



COMPETITION  
**ECN+ Directive**

# ECN+ DIRECTIVE IMPLEMENTATION IN POLAND

## INTRODUCTION - SOURCE AND AIMS OF THE ACT

The act constitutes an implementation of the so-called EU ECN+ Directive, i.e. Directive of the European Parliament and of the Council (EU) 2019/1 of 11 December 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. In doing so, it seeks to approximate the legal provisions in this scope across countries.

On 17 April 2023, the act was submitted to the President for signature. Earlier, the Sejm (Polish lower chamber of Parliament) had rejected the Senate's (Polish higher chamber of Parliament) veto. In the Senate's view, the act violates the procedural guarantees of undertakings, weakens the legal professional privilege, contains disproportionate solutions and violates the fundamental principles of the rule of law. In its view, moreover, the act, in implementing the Directive, does so in an imprecise manner or over-interprets European Union law.

Below we present the key changes introduced by the act.


## LIABILITY OF PARENT COMPANIES FOR THE ACTIONS OF THEIR SUBSIDIARIES

The new regulations shall govern the liability of parent companies for the actions of their subsidiaries. If an undertaking violates competition law, an undertaking exercising decisive influence over that undertaking will also be held liable.

Decisive influence will mean the existence of economic, legal or organisational links, the effect of which is that the undertaking carries out or adapts to the instructions given to it by the undertaking exercising decisive influence. It should be noted that the notion of decisive influence is referred to in the definition of acquisition of control in the Act on Competition and Consumer Protection (the "Act"). It is worth emphasising that this refers to the actual exercise of this influence and not merely the potential (possibility of the influence being exercised).

The Act establishes a rebuttable presumption according to which decisive influence is actually exercised if the share of the parent company in the capital of the subsidiary exceeds 90%.





Under the above conditions, when considering the fine, the President of UOKiK (the Office for Competition and Consumer Protection) will take into account the turnover achieved by the undertaking ultimately exercising decisive influence and all subsidiaries of that undertaking.

In the case of competition-restricting agreements, with the exception of bid-rigging, the fine may also be imposed on the managers of the undertaking exercising decisive influence. In fact, there may be situations when the fine will be calculated on the basis of the turnover of the entire capital group to which the undertaking that violated competition law belongs. The President of UOKiK will then be able to impose a joint fine on the parent company and the subsidiary. They will be jointly and severally liable for its payment, and the act refers in this respect to the Polish Civil Code.

Determining whether decisive influence is exercised will therefore be one of the mandatory findings in the course of any proceedings conducted by the Polish authority. Conducting proceedings also against an entity exercising decisive influence will depend on the discretionary decision of the President of UOKiK. The premise for initiating proceedings against an entity exercising decisive influence will be to foster the effectiveness of antitrust law enforcement.

## **ASSOCIATIONS OF UNDERTAKINGS**

When a breach of competition law is committed by an association of undertakings, the fine will not be allowed to exceed 10% of the total turnover of the members of such association in the financial year preceding the year in which the fine is imposed.

If the association is insolvent, it will call on its members to make contributions to cover the fine imposed. If the contributions are not made, the President of UOKiK will be able to demand its payment jointly and severally from the members of the association of undertakings whose representatives were members of the decision-making bodies of that association.

If, even then, the penalty is not paid, the authority will be able to demand payment from each member of the association, if that undertaking was active on the market on which the infringement occurred.

It will be possible to be exempted from paying the fine if the undertaking demonstrates that it did not implement the association's decision in breach of competition law and was not aware of the practice or actively distanced itself from it before the proceedings were initiated.



## LIMITATION

Regulations relevant from the perspective of calculating the “limitation period” for the application of competition-restricting practices will be introduced to the Act. The President of UOKiK will still not be able to initiate proceedings on competition-restricting practices if 5 years have passed since the end of the year in which they ceased.

However, under the new regulations, the “limitation period” will be suspended on the date on which at least one undertaking involved in a competition-restricting practice is notified by the President of UOKiK of actions taken against it, including in the course of explanatory proceedings not conducted against the undertaking.

The regulations indicate that such events in the course of explanatory proceedings, such as requesting an undertaking to provide information, conducting an inspection/search (dawn raid) or summoning for an interview will lead to the suspension of the “limitation period”. The new regulations will introduce a great deal of uncertainty for undertakings as to the legal position they find themselves in after receiving, for example, a request for information.

The suspension will last until the end of the explanatory proceedings and its effect will affect all undertakings engaging in a restrictive practice. These provisions are more favourable for the Polish authority than the regulations available to the European Commission under Regulation 1/2003.

## FREEDOM FROM SELF-INCRIMINATION

The President of UOKiK will be entitled to issue requests for information also from natural persons who are not undertakings. The explanatory statement to the Act indicates, for example, requests to current or former members of an undertaking's management board, its employees, as well as whistleblowers, whereas the provisions do not introduce such differentiation.

At the same time, the possibility of refusing to respond in the event of exposing oneself or a close person to criminal liability is provided for. Responses will also not be able to be used to the disadvantage of a person when imposing a fine on a manager.

Unfortunately, the new regulations do not guarantee freedom from self-incrimination to the fullest extent possible, either for undertakings or for natural persons.



## SEARCHES (DAWN RAIDS)

Changes will be made with regard to searches of residential premises. This will be carried out by officials, assisted by the police. The role of the police will be limited to enabling the search to be initiated and carried out, as well as watching over its progress. They will be able to use actions to enable the start or conduct of a search against persons who do not comply with their requests.

During inspections and searches, the officials will be given the possibility to continue their activities on the premises of the Office or its delegation for the analysis and copies of evidence, including electronic evidence. The only condition for this will be that it contributes to speeding up the actions, which will be highly discretionary and subject to the officials' interpretation. The inspected person will be notified of the date of continuation of the actions, but their or an authorised person's failure to appear will not stop the action. The act does not differentiate between excused and unexcused absences. Therefore, in the case of an excused absence, e.g. illness, the actions can be carried out without the undertaking's presence.

In our view, this regulation undermines the undertaking's right to participate in any search/inspection actions and, consequently, the right of defence. This may be particularly acute for undertakings whose registered office is located far from the Office's headquarters or regional office. Reference should be made here to the decision of SOKiK (Court of Competition and Consumer Protection) of January 2017 in case XVII Amz 15/17. At that time, SOKiK ended the practice of the President of UOKiK of copying all data at the undertaking's premises and analysing it in such undertaking's absence at the Office's headquarters. In our opinion, such a regulation may lead to abuse by officials and result in less control of the undertaking over the activities conducted during search.

The amendment also includes regulation of the procedure for the protection of legal professional privilege in the course of inspections and searches. Proposals to regulate this institution in the Act had already appeared in the previous major amendment, which came into force in 2015. The provisions envisaged by the legislator are incomplete. In particular, the protection under the LPP should also cover in-house lawyers, internal documents reporting on legal advice or drafted for the purpose of obtaining legal advice, as well as any correspondence with an independent external lawyer, regardless of its subject matter. As the CJEU pointed out in its judgment of 8 December 2022 in *Orde van Vlaamse Balies* (C-694/20), the LPP principle covers not only the exercise of the rights of defence in the course of ongoing proceedings, but any legal advice (all correspondence) with external lawyer and the mere fact of its existence.



## REMEDIES

The ECN+ Directive requires that competition authorities be granted the ability to impose any measures to remedy the effects of an infringement. The act expands the catalogue of structural measures that the President of UOKiK can apply. Until now, it was able to entrust the performance of a certain business activity to individual entities within a capital group or other organisational units within the undertaking's structure.

Now the catalogue has been expanded to include the possibility of splitting up the undertaking, selling all or part of its property, shares or stocks, as well as applying other measures not expressly named in the act. Structural measures will be able to be applied when behavioural measures are ineffective or too burdensome for the undertaking. The open-ended nature of the remedies will give the President of UOKiK a great deal of freedom and flexibility in deciding what is necessary to remedy the effects of a breach of competition law.

## AMENDMENTS CONCERNING BID-RIGGING

Bid-rigging in public tenders is a criminal offence in Poland. According to the President of UOKiK, potential leniency applicants were afraid to report violations of competition law, among others, due to possible criminal sanctions.

The Act provides that a perpetrator of an offence who notifies the law enforcement authorities, the competition protection authorities of an EU Member State or the EC will not be subject to punishment. However, it must disclose all relevant circumstances of the infringement and do so before the authority has knowledge of the infringement.

This solution should be considered a step in the right direction, but in our opinion it is insufficient. The suspicion of entering into any anti-competitive agreement with other contractors, not only bid-rigging, is an obligatory basis for excluding a contractor from participation in a procedure under public procurement law, more so than potential criminal sanctions. This may discourage potential leniency applicants from reporting such violations to the authorities. In practice, it means the "death of business" for undertakings that operate solely or primarily on the basis of profits from public procurement. Such contractor might be interested in submitting a leniency application if the provisions of public procurement law provided for an obligatory exclusion of the obligation and the possibility to exclude it from competing for a given public procurement contract.

In our opinion, therefore, the provisions of the public procurement law also need to be amended in order to ensure the undertaking that submitting a leniency application will not entail any negative consequences for it.



## ROTATION IN THE OFFICE OF THE PRESIDENT OF UOKiK

The act also provides for the introduction of a five-year term of office for persons appointed to the position of President of UOKiK. It will be permissible to appoint the same person only once for a second term. The assumption is to grant greater independence to the President of UOKiK from the Prime Minister, who appoints and dismisses him/her.

The current President of UOKiK, Mr Tomasz Chróstny, will be appointed for the first term of office.

**We are always happy to help. Please feel free to contact us.**



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