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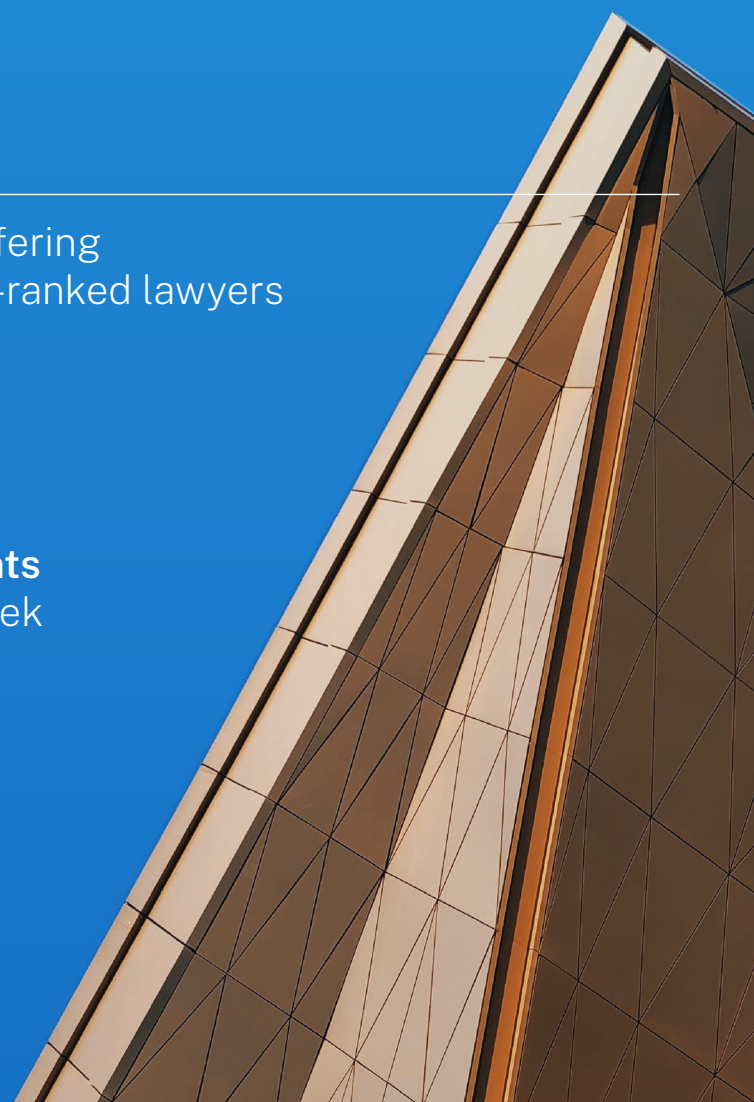

Poland: Trends & Developments

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POLAND

Trends and Developments

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Sołtysiński Kawecki & Szlęzak (SK&S) is an independent Polish law firm with a team of more than 160 lawyers offering legal services to businesses from Poland and abroad. The firm has 30 years' experience of providing comprehensive advisory services in all aspects of Polish and EU competition law and representing domestic and international clients before the EC, as well as before the courts and the Office of Competition and Consumer Protection (OCCP) in Poland. SK&S obtains EC or OCCP approvals for concentrations, in addition to assisting in cases concerned with payment backlogs and securing contractual advantages. The firm represents entrepreneurs seeking compensation for damage resulting from the breach of competition rules. SK&S has one of the largest competition law teams in Poland, meaning the firm can successfully handle complex cases that require a number of lawyers.

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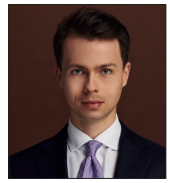

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Overview of the Merger Notification System in Poland and General Enforcement Trends

The year 2022 saw several interesting developments in the field of Polish merger control. Notably, two landmark decisions by the Polish Competition Authority (PCA) have been successfully challenged before the Polish courts. This is a significant shift, given that the courts have not played a prominent role in merger control up until this point.

The PCA's merger control department was kept very busy throughout 2022. As well as dealing with a record number of submissions, the PCA had to handle notifications resulting from foreign direct investment regulations. Moreover, the PCA found itself defending two of its flagship rulings in court. The landmark judicial decisions in the Nord Stream 2 and the Agora/Eurozet cases will be discussed in detail later in this article, following a short overview of the applicable regulations and general developments in the field of merger control practice.

Role of the Polish Competition Authority

Merger notification procedures are regulated by the Act of 16 February 2007 on Competition and Consumer Protection ("the Act"). Transactions that involve acquisition of control over another undertaking, mergers, purchase of assets or the creation of a joint undertaking must be notified to the PCA where the parties meet turnover thresholds.

The notification obligation also covers foreign-to-foreign joint ventures, even when:

- the joint undertaking will not be based or active in Poland; or
- only one of the parent companies exceeds relevant Polish turnover thresholds.

Simple matters that do not entail competition concerns are cleared in Phase I usually within a one-month deadline. If the PCA believes the concentration is likely to have anti-competitive effects, requires a market analysis or otherwise sees the case as complicated, it can initiate Phase II proceedings and thereby extend the deadline by a further four months (which can be subsequently prolonged in certain circumstances).

The applicable regulatory framework for merger control review has not been amended in 2022. Despite the rampant double-digit inflation, the turnover thresholds have remained unchanged – something that, in practice, broadens the scope of application of the Polish notification requirement.

The enforcement of competition rules, including merger control aspects, continues to be robust. The PCA is headed by Tomasz Chróstny, who has brought a renewed focus and inspired the PCA to continue with a strong and active stance in all fields of competition law.

Owing to the implementation of the ECN+ Directive in Polish law, Chróstny has recently been appointed for a new fixed five-year term of office, which will end in 2028. The tough policies of the PCA under his leadership are expected to continue in the forthcoming years. Nonetheless, recent rulings suggest that the PCA's actions might be curbed by the courts on appeal.

Formalisation of merger control proceedings

Once again, there has been an uptick in the number of cases held. In 2022, a total of 342 proceedings were initiated, with the PCA issuing 327 decisions – followed by a further 100 decisions in the first four months of 2023. These figures together suggest that the number of cases

reviewed and decisions issued by the PCA will most likely again exceed 300 in 2023.

With the increasing number of cases under review, merger control cases are taking longer than ever – even those that are uncontroversial in terms of their merits. This is also down to an influx of younger, inexperienced staff joining the merger control department and the PCA's general willingness of the PCA to "leave no stone unturned" in proceedings.

In recent months, the PCA has become stricter with regard to the contents of the notification as well as the supporting documentation presented. This is evidenced by an increased number of requests for information (RFIs) issued in various cases, requiring the provision of:

- additional information or documents that are often not essential to the competitive review of the case; and/or
- foreign-language documents in addition to the sworn translations.

Specifically, the authors have noted that the PCA increasingly asks detailed or very formalistic questions on issues that are neither expressly indicated in the notification form template nor seemingly relevant to the transaction – for example, detailed RFIs concerning precise market shares in non-controversial, no-overlap cases or for newly created and not-yet-established markets.

This has the unfortunate effect of prolonging proceedings in all types of merger review cases, meaning that even the most straightforward (in competition law terms) are subject to lengthy proceedings that potentially extend beyond two months. The timing of the proceedings is one issue to bear in mind when planning the post-signing period.

Review of foreign direct investment notifications

The foreign direct investment (FDