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Conditional merger approvals in Polish legislation and decision-making practice. CARS Open PhD Seminar Report

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I. Introduction

A meeting of the CARS Open PhD Seminar took place on 16 November 2010. It was dedicated to the basic problems arising in relation to conditional merger decisions in Poland. The opening speech delivered by Professor Tadeusz Skoczny was based on his research study concerning the quantitative and qualitative analysis of the decision-making practice of the Polish Competition Authority with respect to conditional merger decisions.

Professor Skoczny presented first the research assumptions underlying his study, the legal justification and basic principles governing conditional merger decisions and the types and nature of merger conditions. In addition, he offered his thoughts on the formulation and imposition of conditions and the sanctions following their violation. Professor Skoczny closed his presentation by outlining his research conclusions and drawing attention to the following issues:

- 1) the small number of conditional merger decisions in Poland attributable mainly to the limited number of controversial mergers notified,
- 2) the poor quality of Polish legislation on conditional merger decisions which is not compatible with EU law, lacks clarity as to the type and nature of conditions and employs an imperfect procedure for the formulation and imposition of conditions, and
- 3) the fact that the practice of issuing conditional merger decisions is improving from the point of view of efficiency (prevention against anticompetitive concentrations).

The speech is available on the CARS website¹.

After the introductory presentation, the participants of the CARS Open PhD Seminar took part in a discussion. Their remarks are presented below in order of appearances.

¹ <http://www.cars.wz.uw.edu.pl/osd/pdf/SkocznyDecyzjewarunkowe.pdf>

II. Discussion

Jarosław Sroczyński drew attention to the insignificant role of judicial review in merger control proceedings asking: ‘Does the Court have anything to say in merger control proceedings?’ He noted that the minor role of the Court is the result of the goals of the merging parties. Due to the dynamic nature of such transactions, decisions should be well-timed – if they are not issued within the required period of time, judicial intervention at a later date may not be an effective remedy.

Jarosław Sroczyński emphasized also the importance of the ‘economic approach’ in merger control proceedings. In cases where a concentration raises competition concerns, the Polish Competition Authority should open an economic dialogue with the parties. Such approach would be of benefit to the Polish Competition Authority also by partly relieving it from the burden of responsibility for analyzing all of the economic effects of the scrutinized concentration.

Jarosław Sroczyński indicated further that the merging parties are sometimes willing to reshape their transaction so as to address the concerns of the Competition Authority. Voluntary modifications result in unconditional merger clearances. The speaker noted that in such cases the conditions of clearance are formulated in the course of the proceedings before the final decision is issued (a notified concentration is different to a concentration declared compatible). A similar situation can take place with respect to prohibitive decisions when the parties expecting a negative outcome decide to withdraw their notification before the final decision is issued.

In his final remarks, Jarosław Sroczyński drew the attention of the participants to cases where the Polish Competition Authority imposed conditions of a ‘social nature’. The true intention behind such conditions is not the protection of competition but granting of additional compensatory benefits to entities affected by the concentration (e.g.: in the *Heineken* merger, the parties were obliged to invest into Polish production of hop).

Małgorzata Modzelewska de Raad was of the opinion that the flexibility of Polish merger proceedings should be improved by the introduction of informal elements such as consultations with the parties. ‘Increased flexibility’ should also be understood as diversified approach to concentrations depending on the level of their complexity. The majority of concentrations fall into the category of simple cases that should be analyzed in the framework of a simplified procedure. More complex cases should involve the use of special analytical tools.

Małgorzata Modzelewska de Raad cited the Foodcare/Rieber Foods concentration case as an example of an inadequate competitive assessment conducted by the Polish Competition Authority whereby it analyzed the market entry cost (costs of constructing a factory) but did not consider other important factors such as supply substitutability.

She argued moreover that the wording of the Polish Competition and Consumer Protection Act should reflect the presumptions of merger clearances – the burden of proof of the incompatibility of a concentration should be placed on the Competition Authority. At the same time, the parties should be responsible for providing the economic knowledge because of their better understanding of the economic fields affected by the concentration.

