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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Poland --

25 February 2014

This note is submitted by Poland to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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1. Pre-merger notification regime

1. The basic act regulating merger control in Poland is the Act of 16 February 2007 on competition and consumer protection (hereinafter also referred to as “the Act”). Under the Act the notification is mandatory in case the jurisdictional thresholds are met. The intention of concentration has to be notified. It means that the notification has to be submitted before the concentration is implemented. Therefore, the parties to concentration should refrain from its implementation until (unconditional or conditional) clearance is obtained or a two-month waiting period elapses without the authority making its decision (the ‘guillotine effect’).

2. Failure to fulfil the “standstill obligation” may lead to application of specific sanctions by the President of the Office of Competition and Consumer Protection (“UOKiK”). The only exception to this rule is the implementation of a public offering for purchase or exchange of stocks, notified to the President of UOKiK, if the buyer does not exercise the voting right resulting from purchased stocks or exercises it only to maintain the full value of its capital investment or to prevent serious damage likely to occur to undertakings participating in a concentration.

3. The obligation of the notification to the President of UOKiK applies to those intentions of concentration of undertakings, whose total global turnover exceeded, in the year preceding the year of the notification, the equivalent of EUR 1 billion or whose total turnover in the territory of Poland exceeded the equivalent of EUR 50 million. Art. 13 of the Act indicates the facts commonly known as forms of concentration, subject to the notification to the President of UOKiK as follows:

1. merger of two or more independent undertakings;
2. takeover – by way of acquisition or entering into a possession of stocks, other securities, shares or in any other way obtaining direct or indirect control over one or more undertakings by one or more undertakings;
3. creation by undertakings of one joint undertaking;
4. 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 in the territory of the Republic of Poland, the equivalent of EUR 10,000,000.

2. Review of mergers falling below notification thresholds

4. The Office of Competition and Consumer Protection does not have a power to investigate mergers that are below notification thresholds. The Polish notification thresholds were revised in 2007 in order to cover transactions most likely to significantly impede effective competition. As far as concentrations of minor importance are concerned, it is assumed that due to the economic capacity of their participants, such transactions do not lead to negative impacts on competition on the market. Thus, the antimonopoly authority may focus its attention on these practices of undertakings which may result in the restriction of competition. At the same time, the applied criterion, which exclusively comes down to the volume of generated turnover, is easy to adopt and allows for obtaining clear-cut results.

3. Review of mergers that should have been notified but were not

5. Whenever a concentration is implemented without obtaining a prior clearance of the President of UOKiK (Art. 106, para. 1, point 3 of the Act.), the President may impose on an undertaking a fine of up to 10% of revenue achieved in the financial year preceding the year of imposing a fine. Moreover, the President of UOKiK may impose a fine on a person performing a managerial function or being a member of the undertaking's managing body. The fine may not exceed fifty-fold of the average salary and such person bears responsibility if they, either intentionally or unintentionally, failed to notify the intention of concentration.

6. Apart from financial sanctions, the President of UOKiK may also apply other measures. In the event a concentration has already been implemented, and restoring competition in the market is not possible in any other way, the President of UOKiK may, by way of a decision, defining the time limit for its implementation under conditions specified in the decision, order in particular:

1. separation of the merged undertaking under conditions defined in the decision;
2. disposal of the entirety or part of the undertaking's assets;
3. disposal of stocks or shares ensuring the control over the undertaking or undertakings, or dissolution of the company over which the undertakings have joint control;

7. The list of structural sanctions is open and it is for the Competition Authority to decide on the case by case basis which sanction would be the most appropriate in the given case. Simultaneously, the legislator assumed that the necessity to apply structural sanctions under certain conditions should be replaced by the need to ensure the steadiness and certainty of business trade. It should be noted that such decision must not be issued after the lapse of 5 years from implementing the concentration.

8. The settled case law of the Supreme Court, including the judgement of Supreme Court of 7 July 1999, I CKN 184/99 and the judgement of Supreme Court of 22 March 2001, I CKN 1127/98 (unpublished), confirms the fact that imposing fines on undertakings by the President of the Office of Competition and Consumer Protection for failing to notify the intention of concentration is discretionary and not based on the assessment of impact of merging undertakings on competition.

