

## **Leniency – the Polish Programme and the ‘Semi-formal’ Harmonisation in the EU by the European Competition Network**

by

Marcin Kulesza\*

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### ***Abstract***

When studying the legal character of the Polish leniency programme, one cannot overlook its origin and the harmonisation process of such programmes in the EU. From the beginning, the Polish programme has been, as it should be, bound to the EU programme and to the European Competition Network’s Model Leniency Programme. The paper briefly presents the European roots of the Polish leniency programme, its original convergence with the Commission’s programme and its current convergence with the Model Leniency Programme. In addition, the status of the Model Leniency Programme is analysed and questioned and its provisions are presented in the context of the evolution of Polish leniency. Some additions to the current Polish programme are suggested in conclusion.

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\* Marcin Kulesza, PhD candidate at the Interdisciplinary Doctoral Studies of the University of Social Sciences and Humanities (Szkoła Wyższa Psychologii Społecznej) in Warsaw and an associate at Wardyński & Partners in Warsaw; [mkulesza@swps.edu.pl](mailto:mkulesza@swps.edu.pl).

## Résumé

Lorsque nous étudions le caractère juridique de programme polonais de clémence, nous ne pouvons pas ignorer ses origines ainsi que le processus d'harmonisation de ces programmes dans l'UE. Dès le début le programme polonais a été, comme il devrait être, lié au programme de l'UE et au programme de clémence modèle du Réseau européen de la concurrence. Cet article présente brièvement les racines européennes de programme polonais de clémence, sa convergence initiale avec le programme de la Commission, et sa convergence actuelle avec le programme de clémence modèle du Réseau européen de la concurrence. En outre, le statut du programme de clémence modèle est analysé et remis en question. Ses dispositions sont présentées dans le contexte de l'évolution de la politique de clémence en Pologne. Certaines modifications de programme polonais de clémence sont proposées en conclusion.

**Classification and keywords:** antitrust enforcement; European Competition Network; harmonisation; leniency; Model Leniency Programme; Poland.

## I. Introduction

According to the official justification of the provisions setting forth the original Polish leniency programme of 2004 and to respective documents accompanying further amendments thereto, the Polish scheme is rooted in the programme operated by the European Commission and in the Model Leniency Programme (hereafter, MLP) based on the Commission Leniency Notice of 2002<sup>1</sup>. It is thus interesting to take a look at the Polish programme's origin in the context of the MLP.

The above paragraph identifies both of the main issues studied in this paper. Presented first will be the official references to the sources of the Polish leniency programme, as noted in the justification of the provisions shaping its first version by its authors and its convergence with the MLP at a later stage. Following this, the background of the MLP will be reviewed and its unofficial character questioned. This leads to the conclusion that the Polish programme, 'semi-formal' by itself at a stage where it was clarified and detailed by non-binding guidelines of the Polish Competition Authority – the President of the Office for Competition and Consumer Protection (hereafter, UOKiK), has been shaped by another 'semi-formal' document – the MLP.

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<sup>1</sup> Commission notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases, OJ [2002] C 45/3; hereafter: 2002 Leniency Notice. See C. Gauer, M. Jaspers, 'ECN Model Leniency Programme – a first step towards a harmonised leniency policy in the EU' (2007) 1 *Competition Policy Newsletter* 36.

The overview is based on the contents of the official justifications of national acts setting forth the leniency programme in Poland, and on the sources of inspiration indicated therein.

This paper is not aimed at explaining the Polish leniency programme in detail. It focuses on its European roots and on its convergence with the MLP, with an important addition of the ‘semi-formal’ perspective of the European Competition Network (hereafter, ECN) and of the MLP itself. The issue of soft harmonisation in general is not discussed. It was the aim of this paper to place the review of the convergence of Polish leniency with the MLP in the context of the allegedly illegitimate harmonisation of leniency programmes across Europe, as carried out with this tool by the European Commission via the ECN.

To do so, the paper is structured as follows. Following this Introduction, Section II will present the official sources of inspiration for the Polish leniency programme, as reflected in the official justification of the respective provisions, and its convergence with its declared original European inspiration. Section III will briefly describe the character of the legal basis of the functioning of the ECN. Section IV will present the MLP as an, in fact, informal means of harmonising leniency programmes in Europe. Finally, in Section V, the Polish leniency programme’s convergence with the MLP will be assessed. In the closing remarks, doubts will be summed up as to the formal character of the MLP in the context of the Polish scheme. Regardless of doubts, areas of the MLP will also be identified that should be implemented into the Polish scheme.

## II. The European origin of the Polish leniency programme

The Polish leniency programme was introduced on 1 May 2004, at the time of Poland’s accession to the European Union and the entry into force of Regulation 1/2003<sup>2</sup>. Until then, Poland had no leniency-type of solution in its legal system<sup>3</sup>. Article 89 of the Act of 15 December 2000 on Competition and Consumer Protection<sup>4</sup> (repealed by the Amendment Act of 2004<sup>5</sup>) gave the UOKiK President a possibility to call upon an undertaking to plead guilty when

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<sup>2</sup> 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] L 1/1.

<sup>3</sup> B. Turno, *Leniency. Program lagodzenia kar pieniężnych w polskim prawie ochrony konkurencji*, Warszawa 2013, p. 361.

