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Dr Mateusz Błachucki
Institute of Law Studies of PAS
mblachucki@gmail.com

The Consistency of Polish Competition Law with ICN Recommendations – the Example of the Merger Notification Obligation[1]

Abstract
The regulation of the merger notification obligation lies at the heart of the system of merger control. It defines what transactions are caught under the scrutiny of competition authorities, and which undertakings are obliged to notify them. The International Competition Network (ICN), which is a virtual network of competition authorities, has developed a series of recommendations for the proper construction of a merger notification obligation. The analysis presented here is limited to substantive provisions and the merger procedure itself is not covered by the paper. The article aims to confront the ICN Recommendations and the Polish regulations. It will identify areas of compatibility and discrepancy between the two sets of norms. The conclusions may serve as a basis for further development and the fine-tuning of the Polish merger control system. The analysis will also contribute to scholarship on the influence of transgovernmental networks on domestic legal order and the administrative practice of public authorities.

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Abstrakt
Określenie prawnego obowiązku zgłaszania koncentracji jest kluczowym elementem systemu kontroli koncentracji. Regulacja ta wskazuje jakie koncentracje podlegają obowiązkowi ich zgłoszenia do organu antymonopolowego oraz na jakim przedsiębiorcy ten obowiązek spoczywa. Międzynarodowa Sieć Konkurencji (ICN) stanowiąca wirtualną sieć organów konkurencji stworzyła serię wytycznych w jaki sposób należy konstruować obowiązek zgłoszenia koncentracji w prawie krajowym. Przedmiotem analizy są jedynie regulacje materialnoprawne, zaś regulacje procesowe pozostają poza przedmiotem analizy. Celem artykułu jest porównanie wytycznych ICN z przepisami polskimi. Zidentyfikowane zostaną pola spójności i rozbieżności pomiędzy regulacjami polskimi i wytycznymi ICN.

Wyniki przeprowadzonych badań mogą stanowić dobrą podstawę do dalszego rozwoju i doskonalenia polskiego systemu kontroli koncentracji. Przeprowadzona analiza wzbogaci również dotychczasowe badania dotyczące wpływu ponadnarodowych sieci organów administracji na krajowy porządek prawny i praktykę organów administracji publicznej.

Introduction

Merger control aims to prevent anticompetitive concentrations from adversely affecting market structure and harm consumers. It is neither possible nor justifiable to review all mergers. Therefore, when introducing the merger control regime, legislators around the world limit the scope of the antimonopoly review to only potentially problematic transactions. A properly designed merger obligation will prevent competition authorities from scrutinising trivial transactions and allow them to concentrate their scarce resources on reviewing exclusively potentially problematic mergers. The substantive scope of merger review is of crucial importance to undertakings, because it may limit or increase transaction costs exponentially. The problem became more evident together with proliferation of merger control regimes, which resulted in the obligation to notify the same transaction in multiple jurisdictions[2]. It should not be surprising that transgovernmental networks of competition authorities began to analyse this problem and to address it by adopting recommendations and other soft law

2 The first comprehensive report capturing this phenomenon was published by the OECD. See D. Wood, R. Whish, *Merger cases in the real world. A study of merger control procedures*, Paris 1994.

documents concerning the proper regulation of the merger control system, and the growing need for international convergence in this area of antitrust.

The aim of this article is to confront recommendations on merger notification obligations issued by the largest network of competition authorities, i.e. the International Competition Network (ICN), with the relevant Polish provisions. The effect of this confrontation will show the possible impact on the domestic legal order of the soft law adopted by transgovernmental networks. In addition, the results will be relevant for discussions on how networks can ensure that their members comply with the soft law rule they together approved. The analysis provided in the article is limited to substantive issues. Procedural issues are also relevant, but it would require extensive additional research and it would be hardly possible to present them within one article[3]. The article is structured as follows: first, the ICN will be introduced together with a brief presentation of the ICN recommendations on the merger notification obligation. It will be followed by a concise description of the Polish merger control system and its main developments in relation to the merger notification obligation. Subsequent sections offer a detailed analysis of the Polish merger notification obligation, including turnover criteria, substantive criteria and exemptions. The final section shows the level of compliance of Polish rules with the ICN recommendations and is followed by conclusions.

ICN Recommendations in relation to the merger notification obligation

The ICN is a virtual and informal network established on October 25, 2005 in New York by 14 high representatives of competition authorities[4]. The ICN is currently the largest network of competition authorities from all over the world and is open to any new agency that wishes to join the network[5]. The ICN has a flexible organisation and is project-oriented. It is led by the Steering Group

3 The detailed analysis of the Polish merger procedure and its comparison to internationally recognised standards is provided by M. Błachucki: M. Blachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012, pp. 114 – 127; M. Błachucki, *Postępowanie antymonopolowe w sprawach koncentracji w świetle aktów prawa wtórnego Rady Europy* [in:] *Kierunki rozwoju prawa administracyjnego,* ed. R. Stankiewicz, Warszawa 2011, pp. 9–22.

4 The origins of ICN are discussed by Y. Devellennes, G. Kiriazis, *The Creation of an International Competition Network*, 'Competition Policy Newsletter' 2002, No. 1, pp. 25–26.

5 It consists of almost 120 jurisdictions bringing together almost all functioning national competition authorities. There is only one major exception – the People's Republic of China. However, after the merger of three Chinese competition authorities into one, the likelihood of China joining the ICN has increased.

and most of the work takes place within working groups[6]. It fits the practical needs of competition agencies who want to develop their expertise in the area of competition law. The ICN is open to non-governmental advisors who participate in the work of the network. The ICN is an information network that enables its network members to share information and exchange their experience in the field of competition policy. The network is devoted exclusively to competition law and policy covering all crucial areas of antitrust, namely antitrust, unilateral conduct, merger control and institutional and policy issues of antitrust enforcement. It organises conferences, workshops and webinars as well as teleconferences depending on the needs of its members. The ICN is primarily a soft law network that has adopted numerous recommendations and best practices, as well as handbooks and manuals for the competition community[7]. Those documents are ultimately aimed at the progressive convergence of the administrative practice of national competition authorities and national competition laws. The ICN is probably the most successful network of competition authorities and constitutes the best solution for the development of international antitrust rules and cooperation in the absence of any likelihood of adopting an international antitrust treaty[8].

