

**The consistency and compatibility of transactional resolutions of antitrust proceedings
(such as settlement processes, leniencies, transactions, commitments, and amicable
agreements) with the due process and fundamental rights of the parties
POLAND**

Authors:

Aleksander Stawicki, LL.M., partner, legal counsel

Dr Bartosz Turno, LL.M., legal counsel

Tomasz Feliszewski, legal counsel

WKB Wierciński, Kwieciński, Baehr, Warsaw

(Sections: 1. – 2.2.5. and Section 5)

Krzysztof Kanton, partner, legal counsel

Dr Katarzyna Karasiewicz, legal counsel

Sołtysiński Kawecki & Szlęzak, Warsaw

(Sections: 2.2.6. – 4 and Section 5)

1. Introduction

Under Polish competition law there are currently several transactional institutions that allow parties to cooperate with the competition authority in order to avoid or at least mitigate the amount of a fine to be imposed by the competition authority. Such “plea bargain” solutions encompass: leniency in cases regarding anticompetitive agreements; commitments applicable in cases of both alleged agreements restricting competition and alleged abuses of dominant position. Finally, there are also commitment decisions in merger procedure available.

All transactional institutions are based on the provisions of the Polish Act on Competition and Consumer Protection dated 16 February 2007 (the “**Act**”) and are enforced by the President of the Office of Competition and Consumer Protection (Polish Competition Authority – “the **PCA**” or the “**Authority**”). In addition, on 10 June 2014, the Polish Parliament adopted a set of significant amendments to the Act which *inter alia* introduce a settlement procedure or some improvements to the leniency program (e.g., leniency plus). The amended Act was signed by the President of Poland on 30 June 2014 and will enter into force on 18 January 2015.

Ratio legis of introducing the plea bargaining model into the Polish competition law regime was to improve the effectiveness of the PCA in safeguarding competition on the market. On the one hand a trade-off with undertakings allows the PCA to spare time and limited human resources by avoiding long-lasting investigations. On the other hand undertakings perceive transactional procedures as a possibility to avoid fines (or at least to receive the reduction of a fine) or as a method to secure a merger clearance decision or conditional clearance decision. Nevertheless, it should be noted that there are also drawbacks of implementing plea-bargaining model into Polish competition law. The said drawbacks are related mainly to the enforcement of the above mentioned tools by the PCA. For instance, a commitment proposal in order to be accepted, should be made by the investigated undertaking at a very early stage of the proceedings. As a result, there is a limited chance for the party to present its case and the supporting legal analysis to justify its behaviour before the PCA. Such an approach

adopted in the PCA's *Guidelines on commitment decisions*¹ ("**Guidelines on Commitment Decisions**") can be seen – to some extent – as a limitation of the party's right to defence. We will elaborate more on this in the upcoming sections.

We would also like to note that, in general terms, transactional institutions are available also in – other than competition law – branches of Polish law but their scope of relevance to antitrust proceedings is rather limited. The Act of 14 June 1960 – Code of Administrative Procedure ("**Code of Administrative Procedure**") provides for a so-called "administrative settlement" However, it can be reached the between parties to proceedings before a public authority rather than between the parties and the authority itself². It is worth mentioning that Polish criminal procedure provides for a solution that is much more transactional in its nature. Article 387 (1) of the Act of 6 June 1997 – Code of Criminal Procedure gives legal grounds for the institution of 'voluntary submission to a penalty' that allows the court to pass a sentence without reviewing the evidence, which significantly shortens the criminal proceedings.

General remarks: Procedural issues

In Poland there are two major types of proceedings conducted in case of infringements of competition rules, i.e.:

- a. explanatory (investigative) proceedings, and
- b. antimonopoly proceedings.

The former type are proceedings dedicated to determine initially whether an infringement that would justify the institution of antimonopoly proceedings has occurred. There are no formal parties to those proceedings, and such procedures are always commenced *ex officio*, even if a complaint was filed. In the course of those proceedings the PCA investigates the matter, such as by carrying out an inspection (dawn raid) or requesting the undertaking(s) to submit specific information or documents (by sending the request for information). Formally, the "suspected" undertaking is not a party to the proceedings. Explanatory proceedings are always concluded with a procedural ruling (i.e. a resolution) and not with an administrative decision on the merits. Therefore, the commitment decision cannot be issued at this stage. Neither the settlement procedure can be implemented in the course of explanatory proceedings.

If during the investigative proceedings it is established that an infringement is highly probable, the PCA institutes antimonopoly proceedings and officially communicates its objections to the undertaking by way of a formal notification.

According to the Act, an application for a commitment decision can be filed in the course of antimonopoly proceedings after the delivery of the formal notification. A motion for settlement (after the amendments to the Act come into effect) can be filed before the termination of the antimonopoly proceedings. A motion for leniency can be submitted in the course of both explanatory and antimonopoly proceedings.

2. Transactional resolution in case of agreements and the abuse of dominance

¹ Office of Competition and Consumer Protection, *Guidelines on commitment decisions in cases of practices restricting competition and practices harming collective consumer interests*, Warsaw 2012, available in Polish at: <http://www.uokik.gov.pl/download.php?plik=12033>.

² See: Koziół T., *Commitment Decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives*, Yearbook of Antitrust and Regulatory Studies 3/2010, p. 77.

2.1. Overview of transactional procedures

Polish competition law currently provides for two types of transactional resolutions available in case of anticompetitive practices: commitment decisions and leniency programme. From 18 January 2015 also a settlement procedure will be available to parties of antimonopoly proceedings. Commitment decision is tailored predominantly for cases of an abuse of dominant position and vertical agreements. The leniency, by its very nature, is limited exclusively to parties of competition restricting agreements. Beneficiaries of a settlement procedure may receive a fixed 10% reduction of on a fine may be reduced by a fixed 10% in exchange for the undertaking's voluntary acceptance of the fine.

2.1.1. Commitment decisions

According to the Act, the PCA is empowered to issue commitment decisions. A commitment decision may be issued only upon an application of a party in the antimonopoly proceedings, in cases of both alleged agreements restricting competition and alleged abuses of dominant position. The legal basis for a commitment decision is provided by Article 12 of the Act. There is ambiguity on practical applicability of the commitments under Polish competition law. Theoretically, it is possible to apply for a commitment decision in cartel cases. However, in practice it is rather unlikely for the PCA to accept such an application where naked cartels are concerned or even in cases related to vertical pricing restraints (such as resale price maintenance). PCA's approach changed significantly from July 2012 when the Guidelines on Commitment Decisions were published. Before that date, the PCA in general accepted commitments in cases involving fixed or minimum resale price maintenance in vertical relations.

According to the Guidelines on Commitment Decisions, the commitment procedure should have a very limited (or exceptional) applicability to hard-core agreements that have as their object, *inter alia*, price fixing or market sharing, tender collusion or limiting or controlling production, sale, technical development or investments³. In consequence, commitment proposals in such cases will be very closely scrutinised by the PCA, and the Guidelines suggest that a leniency application is the preferred way to escape fines.

Therefore, commitment decisions are applicable to anticompetitive agreements which do not constitute a hard-core restriction. As a result, the commitment decision is not considered to be a preferred route for the PCA in cartel cases⁴.

Commitment decision vs. admission of guilt

Under Polish competition law an application for a commitment decision is not formally an admission of guilt, but in practice it is treated that way. It is a practice used by some undertakings to make sure the first written brief to the PCA in the proceedings contains both:

- a) sound legal arguments to defend the alleged practice, and
- b) an application for a commitment decision.

