

# Report

## Poland

### The Polish Competition Authority Accepts Dell's Commitments to Modify the Sales Model in the IT Sector

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#### I. Introduction

On 11 October 2024, the Polish Competition Authority (PCA or Authority) issued a commitment decision concerning a Polish subsidiary of Dell (Dell), one of the leading producers and sellers of IT products. The decision put an end to nearly six years of administrative proceedings. We have previously commented on the initiation of the proceedings in this particular case in *CoRe*.<sup>1</sup>

The questionable conduct consisted of deal registration combined with priority rebates in cases of larger projects. The Authority started the proceedings when it suspected that Dell had been engaging in anti-competitive conduct, which could have led to market sharing between the distributors. The PCA conducted dawn raids in Dell's offices during the proceedings to gather evidence of possible conduct. Afterwards, Dell submitted commitments, which were later modified and resubmitted. The PCA has accepted the modified commitments and substantiated that the alleged conduct infringed Polish and EU competition law concerning Article 101 TFEU due to Dell being a part of an international corporate structure. Therefore, the case can be analysed in the EU law dimension and may reflect on a possible pursuit of such distribution systems in other jurisdic-

tions. The lack of a fine concerning the conduct may result from the fact that the PCA did not previously examine such conduct in isolation, ie separately from other arrangements, such as resale price maintenance. However, in a separate decision, Dell was fined PLN 6 million (approximately €1.4 million) for non-disclosure of documents pertinent to the proceedings.

The case allows for a closer look at considerations of vertical agreements in the context of the model of distributions that a company may assume. The report below will counter the issue of priority rebates in the context of a 'by object' interpretation and indicate the current decision-making practice in Poland with reference to EU law in this respect.

#### II. Facts of the Case

According to the PCA, Dell has introduced a system called Deal Registration Tool (DRT), which was used by their six distributors and 3,000 other authorised sellers to register upcoming deals with institutional or business clients in exchange for a special rebate. Within the system, a distributor would need to name the client and the project being registered. However, deal registration was only available to the first distributor that would register a given project. This meant that other distributors could not benefit from the special rebate after the deal had been registered. The system was also applicable in cases of possible passive sales, where a deal was registered by one distributor, but another was approached by a client and could not attain a special rebate due to a lack of registration. In addition, the system covered sales governed by public procurement law.

Parallel to the DRT, Dell introduced a number of measures to ensure that distributors and authorised

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<sup>1</sup> Tomasz Feliszewski and Mateusz Musielak, *The Office of Competition and Consumer Protection Investigates Vertical Restraints in the IT Sector – Does the EU Approach Prevail?* European Competition and Regulatory Law Review, Volume 6 (2022), Issue 3.

sellers would abide by the registration system. Firstly, Dell introduced a ‘Good Practices’ manual (a set of instructions for the distributors), which governed their conduct regarding sales of Dell products. According to these instructions, the distributors were obliged to register their deals and encouraged to ask before registering a project whether it had been reserved by another distributor. Dell would also ensure that deals would be reported to them through oral arrangements with distributors, according to which they could offer only standard pricing in cases where the project has not been registered. This meant that the authorised sellers could not attain competitive prices *vis-a-vis* sellers with already registered projects. In cases of bids governed by public procurement law where an unregistered authorised seller would win the bid, Dell would obstruct the availability of obtaining a certificate of being an authorised seller, which was required to proceed with the sale of products.

In the context of anti-competitive agreements, the PCA issues commitment decisions in cases where the Authority may not be sure that an infringement exists but wants to issue guidance on how a system might work and not raise doubts. A commitment decision in Poland needs the conduct to only be substantiated, meaning that the decision does not meet a strict evidence bar but rather that the findings of the PCA are credible. Therefore, the foregoing considerations represent the Authority’s current standing on the matter, but the conduct does not fully qualify as an infringement in a formal sense.

Having outlined the substantiated conduct, it is necessary to mention Dell’s commitments. Firstly, the obligation to name the client to get a rebate offer will be removed in cases where it does not obstruct the creation of the offer. Secondly, the special project rebate will be available to at least three distributors or authorised sellers; these should be selected according to objective, non-discriminatory, and transparent criteria, such as the time of applying for the rebate. The rebate given in this respect should be equal for all distributors. In case of a passive sale, upon request of an end client, the rebate will also be given to a distributor or an authorised seller. Next, the commitments will give distributors or authorised sellers an additional rebate for pre-sale services, including previous dealings with the end clients, engaging in a technical dialogue with the client, or having specialist knowledge certified by

Dell. In the context of public bids, Dell needs to give the same rebate level for all the authorised sellers applying and may give an additional rebate for pre-sale services with identical considerations as outlined above.

### III. EU Law References of the Case

With *Dell*, the preliminary ruling in *Visma*<sup>2</sup> comes to mind regarding the registration of clients for potential transactions. That case was referred by a Latvian court and concerned the registration of clients for exclusivity by distributors for six months. The Latvian Competition Authority deemed such a system to restrict the competition by its object, but the court had doubts and referred it to the Court of Justice of the European Union (CJEU). In its judgment, the Latvian court left open the issue of whether such imposition amounts to a ‘by object’ case. However, the CJEU mentioned that intra-brand agreements are less harmful to competition and, in principle, it is only problematic when inter-brand competition is reduced. It also cited that *Visma* has shown certain efficiencies from the system. The CJEU also noted the long-standing principle that restrictive effects in an agreement need to be analysed considering conditions of competition in the absence of the agreement.