<sup>4</sup> Act of 15 December 2000 on Competition and Consumer Protection (consolidated text: Journal of Laws 2003 No. 86, item 804, as amended); hereafter, 2000 Competition Act.

<sup>5</sup> Act of 16 April 2004 on the Amendment to the Act on Competition and Consumers Protection and to Certain Other Acts (Journal of Laws 2004 No. 93, item 891); hereafter, 2004 Amendment.

an investigation's evidence and previous case law led the National Competition Authority (hereafter: NCA) to find that the infringement was indisputable. In such cases, the UOKiK President did not impose a fine on the entrepreneur. However, this provision was applicable only in cases of minor importance for the protection of competition and consumers [Article 89(1)]. It explicitly excluded horizontal agreements (cartels), dominant entities holding market share exceeding 80% and repeated offenders, that is, entrepreneurs found in breach of the prohibition of competition restricting agreements within 3 years preceding the institution of the investigation [Article 89(3)]. It follows from the above that the rules of Article 89 could not have been deemed a leniency programme<sup>6</sup> since they lacked the element of 'willingness' on the part of the investigated undertaking to come forward on its own will. Indeed, one could plead guilty only when summoned by the UOKiK President to do so.

Voluntary cooperation of an undertaking with the NCA, as a basis for a fine reduction or waiver in antitrust proceedings first appeared in Poland in the form of a leniency programme by means of the 2004 Amendment<sup>7</sup> to the 2000 Competition Act. According to the justification of the draft of the 2004 Amendment<sup>8</sup>, it was supposed to implement rules 'analogous to the so-called leniency programme introduced on the basis of the Commission Notice of 13 February 2002 on immunity from fines and reduction of fines in cartel cases'. Similarly, the latest draft of a recent amendment to the current Act on Competition and Consumers Protection of 16 February 2007 emphasised the influence exercised on Polish leniency by EU law, by the provisions of other jurisdictions and, most of all, by the ECN Model Leniency Programme<sup>9</sup>.

It must be stressed, however, that Polish provisions have not constituted a direct reception of EU solutions – some, both minor and major, differences between the Polish leniency programme and its European model can be identified<sup>10</sup>.

Minor discrepancies related to, for example, the approach to the reduction of fines. In the model adopted by the Commission in its 2002 Leniency Notice, the reduced penalty was calculated on the basis of the fine which would otherwise have been imposed. Depending on the order in which the

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<sup>6</sup> B. Turno, *Leniency...*, p. 361.

<sup>7</sup> Article 1 item 50 of the 2004 Amendment.

<sup>8</sup> The print of the Sejm (IV term) no. 2561, p. 38 (p. 4 of the justification).

<sup>9</sup> The print of the Sejm (VI term) no. 1703, p. 70 (p. 30 of the justification). The print contains the draft amendment to the currently binding Act of 16 February 2007 on Competition and Consumers Protection (consolidate text: Journal of Laws of 2015 item 184); hereafter, 2007 Competition Act. The Act of 10 June 2014 on the Amendment of the Act on Competition and Consumers Protection and of the Act – the Civil Code was finally published in the Polish Official Journal of 2014 item 945 on 17 July 2014; hereafter, 2014 Amendment.

<sup>10</sup> See also B. Turno, *Leniency...*, p. 361.

undertakings submitted their respective evidence, and on the added value of such evidence, the Commission could reduce the possible fine by 30–50%, 20–30% or up to 20% (point 23 of the 2002 Leniency Notice). The same approach to fine reductions applies in the new Commission Leniency Notice of 2006<sup>11</sup>. By contrast, the fine reduction was set in Poland to be calculated on the basis of an undertaking’s turnover, with no reference to the fine that would otherwise have been imposed. Thus, leniency applicants would benefit in Poland from a reduction of the maximum level of the fine, that is, a reduction from 10% of the turnover achieved in the year preceding the imposition of the fine to up to 5%, 7% or 8% of their turnover, depending on the order of respective leniency motions (Article 103a(3) of the 2000 Competition Act, as amended in 2004).

There is also a major difference between EU and Polish leniency. The Commission’s programmes have always explicitly applied to illegal horizontal agreements only, that is, to ‘secret cartels’<sup>12</sup>. Polish leniency applies, from the moment of its inception, to all types of prohibited anti-competitive agreements (prohibited by Article 5 item 1 of the 2000 Competition Act, by Article 6(1) 1 of the 2007 Competition Act or by Article 101 TFEU<sup>13</sup>). It is fair to say that this fundamental difference may have its roots in a simple misunderstanding, although it has been kept consequently in place and has spread to other solutions such as commitments. A brochure published in 2004 by the UOKiK President to accompany the 2004 Amendment to the 2000 Competition Act contained a glossary which defined cartels as ‘agreements of undertakings that restrict competition’<sup>14</sup>. There was no indication in any official documents (such as the draft’s justification) that a wider policy had been intentionally considered in Poland, one that would cover all prohibited agreements rather than just horizontal cartels. It therefore appears that the NCA could have relied on this incorrect (overly wide) definition of the term ‘cartel’ while drafting the 2004 Amendment.

Nevertheless, it is obvious that the Polish leniency programme has been modelled, or at least inspired by the schemes of the European Union. This realisation has been strengthened recently by direct reference not only to

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<sup>11</sup> Commission Notice of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases, OJ [2006] C 298/17; hereafter: 2006 Leniency Notice, para. 26.

