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The Amendment of Polish Competition Law of June 2014 – Critical Remarks

I. Introduction

On 18 January 2015, the amendment[1] of Polish competition law[2] came into force. The main objective of the reform was to increase the effectiveness of the competition law enforcement and to accelerate some procedures (in particular, antimonopoly proceedings concerning concentration)[3]. The changes are primarily procedural by their nature, rarely referring to substantive competition rules.[4] The amendment consisted both in the introduction of entirely novel institutions (e. g. fines for individuals, settlement procedure, leniency plus, remedies), and in modifying or expanding current provisions (e. g. control of concentration, inspection powers of the President of the Office of Competition and Consumer Protection (hereafter, „the OCCP") or limitation periods.

The article presents and discusses the majority of the newly added or amended provisions of the Polish competition act, including its critical assessment and some de lege ferenda recommendations.

II. Liability of individuals: wouldn't criminalization be more effective?

One of the most important changes was the introduction of financial fines for individuals – 'managing persons' (defined in art. 4 (3a) ACCP[5]). The legal ground constituting the liability of such persons is provided in the newly added Art. 6a ACCP.[6] According to this provision, if the entrepreneur infringes the prohibition of a competition-restricting agreement (provided for in Art. 6 ACCP), the subject of liability is also the managing person who intentionally, by his/her actions or omissions, allowed that entrepreneur to participate in an anti-competitive agreement. Such liability formally applies to all kind of agreements (i. e. both horizontal and vertical), which have as their object or effect the

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1 The Act of 10 June 2014, amending the Competition and Consumer Protection Act and the Civil Procedure Code (Journal of Laws 2014, No. 945).

2 The Act of 16 February 2007 on the Protection of Competition and Consumers (hereafter, "ACCP"), available at: http://www.uokik.gov.pl/download.php?plik=7618.

3 See The amendments' justification accompanying the Draft Amendment, p. 1 (www.uokik.gov.pl), hereafter "The amendments' justification".

4 With the exception of the so called *de minimis* rule laid down in Art. 7 ACCP. Under this rule, agreements – that formally fall within the scope of prohibition provided in Art. 6 ACCP – may be exempted from that prohibition, if the market share of the parties of that agreement does not exceed certain (legally specified) levels. The amendment broadens the application of *de minimis* rule; see more, e.g., *K. Kohutek*, in: *K. Kohutek/M. Sieradzka*, Ustawa o ochronie konkurencji i konsumentów. Komentarz (Act on Competition and Consumer Protection. Commentary), 2nd edition, Warszawa 2014, p. 305–307.

5 According to this provision, "managing person" shall mean a head of the undertaking, in particular the person fulfilling management tasks or being a member of a managing authority of an undertaking.

6 Individuals cannot be fined for an activity which had taken place before the amendments came into force. For any infringements committed prior to 18 January 2015, the OOCP may punish only the undertaking.

restriction of competition;[7] it does not concern the abuse of a dominant position (prohibited by Art. 9 ACCP/Art. 102 TFEU).

Personal liability does not expire on the date of termination of the employment (or managing) contract with the individual. It is however required that the infringement of article 6 ACCP took place during the performance of managerial functions.

Unlike the penalty of the undertaking itself, proving the individual's intent is a necessary condition of financial liability of the individual.[8] In my opinion, this requirement shall exclude the liability of the individual on the basis of Art. 6a ACCP when the infringement of the prohibition laid down in Art. 6 ACCP/ Art. 101 TFEU took the form of the agreement which resulted in ("has as its effect") the restriction of competition within the meaning of the latter provisions.[9] It follows that only anticompetitive agreements that are classified to so-called "object box"[10] (e. g. horizontal price fixing or market sharing) may cause (also[11]) the liability of managing persons; these are the most severe violations of competition law (so-called hard-core restrictions of competition[12]). The intent condition seems to exclude the liability of individuals also when the infringement of Art. 6 ACCP resulted from exceeding the market shares specified in Art. 7 ACCP (de minimis rule; see footnote 4), or in a relevant block exemption regulation. The managing person may be fined up to 2 000 000 zlotys (approximately 500 000 euros); see Art. 106a (1) ACCP. The OCCP is thus bound with that upper limit of fine. However, by determining the amount of the penalty, the OCCP should consider legal criteria, e. g., to what extent the managing person has influenced the infringement committed by the undertaking, the level of incomes which the person concerned receives from the managed undertaking, market effects, and the duration of the infringement (Art. 111 (1) point 2 ACCP).