Similarly, the CJEU expressed a more context-oriented approach to vertical restraints in *Generics*<sup>3</sup> as well as in *Budapest Bank*,<sup>4</sup> stating that pro-competitive effects need to be considered in violation of Article 101(1) TFEU. These cases show that at first glance, agreements that may look anti-competitive may actually have pro-competitive effects beneficial to the market. Therefore, competition authorities need to analyse these possible pro-competitive effects in light of Article 101(1) and not only in cases under Article 101(3), as some practitioners would argue before. Thus, the case law shows us that proving an infringement of Article 101(1) TFEU in terms of vertical restraints requires a wider approach.

2 Case C-306/20 [2021]. *SIA ‘Visma Enterprise’ v Konkurences padome*.

3 Case C-307/18 [2020]. *Generics (UK) Ltd and Others v Competition and Markets Authority*.

4 Case C-228/18 [2020]. *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*.

## IV. The Approach of the PCA

The factors above should be taken into consideration when analysing deal registration systems such as *Dell*. It seems that the PCA took a more restrictive approach, claiming that the agreement constituted a 'by object' conduct, citing market division through granting rebates based on priority, authorised sellers not having an opportunity to place an anti-competitive offer once a deal has been registered by another distributor and restriction of active and passive sales. In simpler terms, the PCA considered that granting rebates resulted in customer allocation, thus being a 'by object' infringement. There has been no mention of considerations of the CJEU's ruling in *Visma* or any notes on the character of vertical restraints. This shows that the PCA has a low bar for considering such deal registration systems to be restrictive for the competition and a shifting perspective of the focus of the PCA towards vertical restraints, which can be seen in recent years. It must be noted, however, that the PCA has shown to an extent how the priority rebates practically influenced the competition between authorised sellers.

In our view, it is debatable whether such an agreement should be considered 'by object' harming competition, but the circumstances surrounding the case may lead to such a conclusion. The priority rebates given by Dell virtually made it harder for other distributors and authorised sellers to make up an offer, combined with the setting of specialised IT equipment, in which often the end clients were interested in Dell's solutions, signalling reduced inter-brand competition and an agreement obstructing it. Furthermore, obstructions to passive sales and public bids were in place and limited direct competition.

However, considering the priority rebates through DRT to be 'by object' conduct may be described as an excessive qualification. The PCA does not consider the factors outlined by the CJEU and decisively takes a price-oriented approach instead of a wider-reaching one favoured by the CJEU. It may be argued that the priority rebate in question could provide i) efficiencies to distributors and authorised sellers and ii) more intensive marketing and pre-sale efforts. The efficiencies could be provided by fully concentrating one distributor on a given client while others can concentrate on other clients, thus not wasting pre-sale efforts on an uncertain sale. A situation might arise, for example, where distributor A, who might have

more experience than distributor B, coordinates pre-sale efforts by describing and demonstrating the product in detail, while distributor B does not provide the same effort, but the customer chooses distributor B due to lower transport costs. With equal price levels for both products, the client might use one distributor's knowledge and opt for distributor B due to logistical and additional cost reasons. Secondly, with a lack of priority rebates, authorised sellers or distributors may put less effort into marketing and seeking new clients. Therefore, closely analysing the distribution system might have led to different results.

## V. Commitments

The commitments accepted by the PCA (as described above) may offer some guidance; however, after reading them, a competition law practitioner may be more confused than gain any clarity. Firstly, the availability of priority rebates to at least three distributors marginally removes the anti-competitive object that the PCA claims to have existed, as the rebates will still not be available to countless other distributors or authorised sellers. The fact that the Authority agreed to such a commitment shows just how narrow the possible anti-competitive effects of the system were. In addition, the criteria for granting rebates still consider the time of applying for the rebate through deal registration. This means that priority is still one of the key criteria, but its scope is widened to three distributors or authorised sellers having an opportunity for the same rebate. Thus, the system keeps its form but with less restrictive criteria.

Moreover, the additional rebate may result in a practically very similar system of distribution. It can be presumed that most of the early registered deals have been made with distributors or authorised sellers who already had contacts. That is, a client has been cooperating with a given distributor or authorised seller. Consequently, the authorised sellers will usually be the first to receive information on an upcoming project. Therefore, the anti-competitive object of market sharing that the Authority claims to have existed may still be in place. This is because clients with previous experience with a given distributor or authorised seller will most likely be granted the additional rebate for engaging in previous dealings with the client. Thus, the additional rebate may

practically function as a priority rebate, re-implementing the system that the PCA took issue with.

However, the commitments, rather uncontroversially, banned restrictions of passive sales, restrictions on public bids, and naming a distributor as a prerequisite for gaining a rebate. These commitments directly counter the issues that the Authority claimed and do not raise concerns.

## VI. Conclusion

The decision may be met with mixed reactions, considering conflicting commitments and the harsh 'by object' approach to priority rebates. The authority seems to ignore the wider context approach preferred

by the European Courts. The implications of such treatment are far-reaching and hold higher risks of finding an infringement than one could assume, considering vertical restraints.

However, findings in *Dell* outline the boundaries for a possible deal registration system. Such systems may be beneficial to many companies to increase efficiencies within sales by incentivising distributors to find potential transactions. Keeping in mind the benefits of such systems, companies maintaining or wishing to introduce such systems need to be cautious given the PCA's 'by object' approach. Still, the Authority needs to be appreciated for giving guidance through the decision and the commitments, which can be helpful to undertakings.

The commented decision is final.