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# The Polish Court of Appeal confirms that resale price maintenance in franchise agreements violates competition law *(Sfinks Polska)*

**ANTICOMPETITIVE PRACTICES, POLAND, DISTRIBUTION AGREEMENT, RESALE PRICE MAINTENANCE, VERTICAL RESTRICTIONS, AGRICULTURE / FOOD PRODUCTS , SANCTIONS / FINES / PENALTIES, JUDICIAL REVIEW**

Polish Court of Appeal, *Sfinks Polska*, VII AGa 828/18, 10 January 2018 (Polish)

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In its judgement of 10 January 2018, the Court of Appeal in Warsaw upheld the decision of the President of the Polish Competition Authority (Prezes Urzędu Ochrony Konkurencji i Konsumentów, UOKiK) of 25 June 2013 in which Sfinks Polska S.A. (Sfinks) was found to infringe Art. 6(1) of the Polish Competition and Consumer Protection Act (equivalent to Article 101(1) TFEU) by imposing fixed resale prices (RPM) for meals in restaurants operating under brand "Sphinx". The Court, however, considerably lowered the fine from PLN 464,228.92 (approximately €107,000) to PLN 50,000 (approximately €11,500) due to benign anti-competitive effects of the RPM at hand. This is the fourth judgement in the *Sfinks* saga.

*Background*

Sfinks is one of the largest casual dining restaurants operators in Poland. At the time of the decision it had 110 restaurants, including its own outlets and those operating under franchise.

On 25 June 2013, the UOKiK imposed a fine on Sfinks for fixing resale prices in its franchise agreements with restaurants operators. The RPM pursued by Sfinks was regarded as a by object infringement. According to the UOKiK, Sfinks violated the Polish Competition and Consumer Protection Act since 2004 in several ways, including by fixing resale prices on its franchisees or by requiring approval of discounts offered in restaurants. The practice was realised through distributing price lists to restaurant operators. Sfinks monitored franchisees' pricing policy who faced contractual penalties for non-compliance.

*Ruling*

The Court of Appeal did not dispute the existence of the infringement of Article 6(1) as established by the UOKiK and then upheld in previous judgements. By reaffirming Polish [*1*] and European [*2*] case law, it held that fixing minimum resale prices is to be regarded as a restriction by object under Article 6(1) of the Polish Competition and Consumer Protection Act.

In its analysis under Article 8(1) of the Polish Competition and Consumer Protection Act (101(3) TFEU equivalent), the Court acknowledged that RPM is not inherent in the nature of the franchise agreement. Sfinks argued that RPM is necessary for the attainment of the goals pursued by its franchise agreements, namely uniformity of service in accordance with Sfinks' know-how. It was argued that differences in prices arising in absence of the RPM would lead to doubts on the side of customers as to the uniform quality of Sfinks' products, thus hindering effectiveness of the franchise agreement. The Court, in agreement with the UOKiK, found that that intra-brand competition was non-existent in the case, hence competing restaurant operators could not jeopardise network uniformity in absence of the RPM.

Further, the Court noted that franchisees had to adhere to other rigid criteria applying to restaurants and service provision, which opened up a possibility for Sfinks to prevent loss of the quality of service offered by franchisees. Also, it was inferred that Sfinks had to take into account the highly competitive nature of the relevant market while setting its price lists. Franchisees therefore faced: (i) significant compliance cost with Sfinks' restaurant policy; and (ii) prices set by Sfinks that were presumed to be close to competitive levels. In view of the Court, those two considerations would prevent significant price differences between Sphinx restaurants capable of distorting its brand image. Sfinks did not rebut this conclusion with robust evidence. RPM was therefore deemed not necessary under Article 8(1) of the Polish Competition and Consumer Protection Act and thus did not meet the exemption's cumulative criteria.

In the final part of the judgement, the Court affirmed that the doctrine [*3*] on vertical restraints suggests that RPM in highly competitive markets is unlikely to result in anti-competitive effects. In other words, low degree of market power translates to lower probability of consumer harm. Further, the *Sfinks* decision of the UOKiK was criticised for too formalistic approach and lack of a credible theory of harm, which was expressly acknowledged by the Court. [*4*]

With this in mind, the Court went on to establish that RPM at hand did not increase the risk of collusive outcome upstream and that intra-brand competition was not limited as a result of the practice, as it was non-existent in the case. Additionally, due to fierce inter-brand competition faced by Sphinx restaurant operators, the difference between the competitive price set by a hypothetical rational franchisee and price set by Sfinks is unlikely to be significant. These considerations led the Court to conclude that the fine should be substantially lowered.

*Remarks*

The judgement presents a small step towards a more economic approach in analysing vertical restraints. It is to be welcomed that the very competitive nature of the casual dining market and Sfinks' and its franchisees insignificant market power were appraised by the Court. However, the approach presented by the Court of Appeal is embedded in the formalistic legal framework surrounding RPM restrictions in Poland.

Regrettably, allocation to the "object box" was not even elaborated upon by the Court. Interestingly, although "object box" allocation does not require counterfactual analysis, the Court performed it when dealing with the amount of the fine, which resembled an effects-based analysis. It remains to be seen how this development impacts future cases in the field.

Despite express acknowledgement of benign effects that the RPM applied by Sfinks had on the market, the contested measure was still held to infringe Article 6(1) of the Polish Competition and Consumer Protection Act. The strict standard of exemption under Article 8(1), as applied by the Court, may suggest almost a *per se* illegality for RPM measures. The judgement illustrates that economics-based arguments might be taken into account while setting the amount of the fine. However, the formalistic approach to RPM analysis under Article 6(1) of the Polish Competition and Consumer Protection Act was further reaffirmed by the Court.

[1] Judgement of 23 November 2011 of the Supreme Court of Poland III SK 21/11.

[2] Case C 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

[3] C.I. Nagy, 'Resale Price Fixing after the Revision of the EU Vertical Regime – A Comparative Perspective' (2013) 54 Acta Jur. Hng. 349.

[4] A. Stawicki, 'Franchise networks under siege from the Polish Competition Authority over alleged RPM arrangements' (2013) Kluwer Competition Law Blog <*http://competitionlawblog.kluwercompetitionlaw.com/2013/07/23/franchise-networks-under-siege-from-the-polish-competition-authority-over-alleged-rpm-arrangements/*> ; see also A. Jurkowska-Gomułka 'Polska to nie jest kraj dla franczyzy' (2013) (available in Polish only) <*http://www.modzelewskapasnik.pl/pl/...*> .