<sup>12</sup> Point 1 of the 2002 Leniency Notice; see also para. 1, sentence 2 of the 2006 Leniency Notice and para. 1 of the Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases, OJ [1996] C 207/4.

<sup>13</sup> See also B. Turno, *Leniency...*, p. 459, or M. Król-Bogomilska, ‘Program łagodzenia kar (leniency) w polskim prawie antymonopolowym – po pięciu latach obowiązywania ustawy’ (2012) 4 *Europejski Przegląd Sądowy* 6; the same difference is noticeable also as regards to commitment decisions in the Polish competition law.

<sup>14</sup> *Leniency*, Office of Competition and Consumers Protection, Warszawa 2004, p. 3.

the Commission's programmes, but also to the MLP. It is noteworthy that the justification of the recent revision of the 2007 Competition Act did not refer to any case law (European or Polish) with respect to leniency. From the beginning, the justifications of the respective draft acts referred directly only to the Commission's Leniency Notices and to the MLP.

The harmonisation of the leniency programmes across Europe, carried out by the ECN via its MLP, will be presented later in this paper. The MLP forms a clear background for the newly developed provisions governing the Polish scheme. The MLP, as a harmonisation tool, should thus be subject to a closer analysis.

### III. The European Competition Network

Like the Polish membership in the EU, the Polish leniency programme and the overall reform of EU competition law, the European Competition Network's birthday falls – formally – on 1 May 2004; its legal basis can be found in Articles 101 and 102 TFEU and Articles 11-13 of Regulation 1/2003. However, a network of competition authorities of the EU and of its Member States emerged, in fact, already in 2002 but in a less formal and less binding manner.

The ECN was created by the Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities, issued concurrently with the adoption of Regulation 1/2003<sup>15</sup>. The Joint Statement expressly stated that it was a strictly political act, creating no legal rights or obligations (para. 3 of the Joint Statement). Its aim was 'to ensure that the Community competition rules are applied effectively and consistently' in the legal environment shaped by the newly adopted Regulation 1/2003 (para. 1 and 2 of the Joint Statement).

The Council and the Commission made a reservation in points 3 and 4 of the Joint Statement noting that it was limited to setting out the political understanding of the Member States and the Commission on the general principles of the ECN's functioning, and that further details were to be set out in a separate Commission notice<sup>16</sup>. The relevant notice was issued on 27 April 2004<sup>17</sup>. The Cooperation Notice contains the rules on functioning and

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<sup>15</sup> Adopted on 10 December 2002, doc. no. 15435/01 ADD 1, English language version available at: [http://ec.europa.eu/competition/ecn/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/ecn/joint_statement_en.pdf); hereafter, Joint Statement.

<sup>16</sup> See also recital 15 of Regulation 1/2003.

<sup>17</sup> Commission Notice on cooperation within the Network of Competition Authorities, OJ [2004] C 101/43; hereafter: the Cooperation Notice.

on the procedures of cooperation and information exchange applied within the network.

It is worth noting that Articles 11–13 of Regulation 1/2003 formally serve as a legal basis only for cooperation and coordination of actions of the competition authorities of the EU (the Commission) and of its Member States in order to apply Articles 101 TFEU and 102 TFEU. Apart from this general basis, all the remaining rules governing the ECN are contained in documents which remain outside the catalogue of legally binding acts of the EU – the Joint Statement and the Cooperation Notice.

The fact that the rules on functioning of the ECN are defined in Regulation 1/2003, in the Joint Statement drafted primarily by the Commission and – specifically – in the Cooperation Notices, justifies a conclusion that the ECN had been designed by the Commission<sup>18</sup>. In addition, the Commission enjoys a managerial position within the ECN, strengthened by its monopoly as to the design of EU competition policy<sup>19</sup>.

In addition, the ECN’s activities are not subject to any external control, judicial in particular<sup>20</sup>. It should be noted, however, that from the Polish perspective, jurisprudence and literature seem to share the view that if the UOKiK President fails to observe the obligation to notify a draft decision to the Commission on the basis of Article 11(4) of Regulation 1/2003, such a decision is defective. Such a defective decision is inapplicable and cannot be validated by the court, which should annul it. Thus, an element of judicial control of the procedures under Regulation 1/2003 can be identified at the national level at least<sup>21</sup>.

As mentioned, the ECN’s objectives are: (i) uniform and consistent, as well as (ii) effective application of EU competition rules by increasing

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<sup>18</sup> K. J. Cseres, ‘Questions of Legitimacy in the Europeanization of Competition Law Procedures of the EU Member States’ (2013) 2 *Amsterdam Centre for European Law and Governance Working Paper* 25.

<sup>19</sup> F. Cengiz, ‘The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement’ (2009) 5 *European University Institute, Max Weber Programme Working Paper*, p. 10, 12 and 13.

<sup>20</sup> K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Warszawa 2012, p. 509–510, and the case law quoted therein, in particular the General Court judgement in case T-340/03 *France Télécom v Commission*, ECR [2007] II-107.

