

2014 Amendment of the Polish Competition and Consumers Protection Act 2007

by

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Abstract

The article presents a critical analysis of changes introduced into the Polish Competition Act of 2007 by the Amendment Act of 2014. The declared purpose of the Amendment was mainly to increase the effectiveness of the enforcement of the antitrust prohibitions, including the introduction of conduct remedies in antitrust cases, the settlement procedure and fines for individuals, changes in the Polish Leniency Programme and inspection powers, as well as simplifying and shortening merger control proceedings. Considered in the paper is the thesis that some of these changes were not introduced properly; in particular, that the new provisions

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fail to sufficiently safeguard the rights of undertakings, and that the amendment is an inadequate step towards the convergence of the Polish competition law system with the enforcement rules of the EU and its other Member States. Further changes to the Polish Competition Act of 2007 are therefore needed. The paper does not cover changes introduced by the Amendment Act of 2014 to Poland's consumer protection provisions.

Résumé

Cet article présente une analyse critique des changements introduits par l'amendement de 2014 dans la loi polonaise relative à la protection de la concurrence et des consommateurs de 2007. Le but déclaré de l'amendement visait principalement à accroître l'efficacité de l'application du droit de la concurrence par l'introduction des mesures correctives dans les affaires du droit de la concurrence, de la procédure de règlement et des sanctions contre les individus, des changements dans le programme de clémence polonais et dans les pouvoirs d'inspection de l'Autorité de la concurrence, ainsi que par la simplification et le raccourcissement de la procédure de contrôle des concentrations. Selon l'hypothèse présentée dans l'article, certains de ces changements n'ont pas été introduits correctement, les nouvelles dispositions ne parviennent pas à préserver suffisamment les droits des entreprises et l'amendement de 2014 constitue un pas insuffisant vers la convergence du système de droit de la concurrence polonais avec les règles d'application du droit de la concurrence dans l'UE et les Etats Membres. En effet, de nouveaux changements de la loi relative à la protection de la concurrence et des consommateurs de 2007 sont nécessaires. L'article ne couvre pas les modifications introduites par l'amendement de 2014 dans le domaine de protection des consommateurs.

Classifications and key words: enforcement of the prohibition of anti-competitive practices; fines for individuals; inspection powers; leniency; leniency plus; merger control proceeding; remedies; settlement.

I. Introduction

The Polish competition law system is already 25 years old¹. The currently applicable Act on Competition and Consumer Protection (hereafter,

¹ See in detail T. Skoczny, 'Poland: Chapter 3 – Competition Law' [in:] S. Breidenbach, Ch. Campbell (eds.) *Business Transactions in Eastern Europe*, vol. 2 (Lexis Publishing 1977) § 2. T. Skoczny, 'Polish Competition Law in the 1990s – on the Way to Higher Effectiveness and Deeper Conformity with EC Competition Rules' (2001) 2 *European Business Organization Law Review* 777–793; M. Błachucki, *Polish Competition Law – Commentary, Case Law and Texts*, Warszawa 2013 (available in Polish in at: <http://www.UOKiK.gov.pl/publikacje.php?tag=2>).

Competition Act) was promulgated in 2007². The Competition Act of 2007 replaced an identically named act which was issued in 2000³ and subjected to a major amendment in 2004⁴, directly before Poland's accession to the EU. A few years of applying the Competition Act of 2007 in practice made it possible to gradually identify its omissions, shortcomings and faults. Hence, the Polish government declared in its 'Competition Policy 2011-2013'⁵ that the Competition Act of 2007 was in need of an amendment.

After more than two years of preparations and widespread discussions initiated and led by the services of the Polish Competition Authority – the President of the Office of Competition and Consumers Protection (hereafter, UOKiK President), major changes were ultimately introduced into the Competition Act of 2007 by the Amendment Act of 2014⁶ (hereafter, 2014 Amendment Act). The 2014 Amendment Act entered into force on 18 January 2015. According to the 'Competition Policy 2011-2013', and the strong will of the former UOKiK President who originally initiated the preparation of this Act, the new legislation seeks, first, to increase the effectiveness of competition law enforcement in Poland and, second, to simplify and shorten national merger control proceedings⁷.

Effective antitrust enforcement is a key factor for the success of any competition authority. It came as no surprise therefore that the UOKiK President had tried to use the amendment process to add new legal instruments to its already well-equipped toolbox. In order to increase the efficacy of competition law enforcement in Poland, the Parliament accepted the UOKiK President's proposal to introduce into the national legal system a number of completely new instruments of competition law enforcement, and to make significant changes to a number of existing ones. Among the newly created

² The Act of 16 February 2007 on the Protection of Competition and Consumers (Journal of Laws 2007, No. 50, item 331 as amended); available in English at http://www.UOKiK.gov.pl/competition_protection.php.

³ The Act of 15 December 2000 on the Protection of Competition and Consumers (Journal of Laws 2003 No. 86, item 804) (unavailable in English).

⁴ The Act of 16 April 2004 on the Amendment of the Act on the Protection of Competition and Consumers (Journal of Laws 2004 No. 93, item 89) (unavailable in English).

⁵ Competition Policy 2011-2013, Office of Competition and Consumers Protection, Warsaw 2011; available in .pdf at: http://www.UOKiK.gov.pl/publikacje.php?news_page=1&tag=2.

⁶ The Act of 10 June 2014 amending the Act on the Protection of Competition and Consumers and the Code of Civil Procedure (Journal of Laws item 945) (unavailable in English).

