interim decisions (in particular with regard to the deadlines for reviewing an appeal, if filed, against them and compensation for loss suffered by a business if an interim decision is unjustified), decisions of this nature could in practice have a "chilling" effect, reducing innovation with regard to development of new products and the manner in which they are offered.
- In view of the current powers of the PFSA (which are exercised among other things by issuing guidelines and recommendations addressed to financial entities) the far-reaching power of intervention on the part of the President of the OCCP in the financial services sector might result in emergence of two parallel regulatory systems which would not always be consistent with each other, and which would hinder the development of clear and transparent compliance rules for financial institutions.

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