Imposing a fine on a managing person is dependent on the punishment of the undertaking itself. The penalty is imposed in the same decision that is addressed to the undertaking involved, imposing a fine on that undertaking (Art. 106a (2) ACCP). The competition protection act excludes the admissibility of double punishment for the same infringement, what pertains to the situation, when the undertaking has no separate legal capacity from persons who manage it (Art. 106a (3) ACCP). This is the case when the economic activity is conducted as one-man business or in the form of civil partnerships.

Broadening the scope of personal liability for the breach of substantive competition rules aims at increasing the deterrence effect of antitrust prohibitions. The Polish legislator, however, has not decided to criminalize individuals' behaviour, which is the dominant trend not only in Europe, but also globally.[13] Maintaining the administrative character of the sanctions imposed on individuals is deemed "disputable from the point of view

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7 However, personal liability of individuals under competition law does not apply to big-rigging (Art. 6 (1) point 7 ACCP). In these cases, individuals can be fined under separate criminal legislation.

8 According to article 106 ACCP, the undertaking may be fined also for unintentional infringement of competition rules (including the prohibition of anti-competitive agreements).

9 *K. Kohutek*, fn. 4, p. 296, 300.

10 *R. Whish*, Competition Law, Oxford 2009, p. 120.

11 I. e. expect of the liability of undertaking itself.

12 See e. g. *A. Stawicki*, Porozumienia zakazane z uwagi na cel a porozumienia zakazane z uwagi na skutek (Agreements prohibited due to their object and agreements prohibited due to their effect), internetowy Kwartalnik Antymonopolowy i Regulacyjny 2012, No 1, p. 14–15; *D. Geradin*/*A. Layene*‑*Farrar*/*N. Petit*, EU Competition Law and Economics, Oxford 2012, 136–137.

13 Criminal sanctions for individuals operate for example in UK, France, Denmark, Czech Republic, Slovakia, Norway, Iceland, Slovenia, Romania, Greece, Estonia, but also Australia, Brazil, Canada, Indonesia, Israel, Japan, Korea, and, of course, in the US; see *G. Shaffer*/*N. H. Nesbitt*/*S. Weber*, Criminalizing Cartels: A Global Trend? University of Minnesota Law School, Legal Studies Research Paper, No. 11–26, p. 8.

of fundamental rights requirements", because those penalties are criminal in nature (within the meaning of the European Convention on Human Rights Engel criteria).[14] Such "formally administrative" liability of individuals is rightly criticized for the lack of fulfilment of the fundamental principles, applicable to provisions that constitute the legal basis for imposing sanctions (i. e. nullum crimen, nulla poena sine lege).[15] Besides, the Polish legal model does not offer sufficient procedural guarantees provided to undertakings themselves,[16] what makes the introduction of individual liability – in such an imperfect procedural framework – even more disputable.[17] Also the Polish Supreme Court, having recognized that financial fines imposed by the market regulator (i. e. the OCCP) are not of criminal nature, emphasized that "rules of judicial review of accuracy of regulator's decisions by which such fines are imposed should meet the same requirements to those that apply in criminal cases."[18]

The above mentioned critical views should be generally shared. Nevertheless, it seems that the most important issue in the context of the introduction of administrative (financial) liability of managers should primarily focus on the effectiveness of that tool. In this regard it should be considered, whether criminalization would not represent a better solution, in particular from the perspective of pursuing the deterrent function of fines. The undertaking that is managed by the punished person will be able to compensate the loss that the latter suffered due to the payment of the fine. Such possibility does not exist in case of imprisonment.[19]

It is also questionable whether the introduction of the same nature of sanction (i. e. a financial one) – that is already applicable to undertakings – is a step in the right direction. For example in the EU, despite the fact that the level of such fines has systematically increased in the recent years,[20] in ca. 25 percent, the punished undertaking had already infringed competition law before.[21] This fact indicates that even high[22] financial sanctions relatively often do not prove to be effective (as a deterrent mechanism). It is also reported that nowadays there are much less cartel agreements in the US than there used to be earlier.[23] Therefore, it remains to be seen whether also in Poland the number of infringements of anti-competitive agreements will decrease. Simultaneously, one cannot forget that there are other mechanisms pursuing that objective (complying with competition rules) like in particular leniency (Art. 113a–113k ACCP). Also individuals

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14 *M. Martyniszyn*/*M. Bernatt*, On Convergence with Hiccups. Recent Amendments to Poland's Competition Law, 36(1) European Competition Law Review 8 (2015), p. 10–11.

15 See e. g. *M. Król*-*Bogomilska*, Zwalczanie karteli w prawie antymonopolowym i karnym (Combating of cartels in antitrust and criminal law), Warszawa 2013. p. 465, 466.

16 See e. g. *M. Bernatt*, Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji (Procedural fairness in the proceedings before the competition authority), Warszawa 2011, p. 323–324.

17 *Martyniszyn*/*Bernatt*, fn. 14, p. 11.

18 Judgement of the Supreme Court of 14 April 2010, Ref. No III SK 1/10.

19 *Król*-*Bogomilska*, fn. 15, p. 344.

20 At least in three cases amounting to more than one billion euros in total (data available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf).

21 See: http://ec.europa.eu/competition/cartels.

22 At least from the perspective of an average (usually medium or small sized) undertaking, or all the more the consumer.

23 *W. P. J. Wils*, Is Criminalization of the EU Competition Law the Answer?, in: *K. J. Kseres*/*M. P. Schindler*/*F. O. Wogelaar* (eds.), Criminalization of Competition Law Enforcement. Economic and Legal Implications for the EU Member States, Cheltenham, Northampton 2006, p. 83.

can benefit from a leniency regime, where they – inter alia – reveal infringements and fully cooperate with the OCCP (Art.113h–113j ACCP).

III. Settlement: will the reduction of fines provide sufficient incentive?

The main purpose of the settlement procedure is to simplify and hence to accelerate the antimonopoly proceedings,[24] allowing to bring the undertaking's conduct into conformity with competition rules faster.[25] In principle, this institution is expected to bring mutual benefit, i. e. for both businesses and the antitrust authority. Thanks to the settlement, both parties are intended to avoid getting involved in a lawsuit, in which the decision of the OCCP is verified. Currently the majority of the decisions are appealed against before the court, which is costly and time-consuming. Nevertheless, the main incentive for an undertaking to undergo the settlement procedure is expected to be the 10-percent reduction of fines compared to the penalty that would have been imposed if a party does not settle (Art. 89 (3) ACCP).

The settlement procedure is already applied in other jurisdictions (including EU), however, it originates from the US antitrust law.[26] In the EU, settlement is applicable only with regard to horizontal agreements.[27] In Poland, that procedure is available in relation not only to vertical agreements, but also to cases of abuse of dominance.

Under Polish law, the settlement procedure is optional (dependent on the discretion of the antitrust authority); it is, however, not compulsory (the undertaking concerned must agree). This procedure can be initiated both ex officio, and upon request of an undertaking.[28] According to Art. 89a (1) ACCP, the procedure can be applied prior to the conclusion of the antimonopoly proceedings. This provision shall not be interpreted literally, meaning that the application of a settlement is possible at any stage of antimonopoly proceedings.[29] The settlement – similarly to commitments decisions[30] – can be classified to so-called negotiated competition law. The undertaking can (at least to some extent) influence the content (and in particular the amount of the fine) of a final decision, recognizing the practice as restricting competition. Articles 89a (4–9) ACCP provide the solutions enabling to conduct a kind of dialogue between the entrepreneur and the authority.

It is doubtful, whether the reduction of the fine by only 10 percent will constitute a sufficient incentive for undertakings (at least from the economic/financial point of view) to undergo the settlement proceedings. Such reduction is to be applied only if the undertaking does not lodge an appeal against the decision of the OCCP (Art. 81 (3a) ACCP). The company will therefore calculate, whether it is profitable to give up bringing a case to court and hence deprive itself of the chance to have this decision and/or fine repealed,

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[24] See in particular Art. 89a (1) ACCP which provides for legal prerequisite of settlement procedure, i. e. its "contribution to accelerate the antimonopoly proceedings". It is of course a discretionary condition being evaluated by the OCCP.

[25] The amendments' justification, fn. 3, p. 13.

[26] *D. Krajewska*, Settlement w świetle doświadczeń europejskich – w poszukiwaniu najlepszych rozwiązań, (Settlement in the light of European experiences – in search of the best solutions), internetowy Kwartalnik Antymonopolowy i Regulacyjny 2012, No 4, p. 58.

[27] See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art. 7 and Art. 23 of Reg. 1/2003 in cartel cases (OJ 2008 C 167, p. 1).

[28] Such request is however not binding for the antitrust authority.

[29] *K. Kohutek*, in: *K. Kohutek*/*M. Sieradzka*, fn. 4, p. 885–886.

[30] See article 12 ACCP and article 9 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty.

or to have the 10-percent reduction of the fine guaranteed. In this regard it is worth noting that ca. 20 percent of the appealed decisions is repealed.[31] Besides, there is also the number of decisions that had been upheld by the court, however, the fines imposed by the OCCP were significantly reduced, i. e. by 20–70 percent[32] or even by 98 percent in one case.[33] In comparison to this extent of judicial reduction of fines, a reduction of only 10 percent seems to be trivial. It also worth mentioning that, if an undertaking decides to appeal the decision to the court, – in each case[34] – the obligation to pay the fine will be postponed until the decision becomes valid (which may take even several years[35]). This is another factor that can disincentive the undertaking to resign from the judicial review, thus causing the settlement procedure be rarely applied in practice.

IV. Leniency plus: a highly controversial enforcement tool

The leniency programme allows an undertaking to avoid or to reduce the fine by the antitrust authority provided that the former fulfils certain conditions (e. g. has provided the OCCP with information concerning the existence of a prohibited agreement, fully cooperates with the OCCP in the course of the proceedings; see Art. 113a–113b ACCP). In turn, the goal of the leniency plus (Art. 113d ACCP) is to grant an additional fine reduction to an undertaking that submitted an unsuccessful leniency application (which, under the previous legislation, had not given rise to a fine reduction), but disclosed to the OCCP information on another, so far unknown illegal agreement in which that company participates. Leniency plus is thus designed for those undertakings who do not qualify for the total exemption from fine (based on leniency[36]). This institution originates from the U.S., where it is known as amnesty plus.[37]

Article 113d ACCP – which constitutes the legal basis for the leniency plus – has been formulated deficiently, and at least non-transparently. The main problem associated

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31 Sprawozdanie z działalności UOKiK za 2012 r. (The report on the activities of the OCCP for the year 2012), Warszawa 2013, p. 17.

32 For example, judgement of the Court of Competition and Consumers Protection of 13 December 2013, Ref. No XVII Ama 173-178/10 (reduction by 17.5 percent). It is to emphasize that this judgement concerned the greatest Polish cartel case (so called "cement cartel") that constituted obvious and serious infringement of competition law (see decision of the OCCP of 8 December 2009 No DOK-7/09, in which that authority imposed on the parties of the cartel the fine of 411 million zlotys (ca. 100 million euros); see also judgement of the Court of Appeals of 12 May 2010, Ref. No VI ACa 983/09 (reduction by 60 percent); judgement of the Court of Appeals of 19 December 2012 Ref. No VI ACa 752/12 (reduction by 75 percent); judgement of the Court of Appeals of 22 November 2013, Ref. No XVII Ama 114/10 (reduction by 73 percent).

33 The fine imposed by the OCCP amounted to over 52.7 million zlotys (ca. 12.5 million euros). It was reduced to one million zlotys in judgement of the Court of Appeals of 13 July 2013, Ref. No. III SK 24/08 VI ACa 1615/12.

34 Also in cases when the undertaking will lose, because both the decision and the amount of fine imposed by the antitrust authority will be upheld by the court.

35 In particular, when the judgement of the Court of Competition and Consumers Protection is appealed to the Court of Appeals.

36 Which is also confirmed by literal interpretation of. Art. 113d (1) *in principo* ACCP. This provision applies to undertakings referred to in Art. 113c (1) ACCP, i. e. undertakings that do not fulfil the conditions for leniency.

37 See e. g. *K. Arquit*/*J. Buhart*/*O. Antoine* (eds.), Leniency Regimes, London 2007, p. XII–XIV; *M. Martyniszyn*, in: *T. Skoczny* (ed.), Ustawa o ochronie konkurencji i konsumentów. Komentarz (Act on Competition and Consumer Protection. Commentary), 2nd edition, Warszawa 2014, p. 1424, 1430.

with the application of this institution appears in identifying the "other agreement", i. e. the agreement of which the undertaking "additionally" (i. e. in addition to "main" agreement) informs the OCCP. Art. 113d (1) ACCP refers to that notion twice; however, the competition act neither defines it nor establishes the criteria in order to facilitate the identification of what constitutes such agreement. Simultaneously, there are relatively many possibilities of interpretation, depending on what criterion is applied. The agreement in question can be "other", because it has been concluded (implemented) on another relevant market, or because it combines other undertakings or, eventually, because it has another subject.[38] Due to the lack of any normative guidelines, none of these criteria should be treated as irrelevant.[39]

There are also procedural problems with the practical application of leniency plus, i. e. it is namely not clear, whether the issuance of a separate decision imposing a fine and therefore also instituting and conducting another anti-monopoly proceeding (in connection with the creation of a new administrative case) are required.[40]

Last but not least, leniency plus is also problematic from an economic and systemic point of view. Economists warrant that leniency plus can have pro-collusive effects, because it may make cartels more, not less stable.[41] It can also decrease the deterrent effects of a fining system as such, encouraging the undertaking to participate not only in one, but in two or more cartels.[42] This seems to be the most serious challenge concerning leniency plus in Poland. Are there any grounds for rewarding the multimarket violator additionally, i. e. beyond leniency?[43] For example, an undertaking as a member of one cartel is fined 30 million euros. The same company can take part in two anti-competitive agreements and – thanks to leniency plus – be fined "only" 20 million euros.[44] Therefore, the application of art. 113d ACCP can increase the number of leniency motions in general (thus "improving the statistics" of the OCCP), but at the same time it can increase the number of anti-competitive agreements being concluded and implemented in practice.

V. Remedies: an increase of enforcement powers of the antitrust authority

Under amended Polish competition law, the OCCP may apply – so-called – remedies also in a decision recognizing the practice as restricting competition (Art. 10 (4–9) ACCP).[45] Remedies in general can be defined as the obligations of certain ("positive") conduct imposed on the undertaking by the OCCP. The enforcement tools of the antitrust authority have been thus significantly extended; currently it will be able to impose on a

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38 See also *P. Semeniuk*/*S. Syp*, „Wylanie dziecka z kąpielą" – czyli o leniency plus w Polsce ("Throwing out the baby with the bathwater" – about leniency plus in Poland), internetowy Kwartalnik Antymonopolowy i Regulacyjny 7|2013, p. 37–40.

39 *Kohutek*, fn. 4, p. 1082.

40 More on this problem, see, e. g., *Syp*, fn. 38, p. 35–36.

41 See *P. T. Dijkstra*/*L. Schoonbeek*, Amnesty Plus and Multimarket Collusion (2009), available at http://www.webmeets.com/files/papers/EARIE/2009/201/paper.pdf.

42 *B. Turno*, Leniency. Program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji (Leniency programme in Polish competition law), Warszawa 2013, p. 404.

43 *Martyniszyn*/*Bernatt*, fn. 14, p. 11–12.

44 *Semeniuk*/*Syp*, fn. 38, p. 33.

45 Also the obligations imposed in the so-called commitment decision (see Art. 12 ACCP) or in a concentration decision providing for conditions (see Art. 19 ACCP) – i. e., the tools already available under previous legislation, are similar in nature to remedies referred to in Art. 10 (4–9) ACCP.

company not only an order to refrain from the illegal practice in question ("negative" conduct[46]), but also an obligation to apply remedies.[47]

The provisions of Art. 10 (4–9) ACCP are conceptually modelled on the EU competition law (see Art. 7 of Regulation No 1/2003), however they differ from the latter in details (see below). Remedies can be imposed to cease the prohibited practice or to remove its effects (Art. 10 (4) ACCP). It follows that they are designed to achieve a so-called "restitution goal"[48] (i. e. bringing the undertaking's conduct into conformity with the competition law). Article 10 (4) ACCP provides for a non-exhaustive list of remedies, including: a) grant a license or b) provide access to certain infrastructure on non-discriminatory terms, c) order to continue supplies or d) change the agreement. The first three obligations will in fact be applicable to remedy the abuse of the dominant position, consisting in particular in refusal to supply or refusal to deal (including to render certain information[49]), in discrimination of trading parties (see Art. 9 (2) point 3 ACCP). The most "universal" remedy seems to be the last one, i. e. the order to change the contract. It is simultaneously a very generally formulated tool, vesting the OCCP in far-reaching powers. It can not only consist in deleting a certain clause from the contract (e. g., providing for the prohibition of online sales) – which seems to be unproblematic – but also in developing or modifying the content of a contested clause.[50] In particular, the interference in the level of prices used by the company is a controversial issue[51] (formally, the antitrust authority can both order to raise and to lower these prices[52]).

The amended competition act provides not only for behavioural remedies, but also vests the OCCP with the right to apply a structural remedy. The authority may order to reallocate of certain economic activities between entities within a capital group, or assigning them to a separate organizational entity within the same undertaking (Art. 10 (5) ACCP). Such structural remedy is envisaged only when the reliance on the behavioural remedies would not be effective, or when other measures – while equally effective – would be more burdensome for the undertaking involved (Art. 10 (5) ACCP). This remedy interferes with organizational structure of the undertaking aiming at a kind of an "internal unbundling" (disintegration) of economic activities conducted within the enterprise.[53] There should be no doubt that the discussed remedy is to be applied as a last resort tool.

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46 *Kohutek*, fn. 4, p. 447.

47 By applying remedies the OCCP is able to "indicate the way", in which the desirable state of competition shall be achieved; see *J. Sroczyński*, Tzw. środki zaradcze (remedies) w znowelizowanej ustawie antymonopolwej: istony wzrost uprawnień prezesa UOKiK (Remdies in the amended Antimonopoly Law: significant increase of the Presidesnt of the OCCP), in: Przegląd Ustawodawstwa Gospodarczego 2|2015, p. x.

48 See e. g. *A. Piszcz*, Kilka uwag do projektu założeń ustawy o zmianie ustawy o ochronie konkurencji i konsumenta (A few comments on the draft guidelines of the Act amending the Act on Protection of Competition and Consumer), internetowy Kwartalnik Antymonopolowy i Regulacyjny 2|2014, p. 11.

49 See e.g. judgement of the Court of First Instance of 17 September 2007 in the case T-201/04 *Microsoft Corp. v. the Commission* (2007) ECR II-03601 and judgement of the General Court of 5 April 1995 in the case C-241 & 242/91 Magill (1995) ECR I-00743.

50 It is recommended that applying this remedy shall be followed by some arrangements (dialogue) with the undertaking concerned; *Kohutek*, fn. 4, p. 442–443.

51 In fact, constituting a price regulation, that is a measure that is typical of monopolized markets (like in particular distribution of energy).

52 *J. Sroczyński*, fn. 47, p. XII.

53 This remedy shall assure that the same person (natural or legal) is not engaged in different kind of activities, in particular the ones that are economically (commercially) linked, like e. g., the production of X and the distribution of the same good; see The amendments' justification, fn. 3, p. 12–13.

The remedies that have been introduced to Art. 10 (4–9) ACCP constitute a powerful enforcement tool in the hands of the OCCP; they are also a measure allowing the OCCP a far-reaching interference both in an economic freedom and ownership of undertaking concerned. That is why the OCCP shall use remedies with caution and in particular in compliance with the principle of proportionality (which is also expressis verbis provided for in Art. 10 (6) ACCP)[54]). Besides, this principle determines not only facultative,[55] but also exceptional nature of the remedies. The principle of proportionality obliged the public authority to refrain from excessive and/or unjustified interference with the rights and freedoms of an undertaking.[56] It follows that – as a rule – antimonopoly proceeding in the cases of competition-restricting practices shall be concluded by way of a "negative" decision, i. e. the decision recognizing the practice as restricting competition and ordering to refrain from it[57] and without positively defining the way of such refrainment.[58]

With the view of the above, it is questionable whether the introduction of remedies was in fact necessary to improve the effectiveness of the public enforcement of competition rules, although it is explained that the discussed novelty is a measure which had been expected by undertakings themselves, which had often reported the need for specific indications by the OCCP how to implement the decisions.[59] However, if the actual reason underlying the introduction of remedies was to satisfy the expectations of undertakings, one may wonder why the legislator has not made their application dependent on the request of the undertaking concerned. In this situation, there shall be no doubt that such an "antitrust regulation" of the undertaking's conduct is proportionate (and also in line with "volenti non fit iniuria-rule").

VI. Concentrations: acceleration or extension of the proceedings?

The new system of merger control will have two stages.[60] Under the previous legislation, the OCCP had two months to review a merger case; however, in practice, the review of some cases (in particular the one which raised issues) took much longer.[61] Besides, also

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54 Pursuant to this provision, the measure referred to in paragraph 4 and 5 (i. e. behavioural and structural remedy) should be proportionate to the gravity and type of infringement and necessary for its completion or removal of its effects.

55 However, it is also clear from the wording of Art. 10 (4) ACCP, that remedies are a non-obligatory tool ("The President of the OCCP may […] order […] application of measures consisting in […]").

56 See e.g. *A. Walaszek-Pyzioł*, Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego (Principle of proportionality in the jurisprudence of the Constitutional Court), Przegląd Ustawodastwa Gospodarczego 1|1995, p. 15–17.

57 If – at the time of issuing the decision – the market behaviour of the undertaking still infringes the prohibitions specified in Art. 6 or 9 ACCP or Art. 101 or 102 of the EC Treaty).

58 *Kohutek*, fn. 4, p. 449.

59 The amendments' justification, fn. 3, p. 12.

60 Which does not mean that the antitrust authority will assess the planned concentration always within the second stage. Conversely, the majority of concentrations shall be assessed at the first stage (see further).

61 Sometimes even ten months; this was the case with the proceeding (review of the merger) between Auchan Polska and Real; see also e. g. *A. Piszcz*, Długa historia przejęcia Reala przez Auchan. Decyzja Komisji z 7 marca 2013 r., COMP/M.6822 oraz decyzja Prezesa UOKiK z 21 stycznia 2014 r., DKK-4/2014 (The long history of the merger between Auchan and Real. The Commission's decision of 7 March 2013 COMP/M.6822 and the decision of the President of the OCCP of 21 January 2014 DKK-4/2104), internetowy Kwartalnik Antymonopolowy i Regulacyjny 3|2014, p. 89–97.

the examination of unproblematic concentrations lasted – on average – almost two months.

Currently the transactions which do not raise significant competition concerns shall be reviewed within one month (Art. 96 (1) ACCP) – i. e. in so-called Phase 1. More complex transactions will be reviewed within an additional four month period (Phase II). According to Art. 96a ACCP, this second phase will be necessary in a) particularly complex cases, b) cases concerning concentrations that are likely to significantly impede competition, and c) cases, in which a study of the market is required.

All three situations listed in Art. 96a (1) ACCP have been vaguely formulated. The assessment whether the planned concentration is – i. e. – "particularly complex" – is made by the OCCP, which disposes of relatively broad discretion in this regard. The decision of this authority (on the necessity of reviewing the concentration in the second phase) is not the subject of judicial review. Therefore, it is likely that the antitrust authority will often (too often?) use the second phase. If such scenario prevails, the novel legal solution will not only not realize its intended goal, but it will also be counterproductive (extension instead of acceleration of the proceedings). It is, however, expected that ca. 80 percent of notifiable transactions will be reviewed in Phase I.[62] So far (i. e. 4 months after the amendment had come into force) the OCCP has twice taken the opportunity to extend the deadline for examining the planned concentration to 5 months.[63]

The Amendment introduced the possibility of partial non-disclosure of the decision of the President of the Office, in which certain conditions have been imposed on the company taking part in concentration.[64] It occurs upon a request of an undertaking concerned. The request is binding for the antitrust authority (Art. 19 (4) ACCP), obliging it not to disclose the decision to the public in the part relating to the term of fulfilment of these conditions (Art. 19 (5) ACCP). This obligation is temporary, and it cannot last longer than the day of expiration of that term.

The discussed solution is intended to protect the interests of the undertaking obliged to fulfil the concentration conditions, in particular by strengthening its negotiating position in the process of implementation of these conditions. In practice, these conditions often consist in selling the part of the undertaking's assets (or shares) to another (independent company within the period specified by the antitrust authority (exceeding this time limit may result in imposing a fine of equivalent of up to 10 000 euros on an obliged undertaking for each day of delay in execution of the decisions; Art. 107 ACCP). Potential buyers, knowing when this period expires, are able to force the seller to reduce the price of the assets (shares or other rights) even significantly below the level of its actual market value. The concentration conditions are not designed to cause a kind of expropriation of the merging undertaking, but to ensure that the concentration will not result in significant impediments to competition in the market (see articles 18–20 ACCP).

The regulation laid down in Art. 19 (4–5) ACCP is supposed to equal negotiating positions of the parties of the transaction in which the concentration conditions could be fulfilled[65] and hence enable the merging company to sell its assets (other rights) on mar-

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62 The amendments' justification, fn. 3, p. 3.

63 I.e the merger between Górażdże Cement S.A. and Duda Kruszywa Sp. z o.o. i Duda Beton Sp. z o.o. (in April 2015) and the merger between Xella Polska and Grupa Silikaty (in May 2015).

64 It is the so-called conditional consent to concentration, meaning that the concentration may be implemented after fulfilment of those conditions (i. e. to dispose of the entirety or part of the assets of one or several undertakings, or to divest control over an undertaking or undertakings; see article 19 ACCP).

65 And therefore, it is positively assessed in the literature, see. e. g. *D. Wolski*, Kierunek zmian w zakresie kontroli koncentracji przedsiębiorców w projekcie nowelizacji ustawy o ochronie konku-

ket conditions. It is, however, doubtful, whether under the new legal framework the obliged company will be better off. Pursuant to Art. 19 (5) ACCP, only the term of "fulfilment of concentration condition" is excluded from revealing to the public; thus the other party (potential buyer) will still know that the seller is obliged by the public body to certain conduct (in particular, to sell part of its assets), therefore still being able to impose on the seller some unfavourable conditions of the transaction (as in particular the price). De lege ferenda it will be desirable to extend the scope of the non-disclosure institution also to the concentration conditions themselves.

VII. Others: mixed impressions

Apart from the most important amendments of Polish competition law discussed above, there are also many other changes that came into force on 18 January 2015. Some of them are worth mentioning:

The modifications of time periods deserve positive assessment, and in particular the extension of the term for filing an appeal against a decision of the OCCP: one month instead of 14 days (calculated from the date of delivering the decision); Art. 81 (1) ACCP). The previous time limit in many cases was too short for a reliable development of an appeal to the court.[66]

Also the limitations period with respect to anti-competitive practices has been significantly extended: instead of one year, five years from the end of the year in which the practice ceased to be applied (for businesses), or from the end of the year in which a manager ceased the behaviour for which he or she may be held liable (for individuals); Art. 93 ACCP. From the perspective of an undertaking (violator), this change is certainly not welcomed. However, it is desirable for the public interest and for increasing the efficiency of anti-monopoly law. Much information (e. g., from other prosecution authorities) concerning a suspicion that competition-restricting practices have been applied (e. g., bid-rigging) reached the OCCP after one year from the end of the year in which the practice had already ceased. In such cases the initiation of the antimonopoly preceding was inadmissible (due to the expiry of the limitation period).[67]

The amendment added quite many paragraphs concerning the way of calculation turnover for the purpose of establishing whether the planned concentration should be notified to the OCCP (Art. 16 (2–5) ACCP). This change made some of those provisions not transparent, which can lead to difficulties in their practical application.

Further, the amendment introduced significant changes to the OCCP's inspection powers, distinguishing the following two terms "control" (a simple inspection, see Art. 105a–105m ACCP) and "search" (see Art. 105n–105q ACCP) as two separate legal institutions. A control is based on the presumption of co-operation between the OCCP (its representatives) and the controlled undertaking, whereas a search empowers the OCCP to actively look for evidence on the undertaking's premises.[68] However, the search to be permissible requires a prior judicial authorization. The Court of Competition

rencji i konsumentów (The direction of change in the control of concentrations between undertakings in the draft amendment to the Act on the Protection of Competition and Consumers), internetowy Kwartalnik Antymonopolowy i Regulacyjny 1|2013, p.12.

66 It in particular concerns more complex cases or with extensive evidence (decisions in such cases often had dozens of pages (sometimes more than 100); *Kohutek*, fn. 4, p. 842.

67 See The amendments' justification, fn. 3, p. 31.

68 *Martyniszyn*/*Bernatt*, fn. 14, p. 14.

and Consumers Protection shall issue its decision with respect to the admissibility of performing the search within 48 hours (Art. 105 (2-4) ACCP).

VIII. Final remarks

The discussed amendment of Polish competition law generally deserves a critical assessment. In fact all of the novelties that were presented in detail above (see points 2–6), are far from perfect, featuring either legislative (constructive) drawbacks or introducing solutions that are (or at least are likely to be) ineffective or controversial from an axiological or systemic perspective. Many provisions of the competition act have become – as a result of the amendment – extensive, unclear and hence non-transparent.

There are also several problems or "normative defects" of the Polish competition act that can be solved and/or eliminated mainly by the way of legislative intervention, and the amendment of June 2014 was a good opportunity to do so. The mentioned problems pertain to both substantive rules (e. g., simplifying the definition of „undertaking" by removing the reference to public utility services,[69] liberalization of the legal regime on resale price maintenance, rethinking and redrafting of the prohibition of the abuse of a dominant position[70] or introduction of a legal definition of concentration[71]), and the procedure (e. g., the lack of sufficient protection of procedural guarantees of an undertaking at the stage of initiation of anti-monopoly proceedings[72] or during explanatory proceedings, the lack of direct regulation of the so-called Legal Professional Privilege in the anti-monopoly proceedings[73] or the lack of any judicial control over failure to consider the notification concerning a suspicion that competition-restricting practices have been applied). Unfortunately, the amendment of June 2014 has not improved Polish competition law in this respect.

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69 In particular in the context of interpretation of the notion of such services made by the Polish Supreme Court in one of its recent judgements; see judgement of 15 October 2014, Ref. No III SK 61/13; see *K. Kohutek*, Materialnoprawne przepisy ustawy o ochronie konkurencji i konsumentów: postulaty modyfikacji oraz uwagi de lege ferenda (Substantive provisions of the Act on the Protection of Competition and Consumers: de lege ferenda recommendations), internetowy Kwartalnik Antymonopolowy i Regulacyjny 1|2015, p. 61–62.

70 See more, *Kohutek*, fn. 68, p. 62–64, 67–72.

71 *Skoczny*, fn. 37, p. 580.

72 In particular, Polish competition law does not provide for the Statement of Objections (that is applied under EC competition law); however, the introduction of an equivalent measure to Polish law is currently discussed (also with the engagement of the OCCP).

73 For more on this, i. e. the problem of the conditions of the application of so-called LPP under the EC law, see the judgement of the ECJ of the 21 December 2002 in case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* (2010), ECR I-08301.