<sup>21</sup> See D. Miąsik [in:] T. Skoczny, D. Miąsik, A. Jurkowska (eds.), *Ustawa o ochronie konkurencji i konsumentów*, Warszawa 2009, p. 316, and the Polish Supreme Court judgement in case III SK 67/12 ((2014) 5 *OSNAPiUS*, p. 271, first review by M. Kulesza, ‘Ważna zmiana w orzecznictwie SN – sądy mogą badać naruszenia procedury przez Prezesa UOKiK’ (2013) 21.11 *Co do zasady*; D. Aziewicz, ‘Naruszenie obowiązków proceduralnych przez Prezesa Urzędu Ochrony Konkurencji i Konsumentów. Wyrok Sądu Najwyższego z dnia 3 października 2013 r., III SK 67/12 PKP Cargo’ (2014) 1(3) *iKAR*.

participation of NCAs in their application – within the duty to cooperate – and by coordination of the NCAs’ activities<sup>22</sup>. The ECN is formed by NCAs and by the Commission to act ‘in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe’ (para. 1 of the Cooperation Notice)<sup>23</sup>.

As Ms Petra Krenz of the European Commission explained in her speech during the Third GCLC Decentralised Lunch Talk held at the Polish Competition Authority on 9 May 2014, the ECN is based on four building blocks: (i) one set of substantive rules on the application of Articles 101 and 102 TFEU; (ii) pragmatic system of work sharing; (iii) assistance in fact finding and exchange of confidential information; and (iv) a case review system. Ms Krenz stressed also that the formal consultation mechanisms of Regulation 1/2003 are not the only tool to facilitate a dynamic development of close cooperation within the ECN. The same goal is also achieved by informal dialogue.

These building blocks do not seem to leave space for the harmonisation of Member States’ provisions. In fact, although the ECN was originally designed to serve as a policy enforcer, a point of case allocation and information sharing, it ultimately appears to act as a policy maker – a platform for coordination of procedural problems and a discussion forum for specific issues<sup>24</sup>.

## V. Harmonisation of leniency programmes by the ECN

The Commission-designed ECN serves as a platform of harmonisation agreed by the Commission and the NCAs<sup>25</sup>. The ECN itself refers to its activities

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<sup>22</sup> See also recitals 5 and 6 of Regulation 1/2003.

<sup>23</sup> See C. Gauer, M. Jaspers, ‘The European Competition Network Achievements and challenges – a case in point: leniency’ (2006) 1 *Competition Policy Newsletter* 8, who refer to fostering ‘a common competition culture beyond the coherent application of EC competition law’ in the context of the ECN’s exercises in the field of leniency; see also K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 511.

<sup>24</sup> K. J. Cseres, ‘Questions of Legitimacy...’, p. 25; G. Monti, ‘Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network’ (2014) 1 *EUI Department of Law Research Paper* 17.

<sup>25</sup> K. J. Cseres, ‘Questions of Legitimacy...’, p. 25.



related to harmonisation of leniency programmes as ‘convergence’<sup>26</sup> or, explicitly, as ‘harmonisation’<sup>27</sup>.

Out of the four methods of integration of the legal systems of EU Member States, including mutual recognition, coordination (by directives), harmonisation (by directives) and unification (or substitution), the latter plays the leading role here and is the basic method used in the field of competition law and policy<sup>28</sup>. From the perspective of the application of Articles 101 and 102 TFEU, Regulation 1/2003 serves as the main means of integration. Regulation 1/2003 started the decentralisation of the application of EU competition law – the NCAs apply the provisions of EU competition law directly. At the same time, according to the principle of procedural autonomy, they apply Articles 101 and 102 TFEU with the use of national procedural rules<sup>29</sup>.

The other method of integration used in competition law is harmonisation. However, legislative harmonisation does not function in the EU with respect to competition laws. There have only ever been four directives in force, none of them concerning restrictive practices.

Rules of competition law may also be harmonised by jurisprudence. If certain conduct may have an effect on trade between Member States, national courts are obliged to apply Articles 101 and 102 TFEU. Moreover, they are entitled to converge their judicial practice by raising preliminary questions to the Court of Justice of the European Union (hereafter: CJEU). On several occasions, the CJEU expressed the opinion that the provisions of EU law must be applied by national authorities in a way facilitating their effectiveness and uniformity; it is also possible that the CJEU directly orders national provisions to be amended in accordance with EU rules<sup>30</sup>. The CJEU indicated also difficulties in the application of Article 101 TFEU in accordance with national

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<sup>26</sup> Petra Krenz’s speech at the Third GCLC Decentralised Lunch Talk held at the Polish Competition Authority on 9 May 2014.

<sup>27</sup> See for example the Commission’s memo of 29 September 2009 *Competition: the European Competition Network launches a Model Leniency Programme – frequently asked questions*, MEMO/06/356, available at: [http://europa.eu/rapid/press-release\\_MEMO-06-356\\_en.htm](http://europa.eu/rapid/press-release_MEMO-06-356_en.htm), or the memo of 2012, *Competition: European Competition Network refines its Model Leniency Programme – Frequently asked questions*, available at: [http://ec.europa.eu/competition/ecn/mlp\\_2012\\_faq\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_2012_faq_en.pdf).

<sup>28</sup> Z. Brodecki, I. Zużewicz, ‘Zagadnienia ogólne’ [in:] Z. Brodecki (ed.), *Konkurencja*, Warszawa 2004, p. 104–105.

<sup>29</sup> K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 547.