There are three soft law documents of ICN related to the construction of the merger notification obligation: 1) ICN Guiding Principles for Merger Notification and Review[9], 2) ICN Recommended Practices for Merger Analysis[10], and 3) ICN Recommended Practices for Merger Notification and Review Procedures[11]. Those documents are of a different character and length, but they are all relevant for the analysis of the subject. The second and the third documents are accompanied by comments prepared by the ICN Merger Working Group. Those

6 At present there are five ICN working groups: Advocacy, Agency Effectiveness, Cartel, Merger and Unilateral Conduct.

7 The list of the ICN's soft law documents may be found in *ICN Work Products Catalogue (June 2016)*, http://www.internationalcompetitionnetwork.org/uploads/library/doc1002.pdf (accessed 15/08/18) and *Summary of ICN Work Product 2016–2017*, http://www.internationalcompetitionnetwork.org/uploads/library/doc1100.pdf (accessed 15/08/18).

8 For more analysis on the ICN please refer to *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, ed. P. Lugard, Cambridge–Antwerp–Portland 2011. In Polish literature, the ICN is discussed by B. Michalski, *Międzynarodowa koordynacja polityki konkurencji,* Warszawa 2009, pp. 201–230; R. Molski, *Prawo antymonopolowe w obliczu globalizacji*, Bydgoszcz–Szczecin 2007, pp. 72–74; M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012, pp. 81–82.

9 http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf (accessed 01/08/2018).

10 http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (accessed 01/08/2018).

11 http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf (accessed 01/08/2018).

comments are updated periodically and offer more detailed analysis of particular standards.

The first document has been historically the first and the most general document in the area of merger control. The ICN Guiding Principles for Merger Notification and Review is a short set of basic and fundamental guidelines for the merger review system. The document expresses the most important principle – sovereignty of all jurisdictions. This principle means that all countries are free to choose the most appropriate merger control rules for them. However, when choosing the merger rules for a particular jurisdiction, the public authorities should follow the third guiding principle – non-discrimination on the basis of nationality. Finally the seventh guiding principle calls upon jurisdiction to seek the convergence of merger review processes toward agreed best practices.

The second document is devoted to a substantive analysis of notified mergers. However, one of the agreed standards may be also applicable to merger notification obligation. The principle I.B recommends that 'a jurisdiction's merger review law and policy should provide a comprehensive framework for effectively addressing mergers that are likely to harm competition significantly'. Comments made by the ICN Merger Working Group underline that merger control rules should be flexible and enable competition authorities to capture and review all problematic merges. Therefore, merger rules should be broad enough to cover potentially anticompetitive transactions, regardless of how the transaction is structured. As a result, the power to review a merger should not be based on the form or technicalities of a merger agreement. Finally, any exceptions to the merger notification obligation should be avoided or limited and narrowly drawn, clearly delineated, and reviewed periodically.

The ICN Recommended Practices for Merger Notification and Review Procedures is the most comprehensive soft law document adopted by the ICN relating to merger control obligation and merger procedure. First it recommends how the concertation for the purpose of merger control should be defined. Jurisdictions should be careful with this definition and make sure it covers 'transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure' (I.A[12]). Furthermore, national legislators should clearly define 'concentrations'. The recommended method is by preparing a list of 'categories of transactions, such as share acquisitions and acquisitions of assets', together with defining crucial concepts, 'such as the acquisition of «control» or of a «competitively significant influence», as defined by the reviewing jurisdiction' (I.B). Secondly, the ICN recommends that national legislators limit the obligation to notify mergers only to those

12 The numbers in brackets indicate the number of specific recommendation from the ICN document.

'transactions that have a material nexus to the reviewing jurisdiction' (II.A). In order to establish an adequate material nexus, it should be based on *appropriate standards* (II.B). Furthermore the nexus of the concentration should only be related to 'activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory, and/or by reference to the activities of the acquired business in the jurisdiction' (III.C). The third set of recommendations underline general legislative principles. It is crucial that 'notification thresholds should be clear and understandable' (II.D). Furthermore, should the national legislator choose the mandatory notification system, 'thresholds should be based on objectively quantifiable criteria' (II.E). Some of recommendations echo the previously mentioned principles such as the need to 'periodically review their merger control provisions to seek continual improvement' (XIII.A) and the need to promote the convergence of national merger control provisions towards recognised best practices (XIII.B).

This brief recapitulation of the ICN recommendations on the merger notification obligation shows that the ICN tries to achieve a coherent level playing field for merger control systems around the world. The network promotes clear and objective rules for the construction of the notification obligation in order to facilitate their application and eliminate jurisdictional problems. The inevitable consequence of applying the ICN recommendations is a significant reduction in the number of notifications. It is also clear that the ICN is trying to limit the merger control system to purely competition-related principles, which leaves any non-competition-related values out of the picture. Such an ambitious goal will not always fit into the national legislators' agenda. Furthermore, in spite of the ICN's absolutist approach to merger control, in the real life merger control systems often serve not only competition-related goals. Therefore, some inconsistencies between ICN recommendations and national provisions should be expected in all jurisdictions.

Merger control in Poland – overview of the system

The merger control system in Poland is based on the Antimonopoly Act[13] and two implementing regulations[14]. Furthermore, there are two sets of guidelines issued by the Polish competition authority: one devoted to jurisdictional and

13 The Act on Competition and Consumer Protection of February 16, 2007, Dz. U. 2018, item 798.

14 Regulation of the Council of Ministers of December 23, 2014 on the notification of intended concentration of undertakings, Dz. U. 2018, item 367 and Regulation of the Council of Ministers of December 23, 2014 on the calculation of the turnover of undertakings participating in the concentration, Dz. U. 2015, item 79.

procedural aspects of merger control,[15] and the other one dealing with substantive merger analysis.[16] The case law of Polish courts in relation to merger control is very scarce and offers very little if any real guidance. Therefore, the crucial role in the development of the Polish merger control system lies in the hands of the Polish antimonopoly authority, which is solely responsible for merger control in Poland[17]. The President of the Office for the Competition and Consumer Protection (OCCP) is the antimonopoly authority in Poland. The antimonopoly authority is a central public administration authority that has two main domains of activity: first, 'traditional' antitrust matters connected with the protection of competition (in the public interest), and the second one connected with the protection of consumer interests. The antimonopoly authority in Poland is not independent and the President of the OCCP has no fixed term of office and may be dismissed at any time and for any reason by the Prime Minister. The OCCP has exclusive jurisdictional powers and relies completely on an inquisitorial system of proceedings. The authority initiates, investigates and decides on merger cases. The OCCP has powers to clear a merger, order remedies or prohibit a transaction. Appeals against the rulings of the antimonopoly authority are heard by the antimonopoly court[18]. Administrative courts play only a subsidiary role in antimonopoly adjudications. The OCCP is composed of the central office in Warsaw, and nine regional offices. The central office consists of 21 divisions and one of them is the Department of Concentration Control. This department deals exclusively with merger control and the regional offices play no role in merger control in Poland. This brief introduction shows that merger control in Poland is based on a centralised and inquisitorial system, with the antimonopoly authority playing a pivotal role. The basic weaknesses of Polish public enforcement of competition law are the wide jurisdictional portfolio of the OCCP, which has an adverse effect on the competition enforcement ratio, along with the weak position of the antimonopoly authority in the Polish public administration system[19].