Maciej Bernatt emphasized the issue of procedural justice in merger control proceedings and the role therein of the target undertaking. Since, the Polish Competition and Consumer Protection Act attributes the status of a party in merger proceedings to the notifying entity only, the rights of the target undertaking are not duly protected. In addition, the target entity is also deprived of the right to judicial review.

Maciej Bernatt pointed out that according to Article 6 of the European Human Rights Convention, proceedings concerning anticompetitive practices are considered to be quasi-penal while merger proceedings are civil in their nature. The different nature of these two types of proceedings might justify a different judicial review structure.

Marcin Kolasiński indicated that mistakes committed by the Polish Competition Authority cannot be remedied in judicial proceedings. In particular, the Court is unable to negotiate with the parties about any possible conditions modifying the concentration. This realization goes against the mindset of the officials of the Polish Competition Authority, who believe that their potential mistakes can be remedied by the court.

Marcin Kolasiński drew the attention of the participants to the consultation process available to merging parties before the European Commission which allows them to gather crucial information about the possible final decision already in the course of proceedings. In his opinion, the infrequency of conditional merger decisions in Poland results from the Competition Authority's inappropriate approach to such cases. The Authority is not obliged to inform entrepreneurs whether its decision will be conditional. Where it considers the possibility of issuing a conditional or indeed prohibitive decision, the Authority should however make it possible for the parties to address its concerns first before a decision of that type is actually issued. A dialogue between the Authority and the merging parties would minimize the risk of economic mistakes.

Robert Gago emphasized the importance of pre-notification consultations seeing as they would facilitate an accurate fact-finding process. If they were to be implemented into Polish procedural rules, they would also give the Authority a chance to conduct market research before the concentration is actually notified. This could substantially reduce the time necessary to review a notification. He further stressed in this context that the time frame prescribed for a merger review should not be extended since the Authority is often unaware of the urgency of the transaction and effective judicial review is not available.

Robert Gago also suggested that third parties should be granted access to merger proceedings. Their participation would stimulate the assessment process hopefully resulting in better evaluation of the economic circumstances of the case.

Jacek Giziński posed two questions: 1) whether the right to concentrate exists and 2) whether the Competition Authority is obliged to consider a conditional merger clearance. He also questioned whether the Court should analyze the possibility of granting a conditional merger clearance. He argued against extending the scope of the entities with the status of a party in merger control proceedings. In his opinion, the interests of the notifying undertaking is crucial here as it is the only entity able

to suggest suitable adjustments in cases where the concentration is found to raise competition concerns.

Jacek Giziński argued also against the aforementioned proposal to introduce more flexibility into merger control proceedings. He noted that the Polish Competition Authority fulfills a public mission and should be able to decide which procedural model – standard or simplified – is appropriate to any given case. He emphasized that only the parties to the operation actually know what the ultimate economic goal of the concentration is. Therefore, while consultations with third parties are helpful, they should not interfere with such goal.

Patrycja Szot suggested that cases ending with a negative clearance, should be open to settlement before the court.

Piotr Borowiec spoke in favor of extending the scope of the entities granted the status of a party in merger proceedings. He was of the opinion that the notifying undertaking should not be the only official participant since the Polish Competition Authority is entrusted with an obligation to protect the public interest.

Robert Gago suggested that the right to be heard should also be offered to ‘the silent part of the market’, that is, entities without the status of a party in given merger control proceedings.

In conclusion, Małgorzata Modzelewska de Raad explained why entrepreneurs are not eager to appeal merger prohibitions associating this fact primarily with their conviction that the chances to obtain compensation are negligible.

III. Conclusions from the discussion

Professor Tadeusz Skoczny summarized the discussion by pointing out that Polish merger control proceedings do not correspond with the requirements for which they were created – they are inadequately designed. A new direction should be found: there is a need to introduce better legislation that will take account of the distinction between simple and complex cases (increased flexibility of proceedings). In addition, third parties should be granted access to the proceedings since their participation motivates the Authority. Moreover, the competition concerns identified by the Authority should not be voiced in the final phase of evidence hearing only. They should be expressed to the parties earlier in the proceedings otherwise the parties’ ability to address the issues identified by the Authority is limited.

Other important issues identified in the discussion included: 1) the necessity to use an economic analysis in merger control proceedings and 2) the inefficiency of judicial review.

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