<sup>30</sup> *Ibidem*, pp. 555–556, and the judgements of the Court quoted therein: C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., now Netia SA*, ECR [2011] I-3055, C-360/09 *Pfleiderer AG v Bundeskartellamt*, ECR [2011] I-5161, C-17/10 *Toshiba Corporation e.a v Úřad pro ochranu hospodářské soutěže*, ECLI:EU:C:2012:72, and C-439/08 *Vlaamse federatie van verenigen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewaterkers (VEBIC) VZW*, ECR [2010] I-12471.

procedural rules<sup>31</sup>. On the other hand, even in cases in which Articles 101 or 102 TFEU are not applicable, EU law and jurisprudence may serve as ‘intellectual inspiration’ for the interpretation of common rules<sup>32</sup>. According to the Polish Supreme Court, interpretation of provisions eliminating substantial procedural discrepancies in the application of EU and national laws is required<sup>33</sup>.

In fact, competition law is harmonised across the EU in a very soft and spontaneous manner. As noted by the Commission, ‘the entry into force of Regulation 1/2003 has generated an unprecedented degree of voluntary convergence of the procedural rules dedicated to the implementation of Articles [101 and 102 TFEU]’<sup>34</sup>.

On one hand, such voluntary convergence (or spontaneous harmonisation<sup>35</sup>) leads to similarities in both substantial and procedural laws. On the other hand, harmonisation causes an erosion of the principle of procedural autonomy. This is the case in the context of the MLP and of the convergence of national leniency procedures. The MLP is a perfect example of informal, spontaneous, soft<sup>36</sup> but substantive<sup>37</sup> harmonisation by means of a document that is political in nature<sup>38</sup> and issued by a semi-formal body<sup>39</sup>. In addition, as there is no political will on the part of the Member States to harmonise procedural laws across the EU by means of EU law<sup>40</sup>, this approximation of laws takes place not at the level of the Member States but on the level of their NCAs gathered

<sup>31</sup> See K. J. Cseres, ‘Questions of Legitimacy...’, p. 23, referring to the Court’s judgements in *Tele2 Polska* and *VEBIC* cases.

<sup>32</sup> Judgement of the Polish Supreme Court of 9 August 2006, case III SK 6/06 (2008) 1–2 *OSNP* 2008, item 25.

<sup>33</sup> Resolution of the Polish Supreme Court of 23 July 2008, case III CZP 52/08 (2009) 7–8 *OSNC*, item 107; (2009) 7-8 *OSP*, item 86; (2009) 2 *Monitor Prawniczy* 90; (2010) 5 *Europejski Przegląd Sądowy* 43.

<sup>34</sup> Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003 {COM(2009)206 final}, SEC/2009/0574 final, para. 201; see also K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 556–557.

<sup>35</sup> K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 556, and the literature quoted therein; see also B. Turno, *Leniency...*, p. 365.

<sup>36</sup> See V. Juknevičiūtė, J. Capiiau, ‘The state of ECN Leniency convergence’ (2010) 1 *Competition Policy Newsletter* 13; see also para. 26 of the opinion of Advocate General Mazák, delivered on 16 December 2010 in case C-360/09 *Pfleiderer v Bundeskartellamt*.

<sup>37</sup> R. Polley, ‘Leniency in the ECN Framework of Parallel Competences’ [in:] K. M. Meessen, M. Bungenberg, A. Puttler (eds.), *Economic Law as an Economic Good: Its Rule Function and its Tool Function in the Competition of Systems*, Munich 2009, p. 272.

<sup>38</sup> See e.g. C. Gauer, M. Jaspers, ‘ECN Model Leniency Programme...’, p. 38.

<sup>39</sup> In its judgement in case T-189/06 *Arkema France v Commission*, ECR [2011] II-5455, para. 159, the General Court stressed that the MLP ‘was intended, in particular, to lead to the **voluntary** harmonisation of the leniency programmes applied by the members of the network’.

<sup>40</sup> K. Kowalik-Bańczyk, *Prawo do obrony...*, p. 558.

in the ECN, led by the Commission, who themselves view the MLP as a tool of ‘soft’ harmonisation<sup>41</sup>, the ‘first step towards a harmonised leniency policy throughout the EU’<sup>42</sup>.

It must be stressed that the CJEU expressly stated in the *Pfleiderer* case that the MLP ‘has no binding effect on the courts and tribunals of the Member States’<sup>43</sup>.

The MLP was issued on 22 September 2006. As mentioned, those that drafted the MLP stated that its purpose was ‘to provide a basis for soft harmonisation of the European [leniency] programmes’<sup>44</sup>. Their aim was to ‘ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN’<sup>45</sup>, that is, to facilitate applying for leniency in the context of Article 101 TFEU in diversified legal environments of the EU and its Member States. The ECN addressed in the MLP the difficulties encountered by undertakings due to concurrent competences of the Commission and NCAs in the application of Article 101 TFEU<sup>46</sup>, the lack of a one-stop-shop rule in the EU with regard to leniency, and differences between the Member States’ approaches to the details of leniency programmes across Europe<sup>47</sup>. The ECN unified the scope and terms of application, contents of relevant motions and procedures regarding the enforcement of leniency. Thus, the MLP constitutes a collection of ‘the main substantive and procedural rules which the ECN members believe should be common in all programmes’<sup>48</sup>.