15 Office for Competition and Consumer Protection – Guidelines on the criteria and procedure of notifying the intention of concentration to the President of the OCCP, available in Polish at http://uokik.gov.pl/wyjasnienia_i_wytyczne.php.

16 Office for Competition and Consumer Protection – Clarifications concerning the assessment by the President of the OCCP of the notified concentrations, available in Polish at http://uokik.gov.pl/wyjasnienia_i_wytyczne.php.

17 There are sectoral regulators (for example, the Office for Electronic Communications, the Financial Supervisory Authority and National Council for Radiophone and Television) that may review mergers in parallel to the competition authority but their review is limited exclusively to regulatory issues.

18 The official name of the antimonopoly court is the Court for Competition and Consumer Protection.

19 For a general overview of Polish competition law, please refer to M. Błachucki, *Polish Competition Law – Commentary, Case law and Texts*, Warsaw 2013.

To supplement this overview of the institutional and procedural aspects of merger control in Poland, a concise picture of substantive merger control provisions will be presented. Under Polish law, the notification obligation is based on two sets of criteria. First, it is the type of transaction. Second, the turnover generated by the parties to the concentration and their capital groups. Both sets of criteria must be fulfilled in order to establish an obligation to notify the transition to the President of the OCCP. The Polish antimonopoly law does not introduce a definition of a concentration, but indicates what kinds of transactions are considered to be concentrations. The Polish system of merger control is based on the compulsory notification of all transactions meeting the notification criteria. Mergers are reviewed through the prism of a significant impediment to effective competition (SIEC) test. The supplementary test is the public interest test. Jurisdictional issues will be further discussed in detail, but first historical developments will be discussed. Such an analysis will show what drove those normative changes, and whether the ICN recommendations have been identified as a source of any legislative amendments.

Merger obligation – history of Polish regulation

The merger control system has been functioning in Poland since 1990. It was introduced by the first modern Antimonopoly Act of 1990[20]. At first, undertakings were obliged to notify an intention to merge or transform in order to establish a new company whenever the new undertaking gained a dominant position, or if one of the parties to the concentration already enjoyed a dominant position. There were no turnover criteria. The antimonopoly authority had two months to take a decision. A merger, acquisition or establishment of a new undertaking could be implemented if the antimonopoly authority did not oppose it. A significant amendment took place in 1995[21]. The most important change concerned the introduction of turnover criteria[22]. Three new types of concentrations became notifiable – the acquisition of assets, the acquisition of minority shareholdings[23] and the same person assuming the function of a director, deputy director,

20 Act on Counteracting Monopolistic Practices of February 24, 1990, Dz. U. 1990, No. 14, item 88.

21 Act of February 3, 1995 amending the Act on Counteracting Monopolistic Practices, Dz. U. 1995, No. 41, item 208.

22 It was a combined turnover of ECU 5 mln or ECU 2 mln depending on the type of concentration, irrespective of where it was achieved. In bank merger cases, the turnover criterion was set at ECU 50 mln.

23 Any acquisition or subsequent acquisitions of 10%, 25%, 33% and 50% were notifiable.

member of the managing or controlling body, member of revision commission or position of head accountant of competing undertakings. Those changes have been justified by the need to modernise the Polish merger control system and made it more effective and to harmonise Polish competition rules with EC standards[24]. In practice, the notification obligation was widened way beyond any reason, which resulted in a geometric increase in the number of notifications. The most significant part of notifications concerned the privatisation of previously state-owned companies[25]. The subsequent amendment resulted from the Act of October 22, 1998 amending the Act on Monopolistic Practices[26]. The amendment aimed to speed up the merger control process by excluding from the notification obligation all mergers of undertakings when their combined turnover did not exceed ECU 25 million. Notification was not mandatory in the event that the entity acquiring shares in another undertaking resulting in achieving less than 10% of votes at a general assembly or assembly of partners.

Since the adoption of the act of 1990, the economic and political situation of Poland has substantially changed. Hence a new Antimonopoly Act was adopted in 2000[27]. The establishment of a free-market economy and the accession to the European Union shortly after created an impulse for the adoption of a new antimonopoly act. There were several reasons for this act: 1) the significant transformation of the Polish economy; 2) the rearrangement of Polish legislation after the adoption of the Constitution in 1997[28]; 3) the need for an effective legal instrument of competition protection; 4) the harmonisation of Polish law with EC standards[29]. The Antimonopoly Act of 2000 substantially amended the merger control system. The combined turnover was increased up to EUR 50 mln, irrespective of where it was achieved. The act of 2000 limited the types of transactions when notification was necessary, i.e. in cases of mergers, acquisitions and joint-ventures. In addition, notification was also compulsory in situations of quasi-concentrations as follows: 1) taking over or acquiring shares in another undertaking resulting in achieving at least 25% of votes at a general assembly or assembly of partners; 2) the same person assuming the function of

24 I.B. Nestoruk, *Kontrola koncentracji w prawie antymonopolowym – obowiązek zgłoszenia zamiaru koncentracji*, 'Przegląd Ustawodawstwa Gospodarczego' 2008, No. 9, pp. 15–16.

25 P. Lissoń, *Kontrola koncentracji gospodarczej w procesach komercjalizacji i prywatyzacji przedsiębiorstw państwowych*, 'Ruch Prawniczy, Ekonomiczny i Socjologiczny' 1998, Issue 2, pp. 59–62.

26 Dz. U. 1998, No. 154, item 938.

27 The Act on Competition and Consumer Protection of December 15, 2000, Dz. U. 2000, No. 122, item 1319.

28 Constitution of the Republic of Poland of April 2, 1997, Dz. U. 1997, No. 78, item 483 with further amendments.

29 T. Niedziński, R. Stankiewicz, *Kontrola koncentracji przedsiębiorców w ustawie o ochronie konkurencji i konsumentów z 15 grudnia 2000 r.*, 'Radca Prawny' 2003, No. 5, p. 77.

a member of the managing or controlling body of the competing undertakings; 3) initiating to exercise the rights arising from the shares taken over or acquired without prior notification.