However, the PCA enjoys a broad discretion with respect to the acceptance of a motion for a commitment decision.

³ See: Stawicki A., Turno B., Feliszewski T. [in:] Christine A Varney (ed.), *The Cartels and Leniency Review. Second edition*, Law Business Research 2014, p. 272.

⁴ Stawicki A [in:] Stawicki A, Stawicki E (eds), *The Act on Competition and Consumer Protection. Commentary*, Warszawa 2011, pp. 402-403.

Timing of applying for a commitment decision

As already mentioned above, an application for a commitment decision can be filed in the course of antimonopoly proceedings, meaning after the delivery of the formal notification.

In theory, commitments may be proposed by undertakings until the final decision is issued and the infringement is proven. This is because the Act allows commitments if the infringement is demonstrated as probable, which is less than proven. In practice, the opportunity for effective submission of commitments exists only at the initial stage of antimonopoly proceedings. Guidelines on Commitment Decisions⁵ make it clear that an application for a commitment decision should be filed in the first written brief on the merits after commencement of antimonopoly proceedings. The first brief on the merits is filed in response to the formal notification.

There is a controversy whether, as the law is, a commitment decision may be issued if the antimonopoly practice has already been stopped. According to the Guidelines on Commitment Decisions, there is such a possibility if the effects of the practice continue and the proposed commitments are going to eliminate the negative impact of the practice⁶. The amendments to the Act which will enter into force in January next year expressly stipulate that commitment decisions are available in cases of ceased practices.

Commitment decisions and third parties' involvement

As a rule there is no third party's involvement in the commitment-making procedure. The final shape of the commitments is reached over talks between the PCA and an interested party. Nevertheless, it should be emphasized that in July 2013 the PCA decided – for the first time – to launch public consultations which were to conclude the ongoing proceedings concerning the abuse of a dominant position by the leading oil company in Poland – PGNiG. The undertaking addressed the PCA to issue a commitment decision. In return, it offered to take actions which were assumed to restore the market competition. Before issuing the decision, the PCA decided to request the entities operating on the gas market to express their view on PGNiG's offer. Thus, the PCA initiated the first consultations and the market test, in relation to cases concerning the abuse of a dominant position.

According to the decision in PGNiG case⁷, 14 entities submitted comments. Most of the comments questioned the time allowed to achieve the commitments, which they regarded as too long. Taking into account the outcome of the market test, PGNiG's proposal has been modified and the commitment decision has been issued.

Commitment decisions and third parties' interests

Under Polish law the PCA, being an administrative body, does not have powers to decide on civil claims. Therefore, issuance of the commitment decision does not formally influence possible follow-on claims brought to the civil court by the third parties. Moreover, the commitment decision (opposite to a decision finding an infringement) does not bind the civil courts. The civil court will have full competence to independently hear civil claims, if any are raised. Moreover, the court will not be bound by the commitment decision (even if final and legally valid).

⁵ Guidelines on Commitment Decisions, p. 4.

⁶ Ibidem, p. 8-9.

⁷ Decision of 31 December 2013, No. DOK-8/2013.

Commitments procedure

The suspected party is always the initiator of commitment negotiations. After an application for a commitment decision is filed, the PCA may present its opinion on the proposed commitments and may also propose some changes. Sometimes, especially when sophisticated contract relations are involved, the negotiations may last for a couple of rounds. During negotiations, communications are exchanged in writing, sometimes by e-mail. Thus, the final shape of commitments is negotiated with the PCA.

Commitments accepted and imposed by PCA in commitment decisions are purely behavioural. They often consist of an obligation to amend contracts with other parties to the antimonopoly proceedings (cases of vertical agreements) or with third parties not involved in the proceedings (mostly cases of abuse of dominant position).

Sometimes, where a regulated sector (e.g. energy, telecommunications) is concerned, the PCA consults a draft decision with the relevant regulatory authority, but such consultations are not mandatory or binding on the PCA.

The PCA accepts commitments and requires undertakings to comply with those commitments. In theory, a commitment decision may be appealed to court. But in practice, it is difficult to imagine such a situation, as no fine is imposed and the negotiated commitments are approved by the undertaking and subsequently accepted (in the form of a decision) by the PCA.

Leniency programme

The leniency programme was introduced in Poland in May 2004 and is governed by the Act (currently Article 109 and after the amendments to the Act will come into force under Article 113a-113k) and currently also by the Regulation of the Council of Ministers of 26 January 2009 (“**Leniency Regulation**”). There is also ‘soft-law’ regarding the leniency (i.e., the Leniency Guidelines and Guidelines on Fines).

Application for a leniency is available before initiation of any proceedings by the PCA as well as during the explanatory or antimonopoly proceedings.

Leniency procedure

According to Article 113b (2) of the amended Act, total immunity from any financial penalty will be granted only to the first leniency applicant who:

- a) submits to the PCA a leniency application providing details on an anticompetitive agreement;
- b) provides the PCA with evidence sufficient for instituting antimonopoly proceedings or information that enabled the PCA to gain such evidence; or
- c) in case leniency application has been submitted after instituting antimonopoly proceedings, provides the PCA with evidence that to an essential extent will contribute to issuing of the decision or upon the PCA’s request presents information that enabled the PCA to gain such evidence;

provided that the PCA did not have at the time any information or pieces of evidence sufficient for instituting antimonopoly proceedings or issuing a decision;

- d) did not encourage other undertakings to participate in an illegal agreement;
- e) the applicant has ceased participating in the agreement not later than immediately after submitting the leniency application.

The first applicant who does not qualify for immunity, as well as any subsequent applicants may benefit from a reduction in the fine provided that:

- a) the applicant has submitted to the PCA the leniency application providing details on the anticompetitive agreement;
- b) the applicant has ceased participating in the agreement not later than immediately after submitting the leniency application;
- c) the applicant has presented to the PCA evidence that has great importance to the case providing that the PCA did not have at that time such pieces of evidence.

Fines reduction in case of applicants who do not qualify for immunity depends on “the place in the line” according to following rules:

- first applicant may gain full immunity;
- second applicant may gain reduction of the fine that would otherwise be imposed by 30-50%;
- third applicant may gain reduction of the fine that would otherwise be imposed by 20-30%;
- subsequent applicants may gain reduction of the fine that would otherwise be imposed by a maximum of 20%.

Applicant for immunity as well as subsequent applicants are obligated by virtue of the amended Act to fully cooperate with the PCA in the course of the proceedings. Apart from providing the PCA with all necessary information they will be obliged by virtue of law not to reveal their intention to submit the leniency application, or the fact of submission of the application to the PCA. Moreover, the leniency applicants will be obliged not to impede their employees or managers in relation to making depositions.

It should also be mentioned that the Leniency Regulation provides for a ‘marker system’. The undertaking’s place in the queue for leniency (immunity or reduction of a fine) can be secured by submitting the abridged leniency application. Furthermore, the leniency application can be submitted orally. However, in such case it shall be recorded in writing by the authorised PCA’s representative. According to the Leniency Guidelines the minutes of an oral leniency application contain the factual circumstances and the statements, evidence and documents listed as attachments.