⁷ The justification of the Amendment Act of 2014 is available in Polish at <http://orka.sejm.gov.pl/> and the official statement of the UOKiK President (M. Krasnodębska-Tomkiel) published in Polish in *internetowy Kwartalnik Antymonopolowy i Regulacyjny (iKAR)* (2012) 1(1), p. 7–9; also available in Polish at <http://www.ikar.wz.uw.edu.pl/>. See also M. Krasnodębska-Tomkiel, 'Balancing Enforcement with Advocacy: A Constant Challenge' (2012) 3(5) *Journal of European Competition Law & Practice* 423.

instruments are: the use of conduct remedies in antitrust cases, fines imposed on individuals (company managers) for letting anti-competitive practices take place, and settlements. Leniency plus has been introduced as a new element of the already existing national leniency programme. Finally, a number of changes were meant to clarify the inspection powers of the UOKiK President.

II. Increasing the effectiveness of the enforcement of the prohibition of anti-competitive practices

1. Remedies in antitrust cases

Before the 2014 Amendment Act, if an infringement of an antitrust prohibition (anti-competitive agreements or abuse of a dominant position⁸) was established, the UOKiK President could either issue an ‘infringement’ decision or a ‘commitment decision’. In the former case, the authority could order the offending undertakings to refrain from engaging in the forbidden practice in the future (only negative obligations) and impose upon it an antitrust fine⁹. Alternatively, the UOKiK President could issue a ‘commitment’ decision that obliged the undertakings to undertake certain activities that were meant to counteract the violations¹⁰.

Thanks to the 2014 Amendment Act, the UOKiK President will now also be able – for the first time in Poland – to determine in his infringement decisions how an undertaking should go about terminating the infringement, or remove its effects, by imposing conduct remedies (both positive and negative obligations)¹¹. This should improve transparency and legal certainty as the UOKiK President will be able to use measures reflecting the characteristics of the investigated market and the actual case at hand¹².

This new legal institution is modelled on Article 7 of Regulation 1/2003¹³. Still, the European Commission has more freedom in the imposition of conduct

⁸ Article 6-9 of the Competition Act of 2007 and Article 101 or 102 TFUE.

⁹ Article 10(1)-(3) and Article 106(1)(1)-(2) of the Competition Act of 2007.

¹⁰ Article 12 of the Competition Act of 2007.

¹¹ Article 10(4)-(9) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

¹² So K. Kowalik-Bańczyk, ‘Reforms of Polish Antitrust Law: Closer to, or Farther From, the European Model?’ (2014) *Journal of European Competition Law & Practice*.

¹³ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] 1/1.

remedies (both behavioural and structural) than the UOKiK President since the new Polish legal provision does not regulated this issue in much detail¹⁴.

Similarly to the EU, conduct remedies in Poland can be behavioural or structural in nature, albeit behavioural measures are the preferred method. The 2014 Amendment Act provides an open catalogue of behavioural remedies, naming four types 'in particular'. Hence, the UOKiK President may: 1) order an IPR licence to be granted, 2) grant access to certain infrastructure, or 3) deliver to other entities goods or provide certain services. All these three remedies must be performed in anon-discriminatory manner. Moreover, the UOKiK President may also 4) change any concluded contract¹⁵. In light of the above, a question thus arises: will the UOKiK President also be able to impose on the investigated undertaking the obligation to remedy harm resulting from their antitrust infringement¹⁶?

According to the new text of Article 10(5) of the Competition Act of 2007, the UOKiK President may impose structural remedies aimed at the reorganisation of an undertaking's business. Structural remedies may provide for the 'allocation' of a given economic activity to specific entities within the offender's capital group, or to an organisationally separate unit within the structure of the offender. This may pertain, for instance, to a wholesale activity of a vertically integrated business. These exhaustively listed forms of structural remedies can be imposed only if using behavioural remedies would not be effective, or if other measures – while equally effective – would prove more burdensome for the undertakings concerned. The powers of the UOKiK President do not go so far, however, as to allow him to oblige an undertaking to change the subject matter of its business(for instance, to start a new economic activity)¹⁷.

Behavioural and structural conduct remedies must be proportionate to the gravity and type of the infringement at hand. They must also be necessary to bring the violation to an end, and to remove its effects¹⁸. The expected positive

¹⁴ See more A. Piszcz, 'Kilka uwag do projektu założeń ustawy o zmianie ustawy o ochronie konkurencji i konsumentów' ['A few remarks on the draft assumptions for an Act amending the Act on competition and consumers protection'] (2012) 2(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 10, available in Polish at <http://www.ikar.wz.uw.edu.pl/>; A. Maziarz, 'Kilka uwag do projektu nowelizacji ustawy o ochronie konkurencji i konsumentów' ['A few comments on the Draft Amendment to the Act on Competition and Consumers Protection'] (2013) 7(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 9, available in Polish at <http://www.ikar.wz.uw.edu.pl/>.

¹⁵ Article 10(4)-(6) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

¹⁶ So A. Stawicki, B. Turno (WKB), *Istotne zmiany w prawie konkurencji* [Essential changes in competition law], available at: <http://wkb.com.pl/en/node/19?id=273>.

¹⁷ So also K. Kowalik-Bańczyk, 'Reforms of Polish Antitrust Law...', p. 5.

¹⁸ Article 10(6) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

results of this new instrument will primarily depend on the successful dialogue between the UOKiK President (who is obliged to inform the undertakings about his intention to impose certain conduct remedies) and the investigated undertakings. This realisation has the potential to enhance ‘negotiated’ enforcement of competition law – undertakings have, in this context, the right to express their position on the authority’s proposals. Later on, they also have an obligation to provide the UOKiK President with information on the extent of the implementation of the imposed conduct remedies¹⁹.

2. Leniency and Leniency Plus

Since 2004, the UOKiK President has been able to completely refrain from imposing an antitrust fine, or to reduce the level of such fine, with respect to an undertaking which had participated in a prohibited anti-competitive agreement. The appropriate provisions are now found in Article 6(1) Competition Act of 2007 or Article 101(1) TFUE²⁰ (leniency procedure/programme). Despite the fact that the Polish leniency programme under the Competition Act of 2007 referred to the 2006 Commission Notice on Immunity from fines and reduction of fines in cartel case²¹, it was actually widely criticised for being imperfect²². Nonetheless, Poland saw a repeated use of leniency in recent years, albeit, interestingly, it has mostly been used in vertical cases (rather than horizontal). Unfortunately, the possibility to use leniency with respect to vertical agreements has still been preserved, despite the many improvements introduced by the 2014 Amendment Act. These improvements include the incorporation into the Competition Act of the provisions of the Implementing Regulation of 2009

¹⁹ Article 10(7)–(9) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

²⁰ Article 109 of the Competition Act of 2007.

²¹ OJ [2006] C 298/17.

²² See more B. Turno, *Leniency. Program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji* [*Leniency. A program to reduce fines in Polish competition protection law*], Warszawa 2013, passim. See also: K. Rumak, P. Sitarek, ‘Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law’ (2009) 2(2) *YARS* 99; P. Sitarek, ‘The Impact of EU Law on a National Competition Authority’s Leniency Programme – the Case of Poland’ (2010) 7(9) *YARS* 185; D. Hansberry-Bieguńska, ‘Polish Leniency and Competition Procedures – Shifting Sands for Applicants’ (2011) 5 *Competition Law International* 59; M. Król-Bogomilska, ‘Program łagodzenia kar pieniężnych (leniency) w polskim prawie antymonopolowym – po pięciu latach obowiązywania ustawy’ [‘A programme to reduce fines in Polish competition law (leniency) – after five years of the law’s applicability’] (2012) 4 *Europejski Przegląd Sądowy* 4–5; K. Kowalik-Bañczyk, ‘Programy łagodzenia kar (leniency) w Unii Europejskiej i w Polsce a zasada pewności prawa’ [‘Programmes to reduce fines (Leniency) in the European Union and Poland and the legal certainty principle’] (2013) 5 *Przegląd Ustawodawstwa Gospodarczego* 19.

which regulates conditions for obtaining leniency²³. In accordance with the *ECN Model Leniency Programme*²⁴, the only requirement for a leniency applicant contained in the revised version of the Competition Act of 2007 is now to end the infringement as soon as possible (rather than immediately) after lodging a leniency application²⁵. It thus also allows for the use of leniency by the initiator of the agreement; solely those participants that were persuading others to take part are precluded from benefiting from the programme²⁶.

As the UOKiK President strongly desired, the changes introduced by the 2014 Amendment Act are meant to improve the attractiveness of Polish leniency so as to increase the number of undertakings applying for immunity and fine reductions. First of all, the earlier fine setting system for the 2nd, 3rd and further applicants has been changed and has finally become more in line with the EU standard. According to the new system, the 2nd, 3rd and further leniency applicants can now receive a reduction of, respectively, 30-50%, 20-30% or 20% of the fine which would have been imposed if they had not applied for leniency²⁷. Second, in order to improve the attractiveness of the Polish programme, the 2014 Amendment Act introduced also extensive safeguards against the disclosure of documents submitted by leniency applicants²⁸. Some commentators wonder whether the introduction of such far reaching protection of leniency documents might not create a clash between the new Polish provisions and the jurisprudence of the CJEU in *Pfleiderer* and *Donau Chemie*²⁹. The Polish legislator found their introduction necessary, however, in order to shield leniency applicants from damage claims, and in order to prevent discouraging potential applicants from using the programme³⁰.

The Polish leniency programme was also enhanced by the 2014 Amendment Act through the introduction of the 'leniency plus'³¹ instrument, mirroring solutions existing in the USA and some EU member states, such as the UK³².

²³ See Rozporządzenie Rady Ministrów z dnia 26 stycznia 2009 r. w sprawie trybu postępowania w przypadku wystąpienia przedsiębiorców do Prezesa Urzędu Ochrony Konkurencji i Konsumentów o odstąpienie od wymierzenia kary pieniężnej lub jej obniżenie (Journal of Laws No. 20, item 109) (unavailable in English).

²⁴ Available in revised form from 2012 at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf. See more K. Kowalik-Bańczyk, 'Reform of Polish Antitrust Law...', p. 2.

²⁵ Article 113a(6) of the Competition Act as provided by the 2014 Amendment Act.

²⁶ Article 113b point 3 of the Competition Act 2007 as provided by the 2014 Amendment Act.

²⁷ Article 113c(2) of the Competition Act 2007 as provided by the 2014 Amendment Act.

²⁸ Article 70(1) in connection with Article 113a-113k as provided by the 2014 Amendment Act.

²⁹ A. Stawicki, B. Turno, *Istotne zmiany...*, p. 1. See also P. Sitarek, 'The Impact of EU Law...', p. 195.

³⁰ So K. Kowalik-Bańczyk, *Reforms of Polish Antitrust Law...*, op. cit., p. 3.

³¹ Article 113d as provided by the 2014 Amendment Act.

³² See more M. Martyniszyn, M. Bernatt, 'On Convergence with Hiccups. Recent Amendments to Poland's Competition Law' (2015) 1 *European Competition Law Review* 10.

This instrument allows a leniency applicant, which had failed to qualify for full immunity (i.e. 100% reduction of a fine) with respect to an illegal practice, to get an additional ('plus') reduction of the fine imposed for its participation in that prohibited agreement. Such company can receive such 'plus' reduction in exchange for disclosing a separate, yet unknown, illegal anti-competitive agreement on a different market, provided the leniency plus applicant co-operates with the competition authority in that regard. This means that a whistleblower may receive full immunity (a 100% reduction of its fine) under general leniency rules for the additionally disclosed agreement, as well as a fine reduction in the original case.

As a result of this legal change, the UOKiK President expects an increase in the number of applications overall, even if leniency plus is no more than merely an option available to undertakings. However, Polish leniency plus offers many significant benefits to interested undertakings and yet presents them with few risks. When considering filing a leniency plus application, those that participate in an anti-competitive agreement are aware of the set – and very high – level of fine reductions (always 30%) attached to the disclosure of every new illegal agreement separately. In each such case, the leniency plus applicant secures for itself the 1st position in the leniency line for the additional agreement. The whistleblower is also not excluded from the circle of entities which can apply for immunity. It must only refrain from its own participation in such agreements, at least at the moment of delivering its leniency plus application. For all these reasons, cartel participants may try to use leniency plus to secure for themselves immunity from future fines.

Finally, it is likely that a significant increase in the number of leniency applications will also result from a general change in Poland's competition law enforcement system whereby fines can now be imposed upon individuals (see below), and both leniency, as well as leniency plus, will now be open not just to undertakings but also to their 'managing persons'³³.

3. Settlement procedure

Up until 2014, the leniency programme was the only element of the Polish competition law system that provided the opportunity to gain a fine reduction for an antitrust infringement³⁴.

The 2014 Amendment Act introduced a completely new legal instrument, called in Polish 'a voluntary submission to a fine' (in Polish: *dobrowolne*

³³ Article 113h-113j of the Competition Act 2007 as provided by the 2014 Amendment Act.

³⁴ Article 109 of the Competition Act of 2007 with the op. cit. implementing regulation of 26 January 2009 (Journal of Laws No. 20, item 109).

poddanie się karze)³⁵, which should simplify and enhance, in particular, accelerate competition proceedings before the UOKiK President. Indeed, the essence and purpose of the new instrument is to shorten the length of antitrust proceedings thanks to a form of consensus reached between the authority and parties. Hence, the procedure allows both the authority and the parties to save major resources.

The settlement procedure introduced into EU law in 1998³⁶ has the same essence and purpose. However, for no apparent reason, the Polish procedure differs from its European prototype. Similarly to the leniency programme, settlement in Poland can namely be used in any type of antitrust cases. These include not only horizontal, but also vertical anti-competitive agreements, as well as the abuse of a dominant position³⁷.

The law makes it possible for infringers (undertakings or individuals) of antitrust prohibitions to settle the case with the Polish competition authority in exchange for a 10% reduction of the fine to be imposed for the violation to which the undertakings admit to. That reduction is only available to those who voluntarily submit to the fine and agree not to appeal it (if an appeal is submitted, they lose the ‘discount’). Hence, the use of the settlement procedure is much faster in providing undertakings with legal certainty, since they will not have to further preoccupy themselves with eventual court proceeding (judicial review).

Incidentally, the Polish settlement procedure introduced by the 2014 Amendment Act is partly also modelled on the German and the French system³⁸, rather than just on the procedure employed by the Commission. It will take time to discover whether the Polish settlement will fulfil all of the abovementioned expectations. The Competition Act of 2007 states that a settlement procedure may be offered after the main competition proceeding is completed, but before the decision is issued. Yet before settlement talks can even begin, most procedures before the Polish competition authority would have already taken many months. Moreover, the period between the moment when the UOKiK President starts to discuss a settlement (*ex officio* or on a party’s motion) and the time when he actually takes his final decision may also be long. During settlements talks, all parties involved in the infringement, which have accepted the authority’s invitation to settle, must be informed of the initial findings established in the proceeding. The UOKiK President

³⁵ Article 89a of the Competition Act of 2007 as provided by the 2014 Amendment Act.

³⁶ See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No. 73/2004, as regards the conduct of settlement procedures in cartel cases, OJ [2008] L 171/3.

³⁷ Article 89a(1) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

³⁸ See in details M. Martyniszyn, M. Bernatt, ‘On Convergence with Hiccups...’, p. 10.

must also inform them of his anticipated decision, including the extent of the expected fine. The parties must give first their initial and later their formal settlement statement to the authority's proposal whereby they assume liability (but not guilt) for the given infringement and accept the level of the reduced fine. Both the UOKiK President as well as the parties may withdraw from the settlement procedure at any stage. In such situations, however, any information or evidence obtained by the authority within the settlement procedure cannot be used as evidence in the given (or any other) proceedings before the UOKiK President.

The negotiated character of the settlement procedure makes it possible to hope for an improvement in the overall efficiency level of competition law enforcement in Poland³⁹. However, the procedure has an administrative character and thus the UOKiK President plays the dominant role here. Even reduced, the fine ultimately imposed by the UOKiK President has an administrative character as well. Finally, it is a common belief that the 2014 Amendment Act failed to introduce appropriate safeguards guaranteeing the observance of the rights of undertakings, safeguards at least comparable to those of penal law⁴⁰.

As the extent of the fine reduction for using the settlement procedure is not especially high in Poland (10%), it is the lack of appeals, rather than the fine reduction, that might prove a stronger motivating factor for companies to use this procedure. However, lack of judicial review of cases decided with the use of settlement may also be seen as a weakness of this legal instrument. Still, it is rather doubtful whether this can be the basis for the accusation that this legal tool is actually contrary to Article 6 of the European Convention on Human Rights and Fundamental Freedoms⁴¹. Moreover, the consequences of the use of settlement on possible private antitrust enforcement are as yet unknown.

4. The introduction of fines for individuals

The Competition Act of 2007 provides a set of financial penalties for breaking competition rules, including fines for breaking the restrictive practices prohibitions⁴². In general, these fines are imposed on undertakings. Fines for antitrust violations could, until the 2014 Amendment Act, be imposed on an

³⁹ See E.D. Sage, 'Increasing Use of „Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies' (2014) 7(10) *YARS* 235.

⁴⁰ So A. Piszcz, 'Kilka uwag...', p. 10; K. Kowalik-Bańczyk, 'Reforms of Polish Antitrust Law...', p. 4.

⁴¹ See K. Kowalik-Bańczyk, 'Reforms of Polish Antitrust Law...', p. 4.

⁴² Articles 106 para 1 points 1–2 of the Competition Act of 2007.

individual only if he/she was also an “undertaking”. Irrespective of the above, individuals remain subject to criminal liability for their participation in bid-rigging agreements (criminal offence)⁴³. As a result, individuals that are not undertakings (e.g. managers) could thus far only be fined for not implementing administrative decisions and judgements, not notifying a concentration, not supplying information demanded by the UOKIK President, or not co-operating during an inspection⁴⁴.

The Polish competition authority was very keen to use the 2014 Amendment Act to toughen the national antitrust enforcement regime. It thus introduced – for the first time in Poland – the possibility to impose financial penalties on managers (‘managing persons’). According to the Competition Act, managers of undertakings can now be fined for ‘letting a violation take place’ of the ban placed on anti-competitive agreements (Article 6(1)(1)-(6) Competition Act of 2007 or Article 101(1)(a)-(e) TFEU). Hence, liability of natural persons covers both horizontal agreements (thereby going beyond black-listed practices) as well as vertical agreements. Simultaneously however, managers will now also be able to apply for leniency (see above)⁴⁵.

The new Article 4 point 3a of the Competition Act of 2007 defines which individuals could be fined as a ‘person managing an undertaking’. These are, in particular, a ‘person fulfilling directing functions’ or a ‘member of its management board’. The open formula (‘in particular’), and the difficulties in a precise determination who actually ‘fulfils directing functions’ (in different types of companies or at different levels of undertakings), may make it difficult to apply the new provisions in practice. In fact, decisive influence on the decision-making process in an undertaking can sometimes be exercised by a person who is now fluffing managing functions⁴⁶.

Personal liability of managers (even former managers) covers situations when, within their managing function, they intentionally by their actions or omissions allow the undertaking they work for to participate in an anti-competitive agreement⁴⁷. However, an individual may be found in violation only if such a conclusion was reached with regard to the undertaking this person works for, only in the decision addressed to that very company⁴⁸ issued at the end of administrative proceedings directed at that company⁴⁹. This solution implies the possibility of a conflict of interest arising between

⁴³ Article 305 of the Polish Criminal Code.

⁴⁴ Article 108 of the Competition Act of 2007.

⁴⁵ Article 111h–113j of the Competition Act of 2007as provided by the 2014 Amendment Act.

⁴⁶ So A. Stawicki, B., Turno, *Istotne zmiany...*, p. 3.

⁴⁷ Article 6a of the Competition Act of 2007as provided by the 2014 Amendment Act.

⁴⁸ Article 106a(2) of the Competition Act of 2007as provided by the 2014 Amendment Act.

⁴⁹ Article 88(3–4) of the Competition Act of 2007as provided by the 2014 Amendment Act.

undertakings and their ‘managing persons’, a fact that might surface especially during appeals. Individuals (natural persons) can in no way be fined for their actions, or failure to act, dated before the 2014 Amendment Act came into force.

The competition authority can impose on an individual a fine of up to 2 000 000 PLN (about EUR 500 000)⁵⁰. This sum might be regarded as a rather severe penalty, especially when compared to the fine of up to 10% of yearly turnover that can be imposed on undertakings⁵¹.

It is justified to agree with the rather common criticism of the introduction of fines for individuals into the Polish antitrust system since it ‘seems excessive and disproportional and is not a dissuasive measure’⁵². Particularly problematic is the subjective scope of the fines to be imposed on the basis of Article 4 point 3a of the Competition Act 2007 and the fact that they are dependent upon the subjective criterion of intentional fault. Importantly also, although such penalty is formally an administrative fine, it is nevertheless a criminal sanction in nature, in the sense of Article 6 of the European Convention of Human Rights (ECHR) according to the so called *Engel* criteria⁵³. Only actual enforcement practice will show whether this instrument will be effective in combating restrictive practices in Poland, while at the same time managing to avoid violating the right of defence and the presumption of innocence of undertakings. Controversies about this provision centre on the fact that a single UOKiK official will not only conduct the proceedings against the accused undertaking, but also decide on the assessment of the case and the potential imposition of individual fines upon its managing persons.

⁵⁰ Article 106a(1) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁵¹ Article 106(1) of the Competition Act of 2007.

⁵² Lately so K. Kowalik-Bańczyk, ‘Reforms of Polish Antitrust Law...’, p. 7. See also A. Piszcz, ‘Osoba zarządzająca’ w rządowym projekcie ustawy zmieniającej ustawę o ochronie konkurencji i konsumentów’ [‘The ‘manager’ in the Government’s Draft Amendment Act to the Competition Act’] (2013) 7(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 23, available in Polish at <http://www.ikar.wz.uw.edu.pl/>; Sz. Syp, ‘O odpowiedzialności osób fizycznych w polskim prawie konkurencji – de lege lata nad de lege ferenda’ [‘Individual responsibility in Polish competition law – de lege lata and de lege ferenda’] (2014) 4(3) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 11, available in Polish at <http://www.ikar.wz.uw.edu.pl/>.

⁵³ M. Martyniszyn, M. Bernatt, ‘On Convergence with Hiccups...’, p. 13. See more A. Błachnio-Parzych, ‘The Nature of Responsibility of an Undertaking in Antitrust proceedings and the Concept of ‘Criminal Charge’ in the Jurisprudence of the European Court of Human Rights’ (2012) 5(6) *YARS* 939.

5. Inspection powers

The UOKiK President is quite well-equipped when it comes to his powers to conduct different sorts of inspections. However, the Polish competition authority remained unsatisfied with the speed and efficiency of its inspections. Undertakings criticised the original provisions of the Competition Act also, because its rules were not sufficiently precise in specifying the rights of the inspected companies, and because of the lack of judicial control of the UOKiK's actions taken during inspections⁵⁴.

It is necessary to state at the start that the Competition Act of 2007 continues to differentiate between two general types of inspections of undertakings and of their premises: 'a control' (in Polish: *kontrola*)⁵⁵ and 'a search' (in Polish: *przeszukanie*)⁵⁶. Importantly, the two types of inspection were difficult to tell apart⁵⁷ under the Competition Act of 2007, which regulated controls and searches in a similar manner, albeit the latter remains permissible only with the prior authorisation of the Court of Competition and Consumer Protection (hereafter, SOKiK); the division is thus of a purely formal nature.

The 2014 Amendment Act introduced significant changes in this context. First of all, it formally and clearly distinguished its regulation of the two kinds of inspections⁵⁸, limiting at the same time the type of cases where the conduct of a search is possible. A search can now be performed during proceedings on competition restricting practices conducted by the UOKiK President. It can also be undertaken on request of the European Commission or another National Competition Authority with respect to their own proceedings on competition restricting practices or concentration control⁵⁹.

⁵⁴ See more M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [Procedural fairness in the proceedings before competition authorities], Warszawa 2011 passim.

⁵⁵ Articles 105a–105b and Article 105e–105l of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁵⁶ Articles 91 and 105d of the Competition Act of 2007 as provided by the 2014 Amendment Act. A control is sometimes called a simple/usual/ordinary inspection while a search is sometimes known as a forced inspection, equivalent to dawn rights; see M. Martyniszyn, M. Bernatt, 'On Convergence with Hiccups...', p. 813. K. Kowalik-Bańczyk, 'Reforms of Polish Antitrust Law...', p. 5

⁵⁷ See more M. Bernatt, 'The powers of Inspection of the Polish Competition Authority. The Question of Proportionality' (2011) 4(5) *YARS* 47, 53–55. Please note that the EU law does not divide inspections into two separate types, however differs them in similar way (Article 20 and 21 Regulation 1/2003). So K. Kowalik-Bańczyk, 'Reforms of Polish Antitrust Law...', p. 6.

⁵⁸ Article 105n of the Competition Act 2007 as provided by the 2014 Amendment Act.

⁵⁹ Article 105i and 105n of the Competition Act 2007 as provided by the 2014 Amendment Act.

Second, the 2014 Amendment Act has largely differentiated and clarified the rights of inspectors in a control and in a search. According to the amended provisions, inspectors can now also demand the provision of data carriers related to the subject-matter of the inspection⁶⁰. By contrast, the 2014 Amendment Act gives, *expressis verbis*, the UOKiK President a special power to copy data of the inspected undertaking, as well as to seize data storage devices and take them away from the undertaking's premises to be stored and analysed at the premises of the competition authority⁶¹.

The 2014 Amendment Act clarified also the list of data carriers, access to which can be demanded or the content of which can be copied or printed, adding written communications and emails to the already existing list⁶². It also separately listed the possibility to demand 'access to information systems owned by another undertaking which contain the data of the investigated undertaking related to the subject-matter of the inspection, to the extent to which the inspected undertaking has access to them'⁶³.

Third, the 2014 Amendment Act clarified also the role of the SOKiK with respect to his powers in the case of both controls and searches. A control⁶⁴ may be conducted by the services of the UOKiK President during both explanatory and anti-monopoly proceedings based on a written authorisation given by the UOKiK President. Such authorisation cannot be contested before the SOKiK, or any other court, be it on legal or proportionality grounds. At the same time, the UOKiK President may impose a fine of up to EUR 50 million on an undertaking for denying access to its premises or for its failure to co-operate⁶⁵. By contrast, in the case of a search (which must still be authorized by the SOKiK)⁶⁶, the inspected undertaking will be entitled to file a complaint to the SOKiK if the actual search goes beyond the scope established in its judicial authorisation. However, such a complaint will not suspend the search itself⁶⁷.

It is expected that the above provisions should improve the effectiveness of the UOKiK President's inspection powers. On the other hand, the

⁶⁰ Article 105b(1)(2) of the Competition Act 2007 as provided by the 2014 Amendment Act.

⁶¹ Article 105o of the Competition Act 2007 as provided by the 2014 Amendment Act.

⁶² Article 105b (1)(2) and Article 105g of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁶³ Article 105b (1)(2) *in fine* of the Competition Act 2007 as provided by the 2014 Amendment Act.

⁶⁴ Article 105a-105b and Article 105d-105m of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁶⁵ Article 106(2)(3) and (4) as well as Article 108(2)-(6) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁶⁶ Article 105n-105q of the Competition Act of 2007, as provided by the Amendment Act of 2014.

⁶⁷ Article 105p of the Competition Act of 2007 as provided by the 2014 Amendment Act.

2014 Amendment Act introduces also new rules that should help guarantee the observance of the rights of undertakings. Accordingly, a UOKiK President's decision initiating an inspection (both control and search) must clearly indicate a time period for the carrying out of that inspection⁶⁸. The possibility to contest specifically control activities was extended by adding the right to submit a complaint about control activities and complaints by owners of external information storage devices⁶⁹. Specifically with respect to searches, the old institution of 'opposing the start and conduct of search activities' was replaced by 'a complaint about search activities', which can be submitted not only by the entity being searched, but also other entities whose rights have been violated during the inspection.

To sum up, the standpoint expressed by some commentators should be supported that certain changes concerning controls and searches (dawn raids) introduced into the Polish competition law system by the 2014 Amendment Act largely mirror both the practice of the European Commission and their assessment by the European Courts⁷⁰.

III. Simplifying and shortening merger control proceedings

The concentration control model that existed in Poland under the original version of the Competition Act of 2007 had many weakness – both material (e.g. no definition of concentration, control of all joint ventures, rather than only concentrative ones) and procedural (e.g. one-stage-proceeding, lack of a statement of objection)⁷¹. It differed, for no apparent reason, from solutions applied at the same time in the EU and in most of its member states. The amendment of the Polish model has thus long since been postulated⁷².

⁶⁸ Article 105a(4)(7) of the Competition Act 2007 as provided by the 2014 Amendment Act.

⁶⁹ Article 105m Competition Act of 2007.

⁷⁰ So K. Kowalik-Bańczyk, 'Reform of Polish Antitrust Law...', p. 6.

⁷¹ See more T. Skoczny, 'Polskie prawo kontroli koncentracji' ['Polish law of concentration control'] (2010) 5 *Europejski Przegląd Sądowy* 15.

⁷² M. Kolański, 'Polityka kontroli koncentracji w Polsce – stan obecny i możliwe zmiany' ['Policies for controlling concentrations in Poland – current status and possible changes'] (2012) 1(1) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 74, available in Polish at <http://www.ikar.wz.uw.edu.pl/>; D. Wolski, 'Kierunek zmian w zakresie kontroli koncentracji przedsiębiorców w projekcie nowelizacji ustawy o ochronie konkurencji i konsumentów' ['Directions of amendments concerning merger control in the draft of the Amendment of the Competition and Consumers Protection Act'] (2013) 1(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 1, available in Polish at <http://www.ikar.wz.uw.edu.pl/>.

Unfortunately, the changes ultimately introduced by the 2014 Amendment Act related to procedural rules only.

According to the Competition Act of 2007 before its recent amendment, notified concentrations were evaluated by the UOKiK President within a one-stage review process, with a statutory period of two months for the issuance of a decision⁷³. In practice, even decisions in cases that did not generate any competition problems were issued at the very end, or even after the laps of the statutory deadline. More complex proceedings lasted approximately 5–6 month, sometimes even longer⁷⁴.

As expected by many scholars and practitioners, Poland will starting from 18 January 2015 finally have a two-stage merger control system, which will replace the earlier one-stage review model. According to the new regime, cases that do not raise any significant competition concerns should be cleared in a simplified procedure, which should last no more than 1 month⁷⁵. It is expected that about 80% of all notified concentrations will be reviewed and cleared this way. The review process can enter the 2nd stage: for particularly complicated concentrations with a justified probability of a significant competition restriction, or where market research might be necessary. The 2nd stage should last no more than an additional 4 months (on top of the 1 month prescribed for the 1st stage)⁷⁶. A UOKiK President's resolution on the extension of proceedings (that is, entering the 2nd stage) is not subject to judicial review and will thus not prolong the entire assessment process⁷⁷.

This is a very good solution and is generally in accordance with the EU merger control system⁷⁸. Unfortunately, and unlike the EU, the UOKiK President can 'stop the clock' during the 1st and 2nd assessment stage every time the authority poses additional questions, or requests new data, information or documents. This can lead to extensions of the merger procedures in both stages.

The 2014 Amendment Act introduced another very important change into the Polish merger control system namely the UOKiK President expressing a 'competition concern' during the 2nd stage of the procedure, before a final decision is issued. In truth, the UOKiK President's resolution on the extension

⁷³ Articles 96(1) of the Competition Act of 2007.

⁷⁴ See more T. Skoczny, *Zgody szczególne w prawie kontroli koncentracji* [*Special clearances in merger control law*], Warszawa 2013, passim.

⁷⁵ Articles 96(1) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁷⁶ Article 96a(1) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁷⁷ Article 96a(2) of the Competition Act 2007 as provided by the 2014 Amendment Act. See also K. Kowalik-Bańczyk, 'Reform of Polish Antitrust Law...', p. 3.

⁷⁸ See Article 6 and 8 of the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ [2004] L 24/1.

of the investigation to the 2nd stage of the proceedings could already signal that the concentration was causing competition concerns, and could thus potentially prompt undertakings to propose commitments early⁷⁹. However, on the basis of data gathered after the extension, the authority can now issue a separate statement expressing its competition concerns also during the 2nd stage of the procedure. This is the latest point in time when the UOKiK President will inform the undertakings of his justified concerns about the compatibility of the notified concentration⁸⁰. The merging undertakings will then have an opportunity to respond to the concern, and to possibly modify the transaction in order to obtain clearance⁸¹. This institution can lead to more ‘negotiated’ enforcement of merger control rules as undertakings will now be able to offer modifications to a planned transaction⁸². Those amendments are likely to reduce the number of prohibitions (avoiding merger bans) and increase the number of conditional clearances in Poland, which are the most common solution to preventive merger control proceedings in advanced competition legal jurisdictions⁸³.

Due to changes made also with respect turnover calculation rules, and the introduction of new *de minimis* exemptions, the 2014 Amendment Act is likely to reduce the number of ‘technical’ notifications of concentrations planned by an undertaking with limited business activity in Poland. This is because under the new version of the Competition Act of 2007, the turnover of the seller will not be calculated for the purpose of meeting the turnover thresholds, the exceeding of which triggers the notification duty. Moreover, the Competition Act of 2007 retains its *de minimis* exemption from the notification duty for the acquisition of control, or the acquisition of assets, where the target’s Polish turnover had not exceed 10 million EURO in any two proceedings years. Thanks to the 2014 Amendment Act, this exemption has been extended to two additional types of concentrations: a full merger and the creation of a joint venture. Such concentrations will now not be subject to the notification duty if the Polish turnover of any undertaking concerned had not exceeded 10 million EUR in none of the two preceding years⁸⁴.

From a practical point of view, one of the most significant, albeit small, changes introduced into the Polish merger control system by the 2014 Amendment Act concerns the deadline for completing a divestment required

⁷⁹ So K. Kowalik-Bańczyk, ‘Reform of Polish Antitrust Law...’, op. cit.

⁸⁰ Article 96a(3)-(4) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁸¹ Article 96a(5)-(9) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁸² See E.D. Sage, ‘Increasing Use of „Negotiated” Instruments...’, p. 235.

⁸³ See more T. Skoczny, *Zgody szczególne w prawie kontroli koncentracji*, p. 33.

⁸⁴ Article 14(1) of the Competition Act of 2007 and Article 14(1a)-(1b) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

as part of a merger remedy package. Before the 2014 Amendment Act, deadlines were clearly stated in the text of conditional clearance decisions. Such approach put the undertaking subject to the divestment condition in a very weak negotiating position against potential buyers. This sometimes ended in breaches of divestment obligations imposed in conditional merger clearances. After the 2014 Amendment, divestment deadlines will be kept confidential until the date of the completion of the imposed conditions, provided the party concerned requests keeping this part of the conditional clearance (deadline) temporally confidential⁸⁵. Incidentally, the new provision answers the calls of the market only partially. Undertakings spoke, in fact, in favour of confidentiality not only of the deadline for the fulfillment of the conditions, but also of the content of the conditions themselves.

IV. Conclusions

It is too early to evaluate the reforms introduced into the Polish competition law system by the Amendment Act of 2014. The full implications of the new provisions will have to be analysed over the next few months, or even years, not only by the UOKiK President but also by businesses and the academia. For now, the amendment generates mixed feelings. Most of the changes are a definite step (or even a few steps) in the right direction; several may not work as desired. For example, some commentators advocate the changes that have been introduced into the Polish merger control regime and those on the settlement procedure. Amendments with respect to the issue of leniency plus have been received as rather unfortunate⁸⁶. Unsurprisingly, the introduction of individual fines for managers causes deep concern among businesses. The main questions, ‘to what extent may the newly introduced instruments increase the effectiveness of Polish competition law enforcement?’, and ‘how much simpler and quicker will merger procedures be?’, are generating mostly positive feedback.

The generally positive picture of the main changes brought about by the 2014 Amendment Act has been further strengthened by other small, but very welcome adjustments. First, the new version of the Competition Act of 2007

⁸⁵ Article 19 para 4 of the Competition Act of 2007 and Article 19(4–6) of the Competition Act of 2007 as provided by the 2014 Amendment Act.

⁸⁶ P. Semeniuk, Sz. Syp, ‘Wylanie dziecka z kąpielą’ – czyli o *leniency plus* w Polsce’ [‘Throwing out the baby with the bathwater’ – about *leniency plus* in Poland’] (2013) 7(2) *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 31, available in Polish at <http://www.ikar.wz.uw.edu.pl/>.

extends the limitation period from 1 to 5 years, running from the end of the year when the anti-competitive practice was discontinued. This will broaden the powers of the UOKiK President to pursue infringers. Second, extending the period for appealing a decision of the competition authority from 14 days to 1 month is an important change for undertakings. Unfortunately, the new deadline is still short in comparison to the 2 months allowed within the EU system.

The 2014 Amendment Act does not end the process of improving the Polish competition law regime. More changes are expected, some of which have already been proposed many times in the past, for instance during the consultation process for the 2014 Amendment. The fact must be stressed that the recent act did not introduce any changes in Polish substantive competition law provisions. Such amendments have, however, been expected by businesses and academic circles alike, so as to achieve a higher level of conformity of Polish competition law with its EU counterpart. Indeed, about 60% of all proposals that came from academia and the business community ended up being completely omitted during the recent reform⁸⁷. Unfortunately, the amendment process was also not used to ensure full conformity of the Polish enforcement framework with fundamental rights requirements⁸⁸. Finally, the specific issue of Legal Professional Privilege (LPP) is still not directly addressed⁸⁹ by the Competition Act of 2007⁹⁰.

In light of the results of the application of the new legal instruments discussed in this paper (especially leniency plus, individual fines and merger control), and taking into consideration the many omitted proposals made by scholars and the businesses community over the last two to three years, a new amendment initiative to further enhance the substantive rules and the enforcement framework of Polish competition law should be started soon. In the meantime, the idea of a further amendment is being accepted also by the representatives of the Polish competition authority.

⁸⁷ As estimated by M. Martyniszyn and M. Bernat, 'On Convergence with Hiccups...', p. 8.

⁸⁸ As observed by M. Martyniszyn, M. Bernat, *ibidem*, p. 13.

⁸⁹ See more M. Bernat, B. Turno, 'Zasada 'Legal Professional Privilege' w projekcie zmiany ustawy o ochronie konkurencji i konsumentów' ['Legal Professional Privilege in the draft amendment to the Act on Competition and Consumers Protection'] (2013) 1(2) *internatowy Kwartalnik Antymonopolowy i Regulacyjny* 7, available in Polish at <http://www.ikar.wz.uw.edu.pl/>; M. Bernat, 'Convergence of Procedural Standards in the European Competition Proceedings' (2012) 8 *Competition Law Review* 255–283.

⁹⁰ LPP remains to be eventually applied in the case of searches only under the particular provisions of the Code of Criminal Procedure; see Article 105q of the Competition Act of 2007as provided by the 2014 Amendment Act.