In its first version of 2006, the MLP set forth some common rules. It (i) unified the object of leniency motions (limited strictly to horizontal cartels) and entities eligible to benefit from this procedure (limited to non-ringleaders only); (ii) established what information must be included in a leniency motion and the main rules of cooperation between the applicant and the authority; (iii) set forth the rules on the submission of a leniency motion

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<sup>41</sup> The Commission’s memo of 29 September 2009 (MEMO/06/356; see footnote 28) above, p. 2.

<sup>42</sup> *Ibidem*, p. 1.

<sup>43</sup> Judgement of the Court in case C-360/09 *Pfleiderer v Bundeskartellamt*, ECR [2011] I-5161, para. 22; see also judgement in case C-536/11 *Donau Chemie and Others*, ECLI:EU:C:2013:366, para. 40 and footnote 25.

<sup>44</sup> Commission’s memo of 29 September 2009 (MEMO/06/356; see footnote 28 above), p. 2; see also C. Gauer, M. Jaspers, ‘ECN Model Leniency Programme...’, p. 36.

<sup>45</sup> The MLP, para. 2.

<sup>46</sup> *Ibidem*.

<sup>47</sup> B. Turno, *Leniency...*, p. 365; see also V. Juknevičiūtė, J. Capiáu, ‘The state of ECN Leniency...’, p. 13–14.

<sup>48</sup> Commission’s memo of 29 September 2009 (MEMO/06/356; see footnote 28 above), p. 1; see also C. Gauer, M. Jaspers, ‘CN Model Leniency Programme...’, p. 36, who stress that this distinguishes the MLP ‘from efforts undertaken in other international fora’.

and on subsequent procedures concerning the motion; and (iv) introduced marker and summary applications.

The revision of the MLP of November 2012 was meant to clarify and simplify the requirements of leniency programmes. The revision extended the possibility of filing a summary application to applicants having or being in the process of filing a leniency application either for immunity (as in 2006 version) or for a fine reduction. It also introduced a standard template for summary applications. Moreover, the 2012 revision spelled out what conditions must applicants meet in order to qualify for leniency (in particular the duty to cooperate). It also clarified and, in fact, slightly extended the scope of leniency programmes by including cartels with vertical aspects (hub-and-spoke cartels).

Thus, the current MLP provides for: (i) the uniform scope of leniency programmes (cartels, including hub-and-spoke cartels; para. 4 of the MLP); (ii) unification of conditions to qualify for immunity or fine reductions and of duties of applicants (scope of information to be provided, conditions of cessation of participation in the cartel, rules of full cooperation, requirement of non-coercing other undertaking to participate in the cartel; para. 5–13); (iii) general rules on approaching the authority and proceeding with an application (including marker system, granting immunity, fine reduction, statement and oral procedure; paras. 14–23 and 28–30); and (iv) summary applications, including a standardised template form, submitted by undertakings already having submitted or preparing a leniency motion before the Commission (regardless of applying for immunity or for reduction of a fine), to be submitted to a NCA or multiple NCAs.

In theory therefore, harmonisation concerns the application of leniency procedures with regard to the consistent, uniform and effective application of Article 101 TFEU<sup>49</sup>, in accordance with the principles of subsidiarity and procedural autonomy. However, these principles are, as mentioned, weakened by soft, informal harmonisation of strictly procedural rules or provisions.

It is particularly noteworthy that the MLP itself (in both its original and revised version), as well as the associated press communications of the Commission, stress the ECN members' obligation to harmonise their schemes with the MLP. The NCAs are committed 'to using their best efforts within the limits of their competence, to align their respective programmes with the ECN Model Programme'. In all cases, a reservation is made that '[i]n order to become operational, the principles set out in the MLP need to be implemented under the respective leniency programmes of ECN members either by introducing them to the programmes or implementing them in

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<sup>49</sup> And the effectiveness of the leniency programmes in the Member States themselves; M. Król-Bogomilska, *Zwalczanie karteli w prawie antymonopolowym i karnym*, Warszawa 2013, p. 212.

practice, as the case may be<sup>50</sup>. After the MLP’s introduction, C. Gauer and M. Jaspers stressed that the authorities were doing what had been ‘**required** to ensure that their programmes are revised or [...] applied in a manner that is in line with the ECN Model Programme’<sup>51</sup>.

## VI. The Model Leniency Programme and the Polish leniency programmes

The ECN Model Leniency Program was adopted on 29 September 2006. Just one month later, on 26 October 2006<sup>52</sup>, a new draft Act on Competition and Consumers Protection was submitted to the Parliament (in Polish: *Sejm*) by the Polish government. Considering the time frame, one should expect that the draft of the new Polish Competition Act could have reflected at least some of the solutions proposed by the ECN in its MLP – the Polish NCA should have been aware of the works taking place on the creation of the MLP because it had been actively participating in its drafting process<sup>53</sup>. However, this was not the case.

The 2007 Competition Act’s leniency programme<sup>54</sup> was neither harmonised with the MLP, nor with the 2006 Commission Leniency Notice. It repeated solutions contained in its predecessor, which was harmonised with the 2002 Commission Leniency Notice<sup>55</sup>. The solutions of the MLP were not introduced in Poland until the issue of a new Polish Leniency Regulation on 26 January 2009<sup>56</sup> and the Guidelines of the UOKiK President on the leniency programme<sup>57</sup> issued on 24 February 2009.

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<sup>50</sup> Commission’s memo of 2012, *Competition: European Competition Network refines its Model Leniency Programme – Frequently asked questions* (see footnote 28), p. 3.