The amendments to the Act introduce the possibility to impose fines on individuals who manage an undertaking which entered into an agreement restricting competition. A fine may be imposed on any manager of an undertaking who intentionally, by their action or lack of action, involved the undertaking in such an agreement. This is not limited to cartels, and will also cover other horizontal as well as vertical agreements. The fines on individuals can be relatively high. The cap will be set at PLN 2,000,000 (approx. EUR 500,000). Thus as a consequence the new law also provides for the possibility to file **leniency applications for individuals**. The same rules regarding the leniency program for undertakings will apply respectively to leniency for individuals. Also, when an undertaking applies for leniency, the leniency application covers all individuals involved in the relevant anticompetitive practice. However, a leniency application filed by an individual does not cover the relevant undertaking.

Leniency plus

The amended Act provides for a leniency plus programme that will be available for those undertakings who file (as the second, third or subsequent applicant) a leniency application with respect to one matter and will provide the PCA with information regarding another anti-competitive collective practice that previously had been unknown to the PCA. In such cases, the undertaking will qualify for an additional 30% reduction of fines in respect of first matter and for a 100% reduction in respect of the new matter (assuming that all the conditions for immunity from fines are met).

Settlement procedure

Until now Polish law did not recognize a settlement procedure. The upcoming changes cover this issue as well.

According to the amended Act, the settlement procedure may be commenced in the course of antimonopoly proceedings, i.e. after delivery of the formal notice of proceedings. The settlement procedure will be composed of several stages:

- a. the PCA invites all the parties to settle, acting *ex officio* or on application from a party;
- b. then the parties have 14 days to decide whether or not to enter into the settlement procedure;
- c. the parties, which decide to enter into the procedure, are then informed by the PCA about its initial findings, its expected decision and the estimated amount of the fine after the 10% reduction;
- d. the parties are given 14 days to send their responses to the PCA's position;
- e. the PCA analyses the first round of the parties' responses and sends them the modified settlement proposals (the same kind of information as in letter c. above);
- f. the parties have further 14 days to submit their second responses;
- g. having analyzed the parties' second responses, the PCA requests them to submit their final statements of acceptance within the time that is not less than 14 days from the delivery of the request;
- h. the final statement of a party must consist of: (1) a clearly stated voluntary acceptance of the fine; (2) an acknowledgement of the amount of the fine, and (3) an acknowledgement of the receipt of information on the alleged infringements, on the right to be heard and on the possible unfavourable results of appealing from the decision;
- i. the PCA issues its decision consistently with the proposals accepted by the parties (letter h. above).

Although the amended Act is not clear in this respect, it seems that individuals (managers) will also be entitled to settle with the PCA.

Settlement procedure will not become explicitly a guilty plea, but in practice it is at least a non-contest plea. That is because it will be possible to appeal from the fine after the settlement, in which case however the fine reduction will be automatically withdrawn. The fixed 10% reduction does not seem encouraging enough for undertakings in non-obvious cases where the fine might well be lowered or quashed by the court on appeal. However, the PCA may in such cases “offer” a lower basis of a fine than usual, which combined with the 10% off may be an acceptable solution for the undertakings concerned.

The procedure is planned to cover cases of both horizontal and vertical agreements as well as cases of abuse of dominant position. We believe that in cartel cases the PCA should be far more willing to negotiate and finalize a settlement than to issue a commitment decision.

In general terms, settlement procedure is intended to simplify and speed up the proceedings regarding competition-restricting practices. However, taking into account that the PCA will have the right to withdraw from the settlement procedure at any stage, there are serious doubts whether settlement will really be an attractive option for parties to the proceedings.

2.1.2. Discretion of competition authorities and/or judges during proceedings

In both types of transactional procedures available for unilateral and multilateral anticompetitive practices (i.e. commitment decisions and leniency programme) a plea-bargaining is triggered by the undertaking, never by the competition authority. Only the settlement procedure may be initiated by the PCA (as well as by the undertaking).

It is a sole discretion of the interested party to address the PCA with a proposal for commitments or to submit a leniency application. On the other hand, the PCA has powers to reject commitments proposal, as well as a leniency application on its own discretion.

Generally speaking, the PCA might not be willing to accept commitment proposals in case when proposals were not made early enough or when commitments are not sufficient enough to restore effective competition on the market. However, the second obstacle can be easily overcome since negotiations with the PCA's representatives over commitment proposals are available for interested undertakings.

In case of leniency programmes the PCA formally is obligated to accept an application that meets in a cumulative manner criteria set forth in Article 109 of the Act (Article 113b and 113c (1) of the amended Act). However, taking into account that those criteria are not particularly straightforward, the verification of their fulfilment is rather subjective in practice. On the other hand, it is not easy to assume that the PCA is very willing to reject leniency applications because the said programme is a major tool to fight cartels and other agreements restricting competition. Furthermore, one has to bear in mind that the PCA encourages undertakings – by way of public media campaigns – to increase number of leniency applications filed to the PCA. Therefore, there are reasonable arguments to claim that the PCA is much more likely to accept leniency applications rather than to reject them without justified reasons.

Until now there was only one case where the PCA decided not to accept a leniency application on the grounds that the applicant did not meet all requirements described in Article 109 of the Act. In this particular circumstances a leniency application was assessed as incomplete since it did not include full and comprehensive information concerning the existence of a prohibited agreement. It has to be emphasized that a dismissing application has been made after submitting by the PCA a formal request to send a complete document⁸.

2.1.3. Nature of the legal act concluding, approving, and/or making binding the settlement

⁸ See Decision No. DOK 1/08. For more details please refer to Turno B., *'Leniency Program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji'*, Wolters Kluwer, Warsaw 2013.

The PCA's final assessment concerning both the leniency application and commitment proposals, as well as settlement procedure is reflected in decisions issued by the PCA as outcome of the undertaken antimonopoly investigations.

In case of acceptance of the leniency applications or commitment proposals, appropriate wording is included in the operative part of the decision. On the other hand, when the PCA claims that there are no grounds to impose commitments or to grant full leniency (or at least reduce a fine) proper information is included in the justification of the decision.

In case of applying settlement procedure content of the PCA's decision is based on the final statement issued by the interested party confirming undertaking's acceptance for level of the fine to be imposed as well as acceptance for charges raised against the party. The said statement also includes information that the appeal to a court may result in imposing by the PCA a higher fine (please see below).

Furthermore, it should be stressed that the PCA has a right to withdraw from a settlement procedure at any stage of the proceedings if it considers that the settlement procedure does not contribute to the acceleration of proceedings.

Taking into account that the Polish constitution guarantees the right to appeal against administrative decisions to courts (judicial review), a commitment as well as leniency granting decisions may formally be appealed to the Court for Competition and Consumer Protection ("**the Competition Court**") and this right cannot be waived. However, such a decision is usually treated as a "win-win" situation therefore an appeal is unlikely. (in case transactional institutions are not put into action, the party to the proceedings has the right to appeal against the decision to the **Competition Court** within 14 days of being served with a decision by the PCA).

In principle, a decision resulting from the settlement will also be available for the judicial review. However in case undertaking decides to appeal against such a decision to the **Competition Court** and the PCA considers the appeal to be unjustified, it has the power to change the decision by imposing a fine in the amount that would be imposed without benefiting from the settlement advantage. The latter decision will also be available for further appeal.

2.1.4. Legal consequences for the parties

Together with a list of commitments imposed on the undertaking, a commitment decision will always impose a reporting obligation on the undertaking. As a result, the undertaking is given a fixed deadline to send progress report(s) with evidence on how it complies with the commitments. For example, where the commitments include an obligation to amend a contract, the PCA will often require to receive a certified copy of the amended contract.