9. Lack of negative influence on competition, affects however the level of fine (judgement of Supreme Court of 20 June 2001, I CKN 1150/98, unpublished). Furthermore, the Antimonopoly Court emphasised in its judgement of 4 February 1998, case files XVII Ama 66/97 (unpublished) that a financial sanction should be harsh enough to make future potential trials of undertakings to avoid the antimonopoly merger control unprofitable.

10. In 2013, the fines imposed by the President of UOKiK for failure to notify the intention of concentration or implementing a concentration without obtaining the required clearance of the President of UOKiK, totalled PLN 115 thousand (circa EUR 28 750).

11. Sanctions were imposed, for example, in decision no. DKK-77/2013, where Grupa Azoty Zakłady Azotowe „Puławy” S.A. implemented a concentration without a prior clearance of the President of UOKiK. The concentration consisted in creating by Grupa Azoty Zakłady Azotowe „Puławy” S.A. and Instytut Nawozów Sztucznych a joint undertaking operating under the trade name SCF Natural sp. z o.o. The entities did not challenge the fact they should have notified the intention of concentration and informed that their failure to do so was not a deliberate practice. After realising the fact, they prepared the necessary documentation and submitted it to the Competition Authority. Article 163 of the Act of 15 September 2000, the Code of commercial companies (Journal of Laws No. 94, item 1037 as amended)

stipulates that limited liability companies can be established following the fulfillment of 4 obligations, the fifth step is entering into the National Court Register. The notification should be submitted prior to entering into this register. Under Article 94(2)(3) of the Act on competition and consumer protection, the obligation of notifying the intention of concentration rests upon all undertakings involved in the creation of a new entity – in this case both Grupa Azoty Zakłady Azotowe „Puławy” S.A. and Instytut Nawozów Sztucznych. As a consequence, the President of UOKiK imposed fines on participants to this concentration - Grupa Azoty Zakłady Azotowe „Puławy” S.A. (ca. EUR 15 000) and Instytut Nawozów Sztucznych (ca. EUR 3 750).

12. Similarly in the decision from 2012 no. DKK-138/2012 - Remondis Gliwice Sp. z o.o. and Przedsiębiorstwo Składowania i Utylizacji Odpadów Sp. z o.o. (PSiUO) were imposed fines for creating a joint entity (SCR) again without a prior clearance of the President of UOKiK. On 19th July 2012, the two companies submitted „a notification of the intended concentration” to the President of UOKiK. This revealed that Remondis and PSiUO had entered into the SCR agreement on 26th May 2011 and SCR was registered on 20th July 2011 – the notification was filed in fact a year after implementing the concentration. On 1st August 2012, the President instituted the antimonopoly proceedings in order to impose fines on Remondis and PSiUO. The parties were informed of the fact and asked to respond to charges and provide the data of high significance to look into the case. On 24th August 2012, Remondis and PSiUO provided the requested information and asked for immunity from fine. The parties justified their conduct claiming that the established undertaking did not in fact start its operation, and was, consisted only in the preparations for constructing the mechanic and biological installation for communal waste processing. Moreover, the parties assumed it was a multi-stage concentration, and the last one was connected with the publishment of regional plans of waste management as well as relevant legal regulations. Furthermore, Remondis and PSiUO emphasised that SCR did not impact any product and geografic market; the parties did not intend to act against the provisions of the Act on competition and consumer protection, which proves their notification of creating SCR on 19th July 2012.

13. In line with Article 13 of the a.m. Act, the two undertakings exceeded the assumed threshold of turnover and were obliged to notify of the intention of concentration. The President of UOKiK imposed a fine based on Article 106. Moreover, the President of the Office pointed out that Article 83 of the Constitution of the Republic of Poland states that any entities are obliged to familiarize with legal rights and abide by the law. Fortunately, the transaction did not result in the restriction of competition which worked as an asset and influenced the volume of fine. The President of UOKiK imposed fines on participants to this concentration - Remondis Gliwice Sp. z o.o (ca. EUR 9 250), Przedsiębiorstwo Składowania i Utylizacji Odpadów Sp. z o.o. (PSiUO) (ca. EUR 2 750).

4. Subsequent review of previously cleared and consummated mergers

14. Generally, UOKiK does not have the power to re-open merger reviews of previously approved mergers. However, the President of UOKiK may revoke its decisions if they were based on unreliable information for which the undertakings participating in the concentration were responsible or where undertakings did not comply with the conditions (remedies) specified by the Office. On repeal, the President of UOKiK may re-adjudicate on the merits of the case.