<sup>51</sup> C. Gauer, M. Jaspers, ‘ECN Model Leniency Programme...’, p. 38, emphasis added.

<sup>52</sup> The print of the Sejm (V term) no. 1110; see the description of the legislative process at <http://orka.sejm.gov.pl/proc5.nsf/0/5ABF9F4FB480E9B1C1257226004AC723?OpenDocument>; eventually adopted on 16 February 2007.

<sup>53</sup> M. Król-Bogomilska, ‘Program łagodzenia kar...’, p. 9.

<sup>54</sup> Article 109 of the 2007 Competition Act, supplemented by the Regulation of the Council of Ministers of 17 July 2007 concerning the mode of proceeding in cases of undertakings’ applications to the President of the UOKiK of Competition and Consumer Protection for immunity from or reduction of fines (Journal of Laws 2007 No. 134, item 938), repealed in 2009.

<sup>55</sup> See R. Molski [in:] T. Skoczny, D. Miąsik, A. Jurkowska (eds.), *Ustawa o ochronie...*, p. 1665–1666.

<sup>56</sup> Regulation of the Council of Ministers concerning the mode of proceeding in cases of undertakings’ application to the UOKiK President for immunity from or reduction of fines Journal of Laws 2009 No. 20, item 109; the 2009 Leniency Regulation; English language version available at <http://www.uokik.gov.pl/download.php?plik=7619>.

<sup>57</sup> Available (in Polish only) at <http://www.uokik.gov.pl/download.php?plik=9486>; (hereafter, UOKiK President’s Guidelines).

The 2009 version of the Polish leniency programme included some elements of the original version of the MLP of 2006. It specified the contents of leniency applications in accordance with the MLP. The terms and conditions of the applicant's cooperation with the NCA were determined more precisely than before. Simplified (marker) and summary applications procedures were introduced.

Serious doubts arise however from the fact that such detailed procedural rules were introduced in a mere ministerial regulation and guidelines issued by the NCA. Furthermore, the 2009 Leniency Regulation exceeded the authorisation given to the Council of Ministers by former Article 109(5) of the 2007 Competition Act. The latter authorised the Council of Ministers to 'determine (...) the procedure to be followed in the event when undertakings have applied for renouncement or reduction of a fine, including in particular: 1) the method of accepting and considering undertakings' requests for renouncement or reduction of a fine, 2) the method of notifying the undertakings of the position assumed by the President of the Office – having regard to a necessity for ensuring the option for producing a reliable assessment of whether the undertakings have fulfilled the conditions referred to in paragraphs 1 and 2 [determining rules of applying for immunity or for reduction of a fine, respectively], and for classifying the requests appropriately'<sup>58</sup>. As seen in the wording of the 2007 Competition Act, the Council was not authorised at that time to introduce new or more detailed conditions and requests concerning leniency applications (broadening the scope of the leniency programme set forth by the 2007 Competition Act). In addition, the programme's procedures, information requested from a leniency applicant and terms of approaching the NCA with each type of leniency application, were ultimately determined in the UOKiK President's Guidelines. A leniency programme introduced by a ministerial regulation (an act of lower order, implementing statutory provisions) and by an NCA's unofficial Guidelines (having no binding power), instead of by an act of Parliament, must thus be disqualified<sup>59</sup>. In particular, the UOKiK President's Guidelines should not determine duties of undertakings and requirements as to applications not provided in the provision of the 2007 Competition Act and the 2009 Leniency Regulation. They are meant to clarify the UOKiK President's view on existing rules<sup>60</sup>.

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<sup>58</sup> Wording after the English language version as published at the UOKiK's website: <http://www.uokik.gov.pl/download.php?plik=7618>.

<sup>59</sup> See also, e.g., R. Molski, [in:] T. Skoczny, D. Miąsik, A. Jurkowska (eds.), *Ustawa o ochronie...*, p. 1693, M. Król-Bogomilska, 'Kary pieniężne – główne kierunki ewolucji w okresie 20 lat rozwoju polskiego prawa antymonopolowego' (2010) 5 *Europejski Przegląd Sądowy* 12.

<sup>60</sup> B. Turno, *Leniency...*, p. 362.

This error was corrected by the 2014 Amendment to the 2007 Competition Act (see section II above). The 2014 Amendment moved the detailed provisions on the Polish leniency programme from the 2009 Leniency Regulation to the Competition Act itself. However, the details specified in the UOKiK President’s Guidelines are not included in a new regulation<sup>61</sup> and remain the unofficial, non-binding set of rules.

Apart from the above-described formal issues, the newly enacted amendment harmonises the Polish programme with the MLP as revised in 2012. In accordance with the MLP, the new Polish scheme provides a precise description of the conduct that should be contained in the leniency application. It is explicitly required for the application to cover the description of the circumstances and mode of operation of the prohibited agreement (Article 113a(2)(6), as introduced by the 2014 Amendment; para. 6 of the MLP). For the sake of clarification, and in order to ensure higher degree of transparency, the UOKiK President must immediately confirm the date and the hour of each leniency submission (Article 113a(4); para. 15 of the MLP). The conditions of cooperation are refined as well. Now, in addition to the duty to present relevant evidence and information without delay and upon the undertaking’s own initiative, the cooperation requirement will also include a duty (i) not to destroy, falsify or conceal information and evidence; (ii) not to disclose the fact of applying for leniency; as well as (iii) not to hinder the provision of explanations by one’s employees and managers (Article 113a(5)(3) and (4) and (2); para. 13(1)(d), (e) and (c) of the MLP, respectively). The duty to cease participation in the prohibited agreement, which already existed in the earlier version of Polish leniency, has been supplemented with the exceptional right to withdraw from the agreement only after the submission of the application (Article 113a(6); para. 13(1)(a) of the MLP), and not necessarily as of the day, at the latest, of submitting the leniency application. Importantly, the remodelled Polish programme allows an initiator of the infringement to benefit from immunity. Similarly to para. 8 of the MLP, only an undertaking coercing others to participate in the agreement will not be eligible for immunity [Article 113a(3)].

The new Polish programme eventually departs from the former rule of calculating a reduced fine by reducing maximum fine thresholds<sup>62</sup>. Now, as in the 2006 Commission Leniency Notice (para. 26)<sup>63</sup>, a fine reduced under the leniency programme will be calculated on the basis of the fine that would

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<sup>61</sup> Regulation of the Council of Ministers of 23 December 2014 on the mode of proceeding with an application for immunity from or for reduction of a fine, Journal of Laws of 2015 item 81; new guidelines are expected to be issued soon.

<sup>62</sup> See section II above.

<sup>63</sup> See also para. 11 of the MLP.

otherwise have been imposed. The fine will be reduced by 30-50%, 20-30% or up to 20%, depending on the order of approaching the NCA [Article 113c(2)].

Moreover, the amendment moves the marker and summary applications from the 2009 Leniency Regulation to the 2007 Competition Act.

However, it is worth stressing that the Polish leniency programme remains applicable not only to cartels, but also – or, considering the practice of the UOKiK President, primarily – to illegal vertical agreements. Thus, the main difference between the Polish and the EU leniency programme (as well as the MLP) has not been removed by the recent amendment.

## VII. Closing remarks

The MLP is a semi-formal measure of harmonisation of competition protection policies of the EU and its Member States. It relates to reductions of fines imposed with regard to participation in competition restricting conducts, serving as an element strengthening the policies' effectiveness. The MLP itself, as well as the official statement given by the Commission regarding its 2012 revision, stress that European competition authorities have committed themselves to harmonisation of their current and future leniency programmes and practices with the refined Model Programme.

Thus, as follows from the MLP, the aforementioned statement and the new amendments to the Polish scheme, leniency programmes are subject to continuous changes and progressive harmonisation, based on experiences and studies, meant to increase their effectiveness in the EU and in each of its Member States. It is obvious that the recently adopted amendment arises from the aforementioned obligation of the UOKiK President as a member of the ECN.

It would be advisable, however, to consider inserting additional solutions provided in the MLP into the current Polish leniency programme. For example, the possibility to submit a summary application, limited in the Competition Act (as changed by the recent amendment) to an undertaking who already applied to the Commission for immunity (Article 113f of the amended 2007 Competition Act), should be extended to applicants requesting the Commission to find that they qualify for a fine reduction (explicitly provided in para. 24 of the MLP as revised in 2012). Moreover, a marker application should include a justification for the concern that led the applicant to follow this leniency approach (para. 18 of the MLP). Ideally, every leniency application should contain such a justification, subject to verification by the given competition authority.

To sum up, the statement should be fully endorsed that harmonisation of leniency programmes across Europe, or even introduction of a uniform



leniency programme applicable both in the EU and in purely domestic cases, is desirable. It would have a significant positive impact on legal safety and certainty of undertakings and on the effectiveness of combating prohibited agreements (cartels) in the EU. One should even share the view<sup>64</sup> that full harmonisation of the entirety of competition law is necessary.

Moreover, semi-formal harmonisation of leniency programmes is effective. The EU scheme and the programmes of its Member States are increasingly convergent. It is doubtful, however, that the current manner of harmonisation – semi-formal, political, carried out at the level of competition authorities rather than Member States – is correct<sup>65</sup>. If it was the intention of the Commission and of the NCAs to harmonise this area, such harmonisation should take the shape of a directive.

Further doubts arise in the context of the weakening of the principles of subsidiarity and procedural autonomy. Harmonisation by way of the MLP, taking place when NCAs follow their commitment expressed in the MLP, translates directly into national legal systems including also (or even mainly) strictly domestic cases, without any link to Article 101 TFEU. The MLP’s impact on these principles should thus be subject to further studies.

In addition, national authorities may apply the rules set out in the MLP by way of interpreting their national provisions in the framework of these rules (as is the case in Poland under the UOKiK President’s Guidelines). This approach may have an adverse effect on legal safety and certainty of undertakings, which, as mentioned, are the main aims of harmonising leniency programmes<sup>66</sup>.

In the light of the above remarks, considering also the globalisation of the application of competition law and policy, harmonisation is necessary. However, it should be sanctioned on a proper level by binding legislation – both in the European Union and in Poland.

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<sup>64</sup> Expressed in Poland, e.g., by Ms Małgorzata Modzelewska de Raad at the Third GCLC Decentralised Lunch Talk on 9 May 2014.

<sup>65</sup> For extensive criticism of the Commission in the context of harmonisation of the procedural rules via the ECN see K. J. Cseres, ‘Questions of Legitimacy...’, p. 26–31.

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