In the event of a failure to comply with any commitment (including a reporting obligation), the PCA may fine the undertaking up to the equivalent of EUR 10,000 per each day of the delay.

Moreover, in the event of non-compliance, the PCA may also *ex officio* revoke the commitment decision, restart the antimonopoly proceedings, issue a decision declaring the practice anticompetitive and impose a fine of up to 10% of the overall annual turnover generated by the undertaking in the accounting year preceding the year in which the fine is imposed.

In practice, undertakings usually comply with commitment decisions on a voluntary basis. Although some minor problems with proper reporting can occur, we are not aware of any fines for non-compliance with commitment decisions.

In case of settlement decisions the most severe consequences relate to a party which decides to appeal such a decision. As previously said, in case an undertaking decides to appeal such a decision to the Competition Court and the PCA considers the appeal to be unjustified, it has the power to change the decision by imposing a fine in the amount that would otherwise be imposed without benefiting from the settlement advantage.

As it has already been indicated in the previous sections, as an administrative authority, the PCA does not have powers to decide on civil claims. As a result, the civil courts are not bound by the commitment decision (even if final and legally valid).

2.2. Fundamental and procedural rights of the parties

2.2.1. Right against self-incrimination and presumption of innocence

Duty to provide information

Pursuant to Article 50 (1) of the Act undertakings upon the PCA's request are obligated to provide all necessary information and documents (requests for information – “**RFI**”).

The PCA is empowered to request information not only from the parties to the ongoing proceedings but also from any other undertaking that has relevant information or documents (i.e. third parties).

The scope of the RFI is limited by the scope of the information requested, the objective of the request and at last by the principle of “necessity” indicated in Article 50 (1) of the Act. The same rules apply to information and documents gathered in the course of transactional procedures.

In case of failure to provide requested information (as well as providing incorrect or misleading information) the PCA may impose on an undertaking by way of a decision a fine of the equivalent of EUR 50,000,000 (Article 106 (2) of the Act).

As regards the leniency procedure, the obligation imposed on the applicants to provide the PCA with any and all proofs or pieces of evidence that it has at its disposal, as well as with any information relating to the case, upon its own initiative or upon the demand of the PCA is based on Article 109 (2) of the Act.

From the practical perspective it should be noted that the obligation to provide information cannot be justified by protection of business secrets. Polish competition law provides for alternative measures to sustain sensitive information unrevealed i.e. : the party is entitled to fill a request for a limited right of access to evidence (Article 69 (4) of the Act) or Article 71 of the Act providing that PCA's representatives shall protect company secrets, as well as other information protected subject to other applicable regulations.

Legal professional privilege

Similarly, the Act does not currently provide for the legal professional privilege („**LPP**”) rule as under the UE competition law.

However, we would argue that currently on the basis of the relevant legislation (i.e., the Polish Criminal Code), the case law of the Court of Justice of the European Union and the European Court of Human Rights, as well as on the basis of the Bar Code of Conduct, advice rendered by qualified lawyers (advocates or legal counsels), irrespective of whether rendered by an in-house or by external, qualified lawyer, should be legally privileged in Poland. Moreover, when the PCA applies Articles 101 or 102 of the Treaty on the Functioning of the European Union simultaneously with the relevant provisions of the domestic law, it is bound by the general principles of EU law, of which rights of defence (as a fundamental right) is a part. Thus, in such a situation the PCA has a duty to observe the LPP rule which supports the rights of defence.

In practice, during, for example, a dawn raid the PCA officials may be ready to respect the privileged character of some documents (e.g., legal opinions). To the best of our knowledge, there is no clear guideline in this respect in the case law of the Polish courts (although first courts' decisions have been issued). It is interesting to mention that in the initial phase of legislation works on the amendments to the Act, the explicit introduction of the LPP rule into the Polish legal system was considered. Finally, amended Act includes only *quasi*-LPP rule by way of applying accordingly relevant provisions the Code of Criminal Procedure in case of inspections in undertaking's premises. In practice, it means that during a dawn raid an authorised representative of an inspected company has the right to inform the PCA's officials that certain documents are privileged (due to the professional secrecy). According to Article 225(1) of the Code of Criminal Procedure, persons conducting the inspection must not read the documents but have to forward them to a relevant court (i.e. the Competition Court) which will decide whether the documents are privileged. Nevertheless, it should be noted that practical applicability of those provisions in antitrust cases will be very complex. Therefore the *quasi*-LPP rule that is going to be introduced into Polish competition law is surely less far-reaching in scope and less straightforward in enforceability than its EU counterpart.

Right against self-incrimination

In Polish antimonopoly proceedings there are no clear standards when it comes to the guarantees of the presumption of innocence and the privilege against self-incrimination. The latter is not regulated in the Polish administrative procedure despite the opinions pointing to such a need⁹. In consequence, in some cases it may happen that undertakings are forced to confess to violating competition law rules.

Nevertheless, although there are no binding rules safeguarding the right against self-incrimination during antimonopoly proceedings, some authors¹⁰ are convinced that such an obligation imposed on the competition authority stems directly from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Since Poland is a party to the Convention, its provisions (including Article 6 providing for the right to fair trial)

⁹ See: Turno B, 'Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości', (2009) 3 Ruch Prawniczy Ekonomiczny i Społeczny 45-48.

Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warsaw, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2011, pp. 190-191; Krüger J, [in:] Stawicki A, Stawicki E (eds), *The Act on Competition and Consumer Protection. Commentary*, Warszawa 2011, p. 764.

¹⁰ See: Bernatt M., *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warsaw, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2011, pp. 190-191.

are a binding source of law in Poland i.e. rules incorporated in the Convention are applicable in a direct manner¹¹.

2.2.2. Right of the parties to know their case (statement of objections)

The PCA formally informs undertakings concerned about the case against them in a resolution on the institution of antimonopoly proceedings. From the legal standpoint, since the initial phase of the proceedings before the PCA in Poland i.e. – explanatory proceedings – does not have formal parties, there is no formal obligation to inform about objections. Similarly, the PCA does not inform undertakings (e.g., those that responded for the RFI) on termination of the explanatory proceedings.

In a vast majority of cases resolutions on the commencement of antimonopoly proceedings contain solely very general information about charges without detailed justification. They lack a detailed description of the facts and evidence collected in the case files as well as initial legal assessment concerning factual background.

The fact of receiving a resolution on the institution of antimonopoly proceedings seems to be particularly important in case of commitment proposals to be made by the interested undertakings. As it has already been stressed, Guidelines on Commitment Decisions indicate that the commitment proposal in order to be successfully accepted by the PCA should be made at a very early stage of the proceedings, preferably in the party's response to the said resolution.

With respect to a leniency programme, it is predictable that the party's application is much more likely to be accepted also when submitted at a very early stage or even when antimonopoly proceedings have not yet been instituted. In such circumstances information on competition restricting practice that was unknown to the PCA is particularly valuable and will probably result in total immunity from fines.

2.2.3. Right to be heard and access to file

Article 10 of the Code of the Administrative Procedure constitutes a formal basis for the enforcement of the right to be heard during antimonopoly proceedings. It ensures that the parties should be actively involved in each stage of the proceedings and are free to express an opinion on the evidence and materials collected and the claims filed. Reflection of right to be heard in the Act itself is Article 74 pursuant thereto the PCA when issuing decision shall take into consideration only the charges in respect of which the parties concerned could present their position. Similarly, in terms of transactional procedures it should be taken for granted that the right to be heard is obeyed since both commitments and leniency are based on cooperation between the parties and the PCA. Therefore, materials and information submitted by the parties are directly used by the PCA to issue relevant decisions.