The act of 2000 established several exemptions from the obligation to notify the concentration. Firstly, concentrations of insignificant market relevance were exempted. This lack of relevance was identified in cases, where: 1) the turnover of the acquired undertaking did not exceed the equivalent of EUR 10 million in the Republic of Poland, during either of the two accounting years preceding the notification; 2) the combined market share of the undertakings intending to concentrate does not exceed 20%; 3) a financial institution acquires shares on a temporary basis with a view to reselling them. The first exemption was perceived well, although it was hard to find a rational explanation why it is limited to certain types of concentration[30]. The turnover threshold of EUR 10 million was regarded as set at the optimum in the reality of the Polish economy. Nevertheless, a 20% market share in the second exemption was criticised as set at too high a level[31]. Apart from the mentioned exemptions, there were also three more, though of less practical importance. Merger exemptions were amended once in 2004[32]. First, the 20% market share exemption has been repealed. Second, the general rule was introduced according to which no merger exemptions were applicable provided that that concentration leads to creating or strengthening a dominant position.

In 2007, the present Antimonopoly Act was adopted. The official justification for passing a completely new competition act was rather limited and weak. It was argued that the new Antimonopoly Act is an answer to changing market conditions and codifies the administrative practice of the Polish competition authority and judicial developments. The major change concerned the turnover criteria[33]. The act of 2007 kept most of the transactions as types of concentrations and it limited the number of exemptions. Together with the introduction of the new Antimonopoly Act, minority shareholding and interlocking directorates were exempted from the notification obligation. They are no longer regarded as forms of concentrations. The change was made in order to reduce the number of merger notifications and to reduce the transaction costs of undertakings. Those types of concentrations presented 10% to 15% of all merger cases

30 Not covering minority shareholding or interlocking directorates which were also notifiable at that time.

31 J. Olszewski, *Nowa ustawa o ochronie konkurencji i konsumentów* cz. II, 'Monitor Prawniczy' 2001, No. 15, p. 776.

32 Act of April 16, 2004 amending the Act on Competition and Consumer Protection and other acts, Dz. U. 2004, No 41, item 208.

33 Combined domestic turnover of EUR 50 mln and worldwide turnover of EUR 1 000 mln.

notified to the antimonopoly authority in the period of 2000–2007. The obligation to notify the acquisition of minority shares was perceived as an unnecessary burden on undertakings. Several undertakings were fined for a failure to notify those types of transactions. Furthermore, the previous experience of the antimonopoly authority with controlling minority shareholdings proved that those transactions were unproblematic. They are no longer treated as mergers since they fall outside the list of merger notifiable transactions[34]. Generally, the current Antimonopoly Act slightly limited and rationalised the notification obligation.

The current Antimonopoly Act was amended in 2014[35]. The new rules limit the scope of jurisdiction of the authority by clarifying that all types of transactions where the target company or acquired assets do not exceed EUR 10 mln of turnover generated in Poland are exempted from the notification obligation. The jurisdiction of the OCCP has been extended in order to capture what are known as staggered transactions[36]. Those provisions were based on relevant EU competition rules[37]. Under the previous regulations, it was not clear whether such transactions were notifiable. The OCCP ruled in several decisions that parties are obliged to notify such transactions[38]. However, the antimonopoly court took the opposite opinion[39]. Under the new rules, all transactions that take place within two years between the same individuals or undertakings consisting of an acquisition of undertakings or assets belonging to the same capital group must be notified as one concentration. This attempt to capture staggered transactions aims to preventing undertakings from avoiding merger scrutiny by artificially dividing one transaction into several concentrations. The overall evaluation of the amendment is positive, though there are still some concerns regarding the wording of the new provisions[40].

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34 Under the current regime, minority shareholding and interlocking directorates may be only reviewed under the antitrust rules. So far there have not been any cases of this type settled by the Polish competition authority.

35 Act of June 10, 2014 on amending the Act on Competition and Consumer Protection and the Code of Civil Procedure, Dz. U. 2014, item 945.

36 N. Levy, *European Merger Control. A Guide to the Merger Regulation*, vol. 1, Newark 2007, p. 5.

37 A. Bielecki, *Koncentracje podzielone lub krocz*ą*ce w unijnym systemie kontroli koncentracji przedsiębiorstw,* 'internetowy Kwartalnik Antymonopolowy i Regulacyjny' 2018, No. 3(7), pp. 24–25.

38 Decisions of the OCCP of February 11, 2004, No. RPZ-2/2004, nyr and of February 11, 2004, No. RWR 7/2004, nyr.

39 Judgments of the Court for Competition and Consumer Protection of March 21, 2005, XVII Ama 29/04, nyr and of October 5, 2005, XVII Ama 38/04, nyr and judgment of the Court of Appeals of April 28, 2008, VI ACa 1288/07, nyr.

40 M. Błachucki, *Latest Revision of Polish Competition Law*, 'Österreichische Zeitschrift für Kartellrecht' 2015, No. 1, pp. 25–26.

Merger obligation – turnover thresholds

The general and historical sections showed that the basic criteria in the Polish merger control system are the turnover ones. These criteria are objective in nature – the calculation of turnover is specified in the implementing regulation mentioned earlier. It should be noted, however, that the turnover calculated for the purpose of these criteria include the turnover of all undertakings engaged in concentration, as well as any other undertakings in the capital groups to which the undertakings directly taking part in the concentration belong. Pursuant to Article 13 (1) of the Antimonopoly Act, a concentration is subject to notification if:

1. the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1,000,000,000, or
2. the combined turnover of undertakings participating in the concentration in the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50,000,000.

Both criteria are independent of each other and the transaction may fulfil just one of them. It is worth underlining that the transaction does not have to take place in Poland in order to require notification, as long as the worldwide turnover criterion is met. It results in a situation where purely extraterritorial transactions fall under the Polish merger notification obligation. This usually takes place in cases of foreign joint ventures that are being established far away from Poland, for example in the People's Republic of China.

However, one evident problem is that the turnover values were set in 2000 and have not been changed since[41]. The present value of turnover for the purpose of establishing the notification obligation may not be fully adequate for the proper functioning of the Polish merger control system. The arbitrary value of EUR 1 000 mln for worldwide turnover may seem adjusted to transnational transactions, but the Polish competition authority has never supplied any data on how this value was calculated, and why it has not been changed. Furthermore, the last two decades of EUR 50 mln value domestic turnover has proved to have become too high for certain transactions of a purely local nature. There were several local mergers that escaped the scrutiny of the Polish competition authority due to not meeting the domestic turnover criterion, even though they seemed problematic[42]. This suggests that a significant reform of turnover criteria is highly desired.

41 In 2007, the worldwide criterion of EUR 1 000 mln has been introduced.

42 The best example of this would be the merger between the Polish subsidiaries of Wolters Kluwer and LexisNexis, which resulted in the creation a dominant position of Wolt-

Merger obligation – substantive thresholds

The second part of the merger notification obligation concerns the type of transactions regarded as concentrations. Unlike in EU law, the Polish Antimonopoly Act has not introduced the definition of a concentration. This absence of a general definition results in a situation that even temporary market structures need to be notified. Nowhere in the Polish competition act is there any indication that the concentration ought to be created on a long-lasting basis[43]. This leads to a situation that even consortia that are set up to develop one-off projects need to be notified if they meet transaction-type criteria[44]. Pursuant to Art. 13 (2) of the Antimonopoly Act, notifiable concentrations covered by the antimonopoly act are as follows:

1. a merger of two or more independent undertakings;
2. a takeover – by way of acquisition or entering into possession of shares or other securities, or in any other way taking direct or indirect control over one or more undertakings by one or more undertakings;
3. the creation by undertakings of one joint undertaking;
4. the acquisition by the undertaking of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded the equivalent of EUR 10,000,000 in the Republic of Poland.

The list of notifiable merger transactions is exclusive and of a jurisdictional nature, and under the merger control rules the President of the OCCP may not investigate transactions that are not listed in the Antimonopoly Act.

The first type of transaction is not problematic. Two or more previously independent undertakings merge into one legal entity combining all their assets.[45] The second type of transaction may be more burdensome. A takeover takes place whenever one undertaking acquires exclusive or shared control over other independent undertaking(s). The crucial concept here is 'taking over control'. It is defined in Art. 4 (4) of the Antimonopoly Act. According to this provision, 'taking over control' means any form of direct or indirect acquisition of powers by an undertaking, allowing the undertaking, to exert, individually or jointly, taking into account all legal or factual circumstances, a decisive influence

ers Kluwer on the national market for legal databases. The OCCP initiated explanatory proceedings but found no grounds to conclude that the lack of notification constituted a violation of the notification obligation (Case No DKK2–404/5/14).

43 Judgment of the Court of Appeals of October 13, 2011, VI ACa 381/11, nyr.

44 A good example is the case where two construction companies established a consortium to build a train station (Decision of the OCCP of October 4, 2012, No. DKK 105/2012).

45 S. Gronowski, *Polskie prawo antymonopolowe (zarys wykładu)*, Warsaw 1998, p. 319.

upon another undertaking or other undertakings. Such powers follow in particular from:

a) holding, directly or indirectly, a majority of votes in the meeting of company members or a general shareholders' meeting, also in the capacity of a pledgee or user, or in the management board of another undertaking (dependent undertaking), including based on agreements with other persons,
b) the right to appoint or recall a majority of the members of the management board or supervisory board of another undertaking (dependent undertaking), including based on agreements with other persons,
c) members of the undertaking's management board or supervisory board constituting more than half of the members of another undertaking's (dependent undertaking's) management board,
d) holding directly or indirectly a majority of votes in a dependent partnership or in the general meeting of a dependent cooperative, including based on agreements with other persons,
e) holding a title to all or part of the property of another undertaking (dependent undertaking),
f) a contract that envisages managing another undertaking (dependent undertaking), or that undertaking transferring its profits.

The analysed notion of 'control' is quite broad, in order to include any form of decisive influence over another undertaking based on *de iure* or *de facto* actions.

In practice, the most problematic in interpretation are cases concerning the acquisition of assets, and especially the core concept of 'assets'. For the purposes of provisions on merger control, assets should be understood as all or part of an enterprise of another undertaking. Pursuant to Article 55 (1) of the Civil Code, the enterprise is an organised group of intangible and tangible components intended for pursuing economic activity, including in particular:

a) a designation individualising the enterprise or its separate parts (name of the enterprise),
b) the ownership of immovable or movable property, including equipment, materials, goods and products and any other material rights to immovable property or movable property,
c) rights resulting from lease and rent agreements for immovable or movable property and the right to use immovable or movable property resulting from other legal relations,
d) claims, rights in securities and cash,
e) concessions, licences and permits,
f) patents and other industrial property rights,

g) copyrights and related property rights,
h) trade secrets,
i) books and documents relating to the economic activity[46].

In a recent decision, the Polish antimonopoly authority found that, undertakings entering in a long-term lease agreement regarding a petrol station is treated as an acquisition of assets[47]. This interpretation was supported by the courts[48]. Similarly, the two-year lease agreement of a chicken farm has been treated as a notifiable merger[49].

The creation of a joint venture is the last of the statutory examples of notifiable merger transactions and it is one of the most common, apart from the acquisition of control, forms of concentration reviewed by the President of the OCCP. The establishment of a joint undertaking usually takes place through the establishment of commercial companies (limited liability company, joint stock company, general partnership, limited partnership and limited joint-stock partnership) and cooperatives. However, it is not required to notify the President of the OCCP about undertakings establishing a civil partnership[50]. It should be stressed that the obligation to notify the intention to concentrate consisting in the establishment of the joint undertaking by undertakings arises only in the event when more than one undertaking participates in establishing a joint undertaking. Thus, such an obligation does not arise in the situation of establishing a joint undertaking by just one undertaking, or in the event of establishing a joint undertaking by one undertaking and one or more entities not being undertakings. In order for such a concentration to be subject to the notification to the President of the OCCP, the process of establishing the joint undertaking should therefore involve at least two undertakings[51].

Under Polish law, all kinds of joint venture are notifiable irrespective of their concentrative or cooperative character[52]. Furthermore, the Polish antimonopoly law does not distinguish between joint ventures aimed at long-lasting performance of commercial activity and joint ventures created on a temporary basis. However, the notification obligation may be established only if an

46 Office for Competition and Consumers Protection – Guidelines on the criteria and procedure of notifying the intention of concentration to the President of the OCCP, point 2.5.

47 Decision of the OCCP of December 31, 2014, No. DKK 173/2014, nyr.

48 The judgment of the Court for Competition and Consumer Protection of March 7, 2016 (XVII AmA 14/15), nyr and the judgment of the Court of Appeals of October 2, 2017 (VI ACa 715/16), nyr.

49 Decision of the OCCP of September 19, 2017, No. DKK 145/2017, nyr.

50 Office for Competition and Consumers Protection – Guidelines on the criteria and procedure of notifying the intention of concentration to the President of the OCCP, point 2.4.

51 Ibid.

52 R. Stankiewicz, *Joint ventures w prawie antymonopolowym*, 'Przegląd Prawa Handlowego' 2007, No. 8, pp. 15–17.

independent undertaking is created. If the joint venture consists purely of the exchange of knowledge or commercial activities without establishing a separate undertaking structure it is not regarded as a merger. The antimonopoly act does not provide for specific requirements in relation to the joint undertaking (contrary to EU regulation 139/2004, where it is required from the joint undertaking to perform the functions of an autonomous economic entity on a permanent basis). The establishment of a joint undertaking that will not perform all the functions of an autonomous undertaking on a permanent basis (e.g. products manufactured by the joint undertaking will be supplied exclusively or primarily to founding undertakings or capital groups to which founders belong), should also be notified to the President of the OCCP[53].

Last but not least, it should be mentioned that the Polish competition authority treats transactions as joint ventures when, in order to create a joint undertaking, one of participants establishes a new company and then the other participants purchase or take up its shares. Moreover, the OCCP treats transactions the same way when, in order to establish the joint undertaking, participants of a concentration use an existing undertaking. In practice, it is very difficult to distinguish between the creation of a joint venture on the basis of an existing undertaking and the acquisition of joint control over an undertaking[54]. The source of the problem is that there are different rules on the calculation of the turnover depending on the type of transaction. When establishing a joint venture, the combined turnover of all capital groups that create the joint venture is included, but when it is an acquisition of joint control it is the turnover of the active capital group and the turnover of the acquired company (not the entire capital group to which it belongs) that is included. It results in a situation when, depending on the interpretation of the particular transaction, the obligation to notify the merger may arise or not. This creates significant legal uncertainty for undertakings.

Merger obligation – exemptions

Notification criteria are based on formal premises and derived from substantive factors. Therefore there is a need to relax these formal premises by introducing exemptions. Those exemptions aim to eliminate from scrutiny any transactions

53 Office for Competition and Consumer Protection – Guidelines on the criteria and procedure of notifying the intention of concentration to the President of the OCCP, point 2.4.

54 J. Lenart, T. Kaczyńska, *Kiedy utworzenie nowej spółki nie będzie kwalifikowane jako utworzenie nowego przedsiębiorcy (joint venture)? Praktyczne rozważania dotyczące problematyki joint venture w polskim prawie konkurencji*, 'internetowy Kwartalnik Antymonopolowy i Regulacyjny' 2016, No. 1 (5), pp. 43–16.

that are insignificant or, by their nature it is unlikely that they may cause any competitive problems. Article 14 of the Antimonopoly Act indicates that the obligation to notify the intention to concentrate does not apply where:

1. the turnover of the undertaking over which control is to be taken in accordance with Article 13 (2) did not exceed the equivalent of EUR 10,000,000 in the Republic of Poland in any of the two financial years preceding the notification;
2. a financial institution whose normal activities include investing in shares in other undertakings, for its own account or for the account of others, which acquires or takes over shares, on a temporary basis, with a view to reselling them, provided that the resale takes place within one year from the date of the acquisition or take over, and that:
   a) this institution does not exercise the rights arising from these shares, except for the right to a dividend, or
   b) exercises these rights solely in order to prepare for the resale of the entirety or part of the undertaking, its assets, or these shares;
3. the undertaking acquires or takes over shares, on a temporary basis, with a view to securing debts, provided that the undertaking does not exercise the rights arising from these shares, except for the right to sell;
4. the concentration arises as an effect of insolvency proceedings, excluding the cases where the control is to be taken over by a competitor or a participant of the capital group to which the competitors of the target undertaking belong;
5. the concentration applies to undertakings participating in the same capital group.

All the exceptions are of an absolute character. If a transaction fulfils any of premises set out in Article 14, it is exempted from the scrutiny of the antimonopoly authority, even if it is or may be anticompetitive. The most important is the first exemption. Together with special rules on calculating the turnover, it constitutes the most frequent situation when undertakings are exempted from the obligation to notify the merger. When interpreting the fourth exemption, it should be remembered that it applies only to insolvency proceedings taking place in Poland and conducted according to Polish provisions. Interestingly, the competitors are excluded from enjoying this exemption. It is also worth noting that all types of transactions are covered by this exemption[55].

55 Under the previous rules, the acquisition of assets were not covered by this exemption. A. Adamczyk, *Obowiązek zgłoszenia do UOKiK zamiaru koncentracji w postępowaniu upadłościowym*, 'Przegląd Prawa Handlowego' 2010, No. 5, p. 24.

Compatibility and discrepancy between the ICN Recommendations and the Polish regulation

An analysis of Polish provisions on the merger notification obligation through the prism of the ICN recommendations shows that they are compatible only to a certain extent. Polish provisions are surely an expression of the sovereignty of Polish legislator, who constructs the merger notification autonomously and so the scope of the obligation differs (to some extent) from other jurisdictions (including EU competition rules). Similarly, Polish provisions provide for a very wide scope of the merger notification obligation. As a result, the Antimonopoly Act provides for a very wide scope of merger notification obligation. It applies to a variety of transactions, including extraterritorial ones. Merger thresholds are objective, i.e. turnover and type of transaction. The previously applicable dominance threshold has been eliminated in the current Antimonopoly Act. The calculation of turnover has improved immensely through the years. In particular, it is clear now that in the case of acquiring assets or taking over another undertaking, the turnover of the selling group that is not being transferred to the acquiring party is not to be considered when applying the merger notification thresholds. The exhaustive list of notifiable transactions includes only typical transactions and quasi-concentrations, such as the acquisition of minority shareholdings or interlocking directorates, are no longer covered by the merger notification obligation. Furthermore, the list of exemptions properly excludes from the merger scrutiny those transactions that are likely to be unproblematic, like internal group restructuring. To improve the clarity and general understanding of the merger notification obligation provisions, and to increase legal certainty of undertakings, the OCCP has adopted jurisdictional, procedural and analytical guidelines. In principle, it is a good practice recommended by the ICN, the other issue is the quality of these guidelines.

The core regulation of the merger notification obligation is in line with ICN recommendations, but there are also visible discrepancies between the Polish provisions and the ICN recommendations. First some general observations will be presented. There is no doubt that Polish provisions are far from being clear and precise[56]. That deprives undertakings on many occasions from legal certainty when planning their transactions. What is even more troublesome is that the lack of legal certainty is often a result of guidelines prepared by the OCCP, and not the Antimonopoly Act itself. Furthermore, the merger thresholds do not

56 R. Stankiewicz, *Dysfunkcjonalność niektórych norm prawa antymonopolowego przewidujących obowiązek zgłoszenia zamiaru koncentracji przedsiębiorców (uwagi na tle prawa unijnego)* [in:] *Dysfunkcje publicznego prawa gospodarczego,* eds. M. Zdyb, E. Kruk, G. Lubeńczuk, Warszawa 2018, p. 274.

go through any sort of periodical review and adjustment to a changing economic environment[57]. The turnover thresholds have not been updated for almost two decades. During this period, the Antimonopoly Act has been amended on several occasions, and some of those changes concerned merger control provisions. This clearly proves that neither the OCCP nor the Polish legislator express any willingness to analyse the adequacy of turnover thresholds or the proper design of the concentration definition, together with the types of notifiable transactions. This highlights the problem of improperly designed turnover thresholds.

At present, many transactions do not have any material nexus to the Polish jurisdiction. This is due to the existence of the worldwide turnover criterion. This turnover concerns mostly sales generated outside of Poland, and has no relevance to the situation on the Polish market. It is unclear why this threshold was introduced, or why it is still in force. At the same time, some transactions escape the scrutiny of the Polish competition authority because the domestic thresholds are set at too high a level. There is also a significant problem resulting from the lack of any definition of concentration. Hence there is an absence of requirement that concentrations should result in a durable combination of previously independent entities or assets. As a result, many temporary transactions are covered by the obligation to notify. Furthermore, even though the list of types of notifiable transactions provided by the Antimonopoly Act clearly identifies what are the types of notifiable agreements, the official interpretation offered by the OCCP leads to significant problems in identifying types of transactions and creates a dilemma as to whether they are notifiable or not. At the same time, the jurisdictional guidelines were updated only once, when significant changes to the merger procedure were implemented. Finally, the OCCP has failed to regularly update the guidelines, despite the many developments that have taken place since they were adopted i.e. 2009, which are not included in the guidelines. Such an update would be required in relation to the most confusing types of mergers, i.e. the acquisition of assets and joint ventures.

The identified areas of discrepancies should be a starting point for a discussion on future amendments to the Polish merger control system. Such discussions should be as comprehensive as possible and include not only the ICN recommendations, but OECD recommendations as well, together with views of Polish academics, practitioners and undertakings. The ICN recommendations constitute a proposal for a change and the OCCP should thoroughly analyse them before presenting well-reasoned proposals. Ignoring the ICN or OECD proposals, not to mention opinions from Polish academics and practitioners, is a long and controversial practice of the Polish competition authority and the

[57] S. Dudzik, *Kontrola koncentracji w świetle ostatnich zmian ustawowych*, 'internetowy Kwartalnik Antymonopolowy i Regulacyjny' 2015, No. 2(4), pp. 40–41.

Polish legislator (which was shown in the historical section). Such conclusions should not be understood as full support for complete compliance of the Polish merger control provisions with the ICN recommendations[58]. I argue for making a conscious decision by the Polish legislator on the future amendment of the Polish merger control system and taking into consideration all possible experience and opinions.

ICN dilemma – How to make recommendations effective?

The ICN is a virtual and informal transgovernmental network of competition authorities. It is an information network that primarily relies on soft law documents adopted by the ICN. However, the visible and impressive achievements of the ICN in the area of adopting recommendations and best practices are mirrored by equally visible inconsistencies between the ICN recommendations and national merger provisions of its members. Studies have been undertaken exploring reasons explaining why network members decide not to follow network recommendations[59]. There might be objective and subjective reasons behind these discrepancies, and some of them are independent of competition agencies involved in the works on the ICN. Even though no one expects full compliance of all jurisdictions with the ICN recommendations, the level of inconsistencies remain significant. It was supported by the ICN study on the compliance of member jurisdictions with merger recommendations[60]. The results of this study were not very optimistic. The conclusions of this study pointed out that 'a clear majority of jurisdictions have not yet made implementation a priority and it is clear that achieving implementation will be a significant challenge, notwithstanding the consensus and momentum arising from their development and adoption'[61]. The next ICN survey also identified similar inconsistencies, but it concluded that the situation has improved and that there have been

58 I believe that the OCCP should construct Polish merger control provisions so as they create an optimal scrutiny system. Particular provisions may remain contrary to the ICN recommendations. For example, I have argued elsewhere that I strongly believe the market share threshold served its purpose in the Polish merger control system and so should be reinstated. See M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warszawa 2012.

59 S.J. Evenett, A. Hijzen, *Conformity with International Recommendations on Merger Reviews. An Economic Perspective on 'Soft Law'*, 'University of Nottingham, Research Paper' 2006, No. 4, pp. 30–39.

60 J.W. Rowley QC, A.N. Campbell, *Implementation of the International Competition Network's Recommended Practices for Merger Review. Final Survey Report on Practices IV-VII*, 'World Competition' 2005, vol. 28(4), pp. 533–588.

61 Ibid., p. 559.

'a tiny fraction of agencies who have made changes that do not conform to the Recommended Practices, and no agency has engaged in reforms that change an ICN-compliant regime to a non-compliant one'[62]. Those surveys show that ICN is aware of its Achilles heel, i.e. the insufficient level of implementing the network's recommendations.

There are a number of ways in which the ICN may encourage greater convergence among its members. The ICN may call for greater involvement of non-governmental advisors who may indicate deficiencies of the national merger control systems. Furthermore, the network may engage in direct contact with particular agencies assisting them in the development of national merger control rules. The ICN may push for changes that may be directly implemented by agencies themselves without the involvement of the national legislator or government. The network may also take a step-by-step approach, meaning that it should encourage its members to comply with more general recommendations before gradually passing on to more detailed ones. Last but not least, the ICN may begin conducting peer reviews of particular countries on a voluntary basis. When advocating for a more active approach from the ICN to the implementation of the network's recommendations, one should be aware that it may adversely affect the willingness of particular jurisdictions to engage in works of the ICN. The success of the ICN lies within its informality, elasticity and the lack of enforcement powers. Therefore different levels of implementation of particular recommendations by national jurisdictions may be directly connected to the nature of this transgovernmental network.

Even though many jurisdictions have problems with the implementation of the ICN recommendations, it should not be treated as an excuse for the OCCP to ignore the network's soft law. Should the Polish antimonopoly authority decide to deviate from previously agreed best practices, such a decision ought to be made consciously and after careful consideration of international recommendations. In addition, in recent years the Polish antimonopoly authority has presented a rather passive attitude towards the ICN, which has been reflected by a low level of participation in the network's activities. Therefore, a more active approach is advisable. Officials from the OCCP should more eagerly engage in particular working groups of the ICN, which should correspond to the particular needs of the Polish competition authority. The greater involvement of the OCCP in the works of the ICN will lead to a greater chance of achieving a cognitive

62 M. Coppola, C. Lagdameo, *Taking Stock and Taking Root. A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures* [in:] *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, ed. P. Lugard, Cambridge–Antwerp–Portland 2011, p. 315.

convergence among all cooperating officials[63]. Such a cognitive convergence is often a prerequisite for the administrative convergence of practices of national competition authorities. The last stage of this convergence process is likely the harmonisation of hard law national rules. Last but not least, the greater the participation of the OCCP officials in the works of the ICN, the greater is the chance for the development of daily international administrative cooperation between national competition authorities from different jurisdictions.

