



Competition law in the COVID-19 era | part 3

Maximum prices: New tools for combating COVID-19

30 March 2020

In our recent alerts we present the main risks and challenges businesses will have to wrestle under competition regulations in the market situation connected with the global COVID-19 pandemic. In this article we discuss issues connected with the authority to set maximum prices for selected goods and services, planned to be introduced for the Polish Minister of Health.

Sanctions of up to **PLN 5,000,000** or **10% of turnover** for violation of the maximum prices set by the Minister of Health for selected goods and services are included in the "Anti-Crisis Shield," the bill for which is currently being considered by the Senate (as of 30 March 2020).

This type of price-fixing by the state is a significant intervention in fundamental market freedoms, and thus must be justified by very serious cause. But an in-depth analysis of the proposed solutions shows that **the restrictions may affect not only goods essential for combating COVID-19**, but also services and, for example, foods and FMCG. Below we respond to the most pressing questions connected with the planned authorization of the Minister of Health to set maximum prices for goods and services.

Who will introduce maximum prices?

Under the current wording of the planned regulations, maximum prices for goods or services may be introduced by the Minister of Health (in the area covered by the amendment, in agreement with the Minister of Economy and the Minister of Agriculture and Rural Development).

In what form will a "price list" for maximum prices be announced?

It is planned that maximum prices would be introduced in the form of an executive regulation. The wording of this regulation (or even a draft or guidelines) has not been released yet.

What will maximum prices actually mean?

The planned regulations would vest the Minister of Health with authority to set from the top down not only maximum prices for goods and services, but also maximum wholesale and retail margins applied in sales. Prices could thus be set for various levels of trading in goods.

Under an executive regulation setting maximum prices, the Minister of Health:

Get in touch



Dr Dariusz Aziewicz
Associate
Competition lawyer
T: +48 22 50 50 738
dariusz.aziewicz
@eversheds-sutherland.pl

- Would specify the basis for calculation of maximum margins
- Could set maximum margins for specific types of goods or margins calculated based upon wholesale prices.

For what products could maximum prices be set?

Since entry into force of the “Anti-Crisis Act” of 2 March 2020, the Minister of Health has been authorized to introduce maximum prices for products necessary for combating COVID-19, i.e. certain medicinal products, medical devices, and foods for special medical purposes. From entry into force of the new regulations, maximum prices could also be set for *goods or services of vital importance for protection of human health or safety, or costs of maintaining households*.

The new regulations do not provide conditions for any connection between these goods or services and combating COVID-19, even though the Anti-Crisis Shield itself applies to and defines “combating COVID-19.”

The drafters have thus defined a much broader set of goods for which there will be authorization to set maximum prices than addressed just a few days ago by the President of the Office of Competition and Consumer Protection (UOKiK) (covering food and hygiene items). Meanwhile, it is hard to determine exactly what products may actually be included in the set of goods “of vital importance for protection of human health or safety, or costs of maintaining households.” The act would thus vest the Minister of Health with sweeping authority to regulate the market—also for goods and services which under normal conditions would remain entirely beyond his jurisdiction.

Nonetheless, it should be assumed that setting of prices, as an entirely exceptional measure, will be authorized exclusively as part of measures consistent with the aim of the “anti-crisis shield”, i.e. as part of combating the effects of COVID-19 and exclusively during the period of the pandemic.

How will the level of maximum prices be calculated?

The drafters have not specified the precise mechanism for setting the levels of maximum prices. However, in setting prices, the Minister of Health may consider:

- The level of prices during the period preceding introduction of a state of epidemiological threat, and
- Justified changes in cost of production and delivery.

The fact that taking into account prices during the period preceding introduction of a state of epidemiological threat is optional may generate controversy. After all, the underlying reason for setting maximum prices is to halt a rise in prices for some products compared to prices before the pandemic, and not artificial reduction of market prices in general—which no other administrative body is authorized to do. This section of the amendment also very broadly defines the authority of the Minister of Health to regulate the market.

It should be stressed, however, that application of maximum prices, as an exception within the rules of a social free-market economy, should be based upon the criterion of proportionality. In light of that principle, authority to set maximum prices lower than the prices in effect before they rose in the context of the COVID-19 pandemic would be doubtful.

What will be the sanctions for failure to comply with maximum prices?

For failure to comply with fixed maximum prices, the province pharmaceutical inspector, province inspector of commercial quality of agri-food goods, the province sanitary inspector, or the province trade inspector would (mandatorily) impose a fine ranging from PLN 5,000 to **PLN 5,000,000**. Decisions imposing such a fine would be immediately enforceable.

Additionally, the **president of UOKiK** could impose a fine of no greater than **10% of turnover** generated in the financial year preceding imposition of the fine

for repeated infringement, even unintentional, of the ban on charging prices above the maximum, in the case of numerous goods or services or on a large scale. Unfortunately, the drafters did not clarify in the bill the meaning of such terms as “numerous goods” or “a large scale.” Thus in this instance broad leeway to interpret the law and the specific conditions for intervention has been left to the president of UOKiK.

The president of UOKiK will also be able to impose on an undertaking a fine for procedural violations of up to 5% of turnover in the financial year preceding imposition of the fine, but no greater than PLN 50,000,000.

If readers have any questions in this regard, we are available to assist.

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