Under Polish competition law only undertakings being parties to ongoing antimonopoly proceedings have access to case files. This right is conferred to all the parties to proceedings before the PCA. Nevertheless, such a right is subject to possible restrictions. Under Article 69 (1) of the Act, the PCA is empowered to limit access to case files in situations where business secrets or any other legally protected secrets might be revealed.

¹¹ See: Turno B, '*Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości*', (2009) 3 Ruch Prawniczy Ekonomiczny i Społeczny 45-48, p.45.

It should be emphasized that further limitations to files access rights are covered by the Article 70 (1) of the amended Act. Under the said provision any information submitted to the PCA by leniency applicant (as well as the fact of application itself) or by settlement applicant remains unrevealed to other parties until all parties to the proceedings are formally called by the PCA to get acquainted with case files just before issuing the decision. However, the amended Act introduces further restrictions on access to the files at this very last stage. According to Article 70 (4) of the amended Act, documents which contain information submitted by leniency or settlement applicants can be photocopied by parties to the proceedings only upon a prior written consent of the applicant who submitted relevant documents. Moreover, handwritten notes of the said files are allowed under condition that they will be used for the purpose of the ongoing proceedings or during appeal only (Article 70 (4) of the amended Act).

2.2.4. Right to an equal treatment

Enforcement of commitment decisions as well as leniency programme under Polish law can lead to unequal treatment of the parties applying for the said transactional institutions. Such risk occurs because the PCA enjoys wide discretion in using these tools. Wording of Article 12 of the Act clearly states that the PCA **may, or may not accept** the content of the commitments proposed by the parties to the proceedings.

Although provisions regulating leniency programme are more straightforward and the PCA is obligated to grant full immunity (or fine reduction) whenever applicants meet formal criteria, assessment of meeting those requirements lays purely on the PCA. Therefore practical enforcement of the leniency programme is also highly dependent on the PCA's approach in every single case.

As a result it is theoretically possible to imagine a situation when the PCA treats the parties to the proceedings differently in terms of transactional institutions despite the fact they are in similar or even identical positions. However, the right to equal treatment in the antimonopoly proceedings can be derived from the Article 32 of the Constitution of the Republic of Poland of 2 April 1997 stating that "*All persons shall have the right to equal treatment by public authorities*". More direct applicability of right to equal treatment of parties to the proceedings before the PCA can also be based on the Code of Administrative Procedure. Article 8 of the said Code provides for a general principle that "*Public administration bodies are required to conduct proceedings in such a way so as to increase the trust of citizens in the State bodies and public awareness and appreciation of the law*". In result, public authorities are obligated to act in a predictable manner that includes equal treatment of parties in equal situations.

It should be emphasized that pursuant to Article 83 of the Act, the Code of Administrative Procedure provisions are applicable directly in matters not regulated by the Act itself.

2.2.5. Right to an impartial judge

Under Polish competition law almost every aspect of the transactional solution is dependent on the competition authority's discretion. There is no formal differentiation between investigational and decision-making powers of the PCA. As a result, an administrative body is solely responsible for initial scrutiny of commitments proposals, leniency applications or the settlement procedure. The same body makes final decisions in this regard. Moreover, it should

be mentioned that the amended Act gives the PCA authorisation to institute one proceedings against an undertaking accused of entering into an agreement restricting competition and against individuals who manage such undertaking. Consequently, the same case-handler/case-team is responsible for both cases simultaneously. Such circumstance violates the principle of impartiality in a very visible manner.

Taking the above mentioned circumstances into account, it should be claimed that an effective tool to safeguard the right to an impartial judge is a judicial review. According to the Act, a party to the proceedings (and only the party) has the right to appeal the PCA's decision to the acting as a court of first instance. A ruling of the Competition Court may be subject to a further appeal filed with the court of the second instance i.e. with the Court of Appeal. The ruling of the latter can be further appealed to the Supreme Court with a cassation appeal. However, a cassation appeal is accepted by the Supreme Court only in individually selected cases (e.g. where there is a novel issue of law or there is a manifest error in the verdict of the Court of Appeal).

2.2.6. Right to trial

The decision of the PCA may be appealed to the Competition Court by the addressees of the decision. Under the Polish law, the waiver of the right to trial is not permissible. Entities which are not the addressees of the decision (i.e. third parties) are not entitled to appeal the decision to the Competition Court.

The Competition Court is entitled to assess the case on the merits, as it acts as the first instance court.

2.2.7. Ne bis in idem

The principle *ne bis in idem* does not apply to transactional resolutions of competition law proceedings. Therefore, also in case of leniency application the applicant informing the PCA about bid-rigging will face the responsibility under the Polish Penal Code. We believe that such approach toward *ne bis in idem* rule is very unfortunate as it deters many potential applicants from filling leniency in case of bid-rigging cartels.

2.2.8. Other issues and rights

Not applicable.

2.3. Rights of third parties

2.3.1. Right to be heard and access to file

Entities which are not directly involved in proceedings (i.e. third parties) do not have a status of the party to the proceedings and they do not have access to confidential version of the written document communicating the case against the defendant company. Their influence on the final scope of the decision is limited as they are only entitled to present their view in the course of the proceedings. In addition, according to the hereto practice of the PCA it is usually possible for the third parties to voice concerns related to the case during a meeting with the Authority. Nonetheless, the third parties do not have legal instruments to effectively ensure that the PCA considers their arguments while issuing decision.

In addition, in the course of the proceedings, the PCA may carry out a market inquiry by sending out questionnaires to, among others, complainants, competitors, and/or contactors of the parties involved in the proceedings. In such case, they are obliged to provide the PCA with the requested information and/or documents, under the penalty of financial fine which amounts to 50.000.000 EUR.

2.3.2. Right to trial

Entities which do not have a status of the party to the proceedings are not entitled to appeal the PCA's decisions which close the proceedings before the PCA to the Competition Court. Third parties may only appeal (i) the PCA's orders which relate directly to their rights and obligations e.g. the PCA's order pertaining to treating the part of information and documents provided by the third party as confidential and (ii) the PCA's decisions which relate directly to third parties' rights and obligations e.g. the PCA's decision imposing the financial fine on the third party for the lack of the cooperation with regard to submission of information and/or documents requested by the PCA.

Despite of the above, the third parties do not have any rights to challenge PCA' decisions or any other settlements issued by the PCA.

2.3.3. Right of equal treatment

The principal of the equal treatment does not apply to the third parties due to the fact that they do not have a status of the party to the proceedings. Hence, no procedures or other safeguards are implemented to reduce the risk of potential unequal treatment of the third parties.

The third parties may influence the final scope of the decision only by providing the PCA with their views in the course of the proceedings. Nonetheless, the third parties do not have legal instruments to effectively ensure that the PCA considers their arguments while issuing decision.

2.3.4. Other issues and rights

The amended Act does not grant to the entities other than the parties to the proceedings the access to the case files. However, the information and documents gathered by the PCA during the leniency or settlements programmes may be disclosed to third parties provided that the leniency or settlements applicants give their consent (in writing) in this respect. Therefore, the entities which do not have a status of the party to the proceedings or which did not receive the approval from the leniency or settlements applicants will not have the access to case files, even during the proceedings before the court which pertains potential antimonopoly damages.