Conclusions

The merger notification obligation plays a crucial role in the optimal construction of a merger control system. The ICN recommendations may serve as an important source of assistance for national authorities when designing relevant national provisions. The Polish legislator is very reluctant to admit any foreign influence over legislative changes. The only exception is the influence of the 'acquis communitaire'. The OCCP has never officially acknowledged the influence of the ICN recommendations on Polish legislation or administrative practice. This is especially surprising, given how many of the Polish competition authority's resources have been invested in the Polish competition authority participating in the network (including organising the annual conference). What is even more worrying is that the OCCP has never expressed any desire in pursuing convergence to the best practices and international standards of merger control (the OCCP similarly ignores the recommendations and conclusions from peer reviews undertaken by the OECD[64]). Despite this official denial of the ICN's influence, it is possible to speculate on the informal influence that has shaped Polish merger provisions. When analysing the history of Polish merger rules, there is a visible tendency towards greater conformity of those rules with the ICN recommendations. This tendency may suggest that participation in the work of the ICN has indeed stimulated Polish officials and resulted in altering their administrative practice, ultimately encouraging the amendment of Polish merger control provisions. On the other hand, the absence of any official recognition of external influence from the ICN may be driven by political considerations. Furthermore, there may also be a practical side to such a policy. By officially ignoring the influence of the ICN recommendations, the OCCP does not need to explain why there are so many discrepancies between them and the

63 D.K. Tarullo, *Norms and Institutions in Global Competition Policy*, 'The American Journal of International Law' 2000, vol. 94, No. 3, pp. 479, 495.

64 M. Błachucki, *The role of the OECD in development and enforcement of competition law*, 'e-Pública – Revista Eletrónica de Direito Público' 2016, vol. 3, No. 3, p. 190.

Polish provisions. This may provoke a relevant question though – why does the Polish competition authority support the adoption of recommendations by the ICN, while simultaneously refusing to follow them? The answer to this question would require more of a political analysis rather than a legal one.

It is worth emphasising that identifying possible inconsistencies between the Polish provisions and the ICN recommendations is not a purely academic exercise. It would be naïve to assume that all jurisdictions will be totally in line with international standards, since any provision must fit into the national legal system and reflect the political choice of the national sovereign. Therefore, one should not *a priori* exclude the possibility that there might be a good justification why Poland's merger provisions do not comply with international standards, though neither the OCCP nor the Polish legislator have ever presented any. What is even more important is that the identified discrepancies between the ICN recommendations and the Polish merger provisions are also indicated by Polish academics and practitioners as problematic and defective. This is a clear sign that there should be a comprehensive amendment of the merger control system in Poland. It also supports the view that international standards may be beneficial for the design of national provisions, where they are based on the shared experience of various jurisdictions from all over the world. The ICN delivers such standards, but it lacks any powers to enforce them. Nonetheless, the ICN should invest more resources in monitoring compliance with the adopted recommendations and continue to place persuasive pressure on national jurisdictions for greater convergence. The last word will still be with national legislators, who may choose to retain full sovereignty over inefficient national merger control systems, but the cost of this choice will then be incurred by undertakings and consumers.

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SUMMARY

The article presents the Polish regulation on the merger notification obligation in the context of the ICN Recommendations. The analysis is limited to substantive provisions and the merger procedure is not covered. The article aims to identify the extent to which the Polish provisions comply with internationally recognised recommendations. First it introduces the International Competition Network and its soft law documents related to the merger notification obligation. The next part describes the Polish system merger control, i.e. basic concepts and relevant historical developments. This is followed by a detailed analysis of the substantive regulation of the obligation. The article discusses turnover criteria, substantive criteria and exemptions to the notification obligation. It is then confronted with the ICN Recommendations. The comparison proves that the Polish merger obligation regulation has developed independently of the ICN Recommendations, and that there are visible discrepancies between the Polish provisions and the ICN soft law. It is argued that several amendments to the Polish provisions are needed. The ICN Recommendations may assist in this process, but most importantly it should address the real needs of the effectiveness of the Polish system of merger control. The article highlights that the ICN lacks an effective system of compliance scrutiny, and that this may undermine the overall achievements of the network. It is suggested that peer review should be implemented and that the broader engagement of OCCP officials in the works of the ICN and other transgovernmental networks is required.

Keywords
competition law, merger control, International Competition Network, soft law, recommendations, Polish law

STRESZCZENIE

Spójność polskiego prawa konkurencji z wytycznymi Międzynarodowej Sieci Konkurencji – na przykładzie przepisów o obowiązku zgłaszania zamiaru koncentracji przedsiębiorców

Artykuł omawia polskie przepisy ustanawiające obowiązek notyfikacji koncentracji Prezesowi UOKiK, konfrontując je z rekomendacjami ICN dotyczącymi tego zagadnienia. Przedmiotem badania są wyłącznie regulacje materilano-prawne z pominięciem analizy procedury antymonopolowej w zakresie kontroli koncentracji. Celem badań jest zidentyfikowanie w jakim zakresie Polskie przepisy są zgodne z międzynarodowymi standardami.

Na wstępie omówiono ICN i zaprezentowano dorobek sieci w zakresie regulacji obowiązku notyfikacji koncentracji. W kolejnej części przedstawiono podstawowe cechy polskiego systemu kontroli koncentracji oraz najważniejsze historyczne zmiany tych regulacji. Następnie przeprowadzona została szczegółowa analiza elementów konstrukcyjnych obowiązku notyfikacyjnego, obejmująca: kryteria obrotowe, kryteria transakcyjne oraz wyłączenia spod obowiązku notyfikacyjnego. Analiza porównawcza wytycznych ICN i polskich przepisów odnoszących się do obowiązku notyfikacyjnego ujawniła obszary widocznych niezgodności. Może ona stanowić punkt wyjścia do ewentualnych zmian polskiego prawa konkurencji. Jednocześnie, choć wytyczne ICN mogą być jedną z inspiracji zmian, to ewentualna nowelizacja ustawy antymonopolowej powinna też uwzględniać niedoskonałości wykryte w procesie stosowania ustawy.

W artykule podkreślono, że ICN nie ma skutecznego mechanizmu zachęcania swoich członków do konwergencji ich przepisów krajowych, co w dłuższej perspektywie może podważać istotność jej dorobku. Z tego względu sformuowano postulat wprowadzania mechanizmu przeglądów partnerskich w działalności ICN oraz zwiększenia zaangażowania przedstawicieli UOKiK w pracach sieci.

Słowa kluczowe
prawo konkurencji, kontrola koncentracji, Międzynarodowa Sieć Konkurencji, prawo miękkie, wytyczne, prawo polskie