2.3.5. Principle of legitimate expectation and of good faith

The Code of Administrative Procedure includes the general principles of administrative procedure which have to be obeyed by the PCA e.g. principle of legality, principle of objective truth, principle of deepening trust and principle of hearing of the parties. In practice it may be very difficult to appeal effectively the decision by formulating charges based only on the lack of compliance with the general principles of administrative procedure.

The entities which will be able to demonstrate that they have legal interest in the annulment of the particular decision, may request the PCA to declare the decision invalid. The Code of Administrative Procedure includes the exhaustive catalogue of the prerequisites for invalidation of the decision (e.g. decision concerns a matter which has been previously decided under another final decision, decision has been addressed to a person not being a party to the matter which). However, in the hereto practice of the administrative authorities, the motion of the legal interest was defined very narrowly, hence entities other than addressees of the decision should not be considered as having legal interest to take actions against the decision.

2.3.6. Confidentiality and publicity of the transactional solutions

The PCA cannot disclose to any third party or distribute within public administration information and documents included in the case files.

In case of the information and documents gathered by the PCA during the leniency or settlements programmes, the case files may be disclosed (i) to parties to the proceedings other than the leniency or settlement applicants before the issuance of the decision and (ii) to third parties provided that the leniency or settlements applicants give their consent (in written) in this respect.

The access to information and documents included in the case files may be restricted towards the party to the proceedings in case when third party or other party to the proceedings request the PCA to consider some parts of information and documents as confidential due to the fact that they constitute their sensitive business data. For that purpose, the party to the proceedings or third parties need to file a request for confidentiality of sensitive business information. Such request shall indicate not only the precise scope of the sensitive business information but also justification demonstrating why the particular parts of information or documents are sensitive.

Each decision is published on the website of the PCA within a few calendar days of its issuance. The confidential data is not available in the published version of the decision.

3. Merger control

3.01 Substantive Provisions

General provisions related to merger control proceedings are included in the Act while relevant procedural aspects are governed by the Code of Administrative Procedure. Please note that on 18th of January 2015 a substantial amendment to the Act, modifying also merger provisions, will come into force. Hence the below study takes into account also the amended Act.

3.02 Clearance Decision

The PCA issues three types of decisions in merger cases: (i) an unconditional clearance, (ii) a conditional clearance subject to commitments or (iii) a prohibition decision. Please note that the merger filing will not be reviewed based on merit in case of formal obstacles or party's withdrawal before issuance of the decision.

In case of transactions which are considered to significantly restrict (due to substantial aggregation of market share or reduction of strong competitors on the market) the competition on the relevant market, it is likely for the PCA to issue conditional decision including commitments. Commitments are intended as a mean to ensure that affected markets remain competitive.

3.03 Commitments

The Act provides for two types of commitments i.e. behavioral and structural. List of commitments included in the Act is exemplary, hence the PCA is entitled to implement other behavioral and structural commitments than the ones indicated in the Act.

Please note that analysis of current decisions issued by the PCA indicates that the Authority is willing to impose behavioural commitments additionally to structural measures. In the recent decision pertaining to the acquisition by Henkel of the part of the assets of PZ Cussons, two major laundry detergent entrepreneurs¹², a structural commitment was accompanied by the requirement for Henkel to ensure that prior to the transfer of the assets to new investor the level of sales of the divestitured assets as well as expenditure incurred for the advertising should remain fixed.

Also, in the decision pertaining to the acquisition of control by UPC over Aster City, a structural remedy was accompanied by the requirement for UPC to ensure that prior to the transfer of the assets to a new investor, the consumers' access to the services would not be limited in any manner, and that those services are provided at least at the same level as previously. The decision also obliged UPC to guarantee that consumers would have the right to freely choose an alternative service provider upon transfer of the network to a new investor.

Additionally, in a number of recent cases commitments imposed on merging parties included also reporting obligation. Therefore, in the course of commitments enforcement process, merging parties needed to report of the manner of implementation of the imposed condition within the timeframe specified in the decision.

3.03.1 Behavioural commitments

Behavioural commitments take form of an obligation to act or to carry out business activity in a manner prescribed in a decision The PCA is increasingly reluctant to rely on behavioral remedies as an effective instrument to remedy competition concerns (as opposed to 1990's when the PCA was willing to clear concentrations, which raised competition concerns, relying solely on the condition to adhere to certain future market conduct¹³. Recent decisions clearly show that divestment orders are currently employed as primary tools to remedy competition concerns (see our comments below). However, there are still examples of the PCA employing a behavioural types of commitments in specific cases (for example, in Multikino/ Silver

¹² PCA, decision of 6 February 2014, DKK-11/2014, *acquisition by Henkel AG & Co. KGaA with its registered seat in Dusseldorf (Germany) part of the assets of PZ Cussons (Holdings) Limited with its registered seat in Manchester (United Kingdom), PZ Cussons Polska S.A. with its registered seat in Warsaw and PZ Cussons (International) Limited z with its registered seat in Manchester (United Kingdom)*.

¹³ For example, the acquisition of several breweries by Heineken was cleared by the PCA on the condition that the merged entity will continue to purchase hops from local producers for a designated period of time.

Screen case, Multikino was cleared to acquire a control over Silver Screen¹⁴ subject to withdrawing and refraining from activities aimed at acquiring the rights to the cinema located in the commercial centre in Gdańsk.

3.03.2 Structural commitments

According to the Act structural commitments can take a form of (i) disposal of the entirety or part of the assets of one or several undertakings and (ii) divestment of control over an undertaking or undertakings, in particular by disposing of a block of stocks or shares, or to dismiss one or several undertakings from the position in the management or supervisory board.

Divestment/ disposal obligations are currently employed as primary measures to remedy competition concerns in merger cases. Over the recent years, conditional clearances included predominantly that type of commitment.

Pursuant to divestment/ disposal obligation, the notifying party is obliged to sell selected assets (either acquired or own assets) within a prescribed period of time. The deadline for enforcement of the commitment starts on the day of issuance of a conditional decision or on the day of closing of the transaction. The hereto practice of the PCA indicates that the Authority usually finds the period of 12 to 18 months sufficient to fulfil commitments. However, the approach of the PCA in this respect differs on the case by case basis, depending on, among others, the scope of the imposed commitment and the economic sector within each the parties are active.

In recent merger cases conditional clearance decisions included a commitment to dispose of the particular assets (own or acquired) to an independent investor which ensures that the business attributed to the disposed assets will be continued in the same manner as prior to the divestment. In addition, the choice of particular investor was subject to the PCA approval. The PCA obliges also the notifying party to demonstrate that the investor was previously active on the same markets. In other cases, the notifying party was obliged to procure a declaration of an investor's intent.

It should be noted that in the hereto practice of the PCA, the Authority did not conduct detailed investigations regarding the potential investors, and if the criteria in question were met, the PCA issued its approval. However, in light of the recent cases it seems that the pertinent approach of the PCA has changed and the PCA started reviewing whether the acquired business will be continued in the same manner as prior to the divestment.

The PCA tends to approve the parties' requests to suspend the proceedings for period necessary to accept an investor. Therefore, the clock starts ticking again when the investor is considered by the PCA to fall under the relevant requirements.

3.1. Negotiation of remedies

3.1.1 Discussion on commitments

¹⁴ PCA, decision of 19 June 2008, DKK-49/08, *Multikino S.A. with its registered seat in Warsaw, Silver Screen Targówek Sp. z o.o. with its registered seat in Warsaw, Silver Screen World Cinemas Sp. z o.o. with its registered seat in Warsaw, Silver Screen Wola Sp. z o.o. with its registered seat in Warsaw and SC - Personel Sp. z o.o. with its registered seat in Warsaw.*

The amendment to the Act introduces a two-phase review procedure which divides concentrations according to the criterion of their complexity. Transactions which do not give rise to any competition concerns will be reviewed by the PCA during the first phase. On the other hand, transactions, where the definition of the relevant market is very complex or there is a risk of significant impediment of competition, will be qualified to the second phase. Simultaneously, with the qualification to the second phase of the proceedings, the PCA presents notifying party with its concerns with regard to the concentration. The notifying party may comment upon the PCA decision to instigate the second phase of proceedings within 14-days period (this period may be extended up to 28 days at the party's request). The party may present its view in two possible scenarios i.e. it may provide the Authority with legal and economic data in order to clear the transaction or may propose commitments. In this respect the notifying party/ parties is/are entitled to put forward all types of evidence (e.g. expert witness opinion).

If, in light of additional materials provided by the party or as an outcome of the investigation during the second phase of the proceedings, the transaction still gives raise to competition concerns, discussion on commitments may be commenced both by the PCA and the notifying party. The type, scope and deadline of enforcing relevant commitments will be then subject to the decision of the Authority. Please note that in practice it is difficult for a party to substantially amend the initial draft commitments proposed by the PCA or to persuade the PCA to accept party's own draft commitments during negotiations. At this stage further discussion about the relevant market is usually not possible.

The conditional clearance may be issued only if the party grants its consent on the type and scope of commitments. In other case, the PCA issues a prohibition decision. The PCA is entitled to determine, at its sole discretion, the type and scope of commitments. In this respect, the Authority should consider only the binding law, in particular the Constitution and general principles of administrative procedure (e.g. the principle of proportionality, protection of justified interest of the parties).

Please note that at the second stage of merger proceedings all communication between the Authority and parties involved is in writing. However, the PCA Guidelines on the criteria and procedure of notifying the intention of concentration to the President of UOKiK ("the Guidelines")¹⁵ provides for a procedure under which the PCA may hold meetings with parties involved, in particular in relation to discussion about commitments. However, in practice such meetings occur rarely and only on the party's request (please note that the PCA usually agrees to hold only one or two meetings with the party).

The Authority cannot disclose to any third party or distribute within public administration information and documents included in the case files, including those related to the merging party. The third parties do not have rights comparable to those which are granted to the notifying party. Hence, under no circumstances third parties may have access to the case files.

The access to information and documents included in the case files may be restricted towards the notifying party in case when third party requests the Authority to consider some parts of information and documents as confidential due to the fact that they constitute sensitive business data of the third party.

¹⁵ The Guidelines have been published on the webpage of the PCA: http://www.uokik.gov.pl/merger_control.php.

The Authority may also, on the request of the notifying party, consider the deadline to fulfill commitments as confidential information.

Each merger decision is published on the website of the PCA within a few calendar days of its issuance. The confidential data is not available in the published version of the decision.

3.1.2 Third parties' rights

Entities which are not directly involved in merger proceedings (i.e. third parties) are entitled to present the PCA with argumentation demonstrating risk related to the transaction. According to the hereto practice of the PCA it is usually possible for the third parties to voice concerns related to the proposed transaction during a meeting with the Authority. Nonetheless, the third parties do not have legal instruments to effectively ensure that the PCA considers their arguments while issuing conditional decision.

In addition, in the course of the merger control proceeding, the PCA may carry out a market inquiry by sending out questionnaires to customers and business partners of the parties involved in the concentration. In such case, customers and business partners are obliged to provide the PCA with the requested information and/or documents.

3.1.3 Appellate rights

The conditional decision, even if it is issued upon party's approval, may be appealed to the Competition Court by the notifying party. The Competition Court is entitled to assess concentration on the merits, as it acts as the first instance court. The appeal may be lodged within 30 calendar days from the date of receipt of the decision (please note that before the amendment this period was much shorter as it counted only 14 days) Third parties (e.g. competitors or business partners) are not allowed to file the above mentioned appeal or to accede to the appeal proceedings.

In practice, conditional decisions are not appealed to the Competition Court. However, the parties to the concentration tend to appeal from decision prohibiting the transaction.

3.2. Enforcement of remedies

The addressee of conditional decision is required to provide the PCA with information regarding enforcement of commitments. The PCA usually obliges the acquiring party to submit such information in the prescribed period. Although, in light of the Act, the acquiring party is ex lege obliged to report to the PCA "after the fulfilment" of commitments¹⁶.

Contrary to the practice of the European Commission, the PCA does not appoint a trustee, nor does it include mandatory arbitration clauses in a conditional merger clearance. However, the Act does not prohibit the PCA to do so.

As to the enforcement of structural commitments, the PCA tends to limit the choice of the party as regards the investor (i.e. the purchaser of the shares or assets). For this purpose, in a number of the conditional decisions, the PCA stipulates the additional requirement of a priori acceptance of the investor by the PCA before closing the divestment transaction.

¹⁶ PCA, decision of 31 March 2014, DKK-40/2014, acquisition of control by Neuca S.A. with its registered seat in Toruń over ACP Pharma S.A. with its registered seat in Warsaw, page 3 – duty to submit monthly reports to the PCA.

In case the party did not comply with the commitments included in the conditional decision the PCA may revoke this decision. However, if the transaction was executed, the decision may be revoked only if competition on the market cannot be restored in any other way (the Authority should apply the proportionality test). In such case, the PCA may revoke the decision within 5 years from the day of closing of the transaction. In its 24-years history, the PCA did not revoke its decision

In addition, the PCA may impose financial fine on the merging party which did not implement the commitments included in the conditional decision. The pertinent financial fine may amount to the equivalent of 10.000 EUR (maximum cap) for each day of delay in the fulfilment of the commitments imposed. Decision regarding the fine may be appealed to the Competition Court (and further to the Court of Appeals as well as a cassatory complaint may be lodged to the Supreme Court). In most of the cases where the parties did not enforce commitments, the PCA imposed such fines. In the most recent proceedings regarding fines for non-enforcement of commitments, Carrefour B.V. was fined for non-compliance with obligation to divest some commercial premises (supermarkets) previously acquired from Ahold Polska sp. z o.o.¹⁷ It should be noted that under the amended Act the managing person will also be directly liable for delay in commitments implementation and in such case may be fined with a financial fine amounting to 50 average remuneration (currently: 50 x 3896,74 PLN = ~ 50 x 941,22 EUR).

Merger control proceedings. Under art. 95 Sec. 2 of the Act the PCA proposes draft commitments to the merging parties. Such proposal indicates also the timeframe within which the parties should accept or refuse the proposed commitments (in case of lack of response or negative response from merging parties, the PCA issues a decision prohibiting concentration). However, the Act does not prohibit the merging parties to submit revised proposal of commitments. The Authority may consider such proposal but it is not bound with it. According to the hereto merger practice, the PCA tends to revise its initial proposal of draft commitments after it receives submission from the merging parties. In practice, negotiations of the scope of commitments in merger cases last around 1 month.

Antitrust proceedings. Please note that in case of the antitrust proceedings the PCA may impose upon parties to the proceedings measures equivalent to the commitment included in the merger decision, which are known as remedies. Additionally, parties to the antimonopoly proceedings may request the PCA to issue a decision including obligation to cease anticompetitive behavior and remove result of the infringement. In case of all the above-mentioned decisions issued in the antimonopoly proceedings, the Authority is entitled to impose not only a remedy or an obligation but also prescribe the timeframe to implement them. Contrary to the merger control proceedings, in antitrust case, the PCA is obliged by law to require from the undertaking periodical reports regarding the status of implementation. .

Both in merger and antitrust proceedings, entities which are not directly involved in the proceedings do not have a status of the party to the proceedings. Their influence on the final scope of commitments/ remedies is limited as they are only entitled to present their view in the course of the proceedings. Please note that the third parties are obliged to provide the

¹⁷ PCA, decision of 28 August 2009, DKK-58/2009, *Carrefour B.V. with its registered seat in Amsterdam, the Netherlands*; Competition Court, judgment of 3 October 2011, XVII AmA 8/10; Court of Appeals in Warsaw, judgment of 17 May 2012, VI ACa 1428/11; Supreme Court, judgment of 3 October 2013, III SK 51/12.

Authority with the information demanded, under the penalty of financial fine which amounts to 50.000.000 EUR.

4. Impact on transactional outcome and on market intervention

Over intervention as a deterrent factor

Undertakings may deter from entering the dialogue with the PCA due to the rigid approach of the Authority in the hereto decisional practice. Cases where the PCA focuses on single aspect of business relations between undertakings and does not take into account the wider economic context of pertinent situation are good example of such rigid approach. In this respect, please refer to the following decisions issued by the PCA in antitrust and merger cases.

Antitrust

In December 2007 the PCA commenced antitrust proceedings against Xella Polska - the manufacturer of construction materials - and its largest distributors. The PCA questioned the contractual clauses according to which the distributors are obliged not to sell their products below the purchase price. During the antimonopoly proceedings Xella Polska submitted the obligations whereby it committed itself to revise the existing distribution agreements and delete the alleged competitive clauses. On 4 July 2008 the PCA issued a decision which obliged Xella Polska to comply with the commitments proposed¹⁸. In the pertinent decision, the PCA highlighted that it is not economically profitable for the distributor to sell the products below the purchase price (in some circumstances conduct contrary to the questioned practice i.e. sale of products below the purchase price may be qualified as dumping pricing which constitutes the act of unfair competition prohibited under the Polish law). However, in the opinion of the PCA the sole wording of the alleged clause is anticompetitive by itself and it may cause anticompetitive effects in the future (even if it is not anticompetitive at the moment of the issuance of the decision). The PCA did not impose the fine on Xella Polska for the participation in anticompetitive agreements, however, any further defense of the contested clauses could result in a financial fine as well as protracted proceedings before the Competition Court and possibly higher instances. Instead, Xella Polska was obliged to review 600 agreements with different distributors.

Xella Polska case shows that the PCA, when assessing the undertakings' practice in light of competition law, may focus solely on pure wording of the contractual clause and neglect the wider economic context of the case (character of the marketed products, dumping pricing, actual conduct of the undertakings). The rigid interpretation of each contractual clause without any reference to the context of the undertakings' conduct may deter the entrepreneurs from entering any dialogue with the PCA, which may lead to the adverse effect in particular in RPM cases.

Mergers

¹⁸ PCA decision of 4 July 2008, DOK-3/2008, *Xella Polska Sp. z o.o. with its registered seat in Warsaw, BIST Białobrzegi, Stykowski Sp. j. with its registered seat in Warsaw, Centrum Zaopatrzenia Budowlanego „Hadex” Sp. z o.o. with its registered seat in Jastrzębie Zdrój, „GEN-BUD” S.A. with its registered seat in Warsaw, Grupa Polskie Składy Budowlane S.A. with its registered seat in Welecz, Materiały Budowlane „Wesolek” Sp. z o.o. with its registered seat in Chocicza, „PEAMCO” Materiały Budowlane J. i B. Tomczak Sp. j. with its registered seat in Leszno, P.H.U. i B. Sambud II s.c. with its registered seat in Ostrołęka, P.P.H.U. „Tęcza” Hurtownia Artykułów Budowlanych E. Żur with its registered seat in Koszalin, Przedsiębiorstwo Wielobranżowe „MATEX” Z.M.P. Rogoziński Sp. j. with its registered seat in Wolsztyn and Saint-Gobain Dystrybucja Budowlana Sp. z o.o. with its registered seat in Wrocław.*

As to mergers cases, the example of over intervention of the PCA may be Auchan Polska/Real case. During the 9-month merger control proceedings, the PCA thoroughly examined 57 local markets for FMCG retail sales in HSD (hypermarkets, supermarkets and discounters). In its decision of 21 January 2014 the PCA committed Auchan Polska to divest 8 of 57 acquired Real- hypermarkets purchased from Metro Group within 18 months. It is noteworthy that the PCA modified its approach to FMCG retail markets by limiting the product market definition to the hypermarkets only. Therefore, in the course of proceedings the market shares were calculated separately for both alternative market definitions, i.e. HSD and hypermarket format. The PCA justified such huge scope of divestment obligation with high market shares of merging parties on the affected markets, exceeding 50% in the local markets for hypermarket format. The PCA's examination was focused solely on the level of market shares which was perceived as a decisive factor for competition assessment. The assessment was not performed by the reference to the other market conditions relevant for the transaction, e.g. dynamic expansion of discounters (Lidl (Schwarz Group) and Biedronka (Jeronimo Martins Group), characteristics of marketed products (limited substitutability between various FMCG products, private labeling). The pertinent case demonstrates that the rigid attitude of the PCA to market share issue may constitute a deterrent factor in merger cases as well.

Under intervention

Taking into account the general provisions of Polish and European competition law, the soft-law documents (i.e. guidelines, codes of conduct) issued by the PCA and the Commission increase transparency of actions taken by the competition authorities. For example, the PCA has issued the following guidelines pertaining to the merger and antitrust proceedings:

- (i) Clarification on issuing the commitment decision in cases of competition restricting practices and practices infringing the collective consumers interests (2012)
- (ii) Clarification concerning the assessment by the President of UOKiK of the notified concentrations (2012)
- (iii) Guidelines on the criteria and procedure of notifying the intention of concentration to the President of UOKiK (2010)
- (iv) Guidelines relating to the leniency programme (2009)
- (v) Guidelines on setting fines for competition-restricting practices (2008).

These documents may be considered as very useful measure allowing undertakings to conduct their business in line with the position of the PCA. However, as the above mentioned guidelines are not binding for the PCA, it is not always the case that undertakings consider the policy of the PCA as transparent.

5. Conclusion and recommendations

Polish competition law regime recognises several transactional institutions that are predominantly aimed at speeding up proceedings and improving effectiveness of the PCA's enforcement actions. Apart from already existing tools (leniency or commitments), due to the amendments to the Act, one more tool will be available for the parties soon – settlement procedures. As an effect, one could argue that Polish undertakings are well-equipped to take advantages of “plea bargain” solutions in relations with the PCA. In theory it is true but the devil is in the details – since majority of transactional institutions are in practice dependent on

the PCA's own discretion the final outcome of such "negotiations" with the authority is highly unpredictable. Therefore, we can only recommend that juridical practice of implementing transactional solutions is more transparent to increase their recognition among undertakings operating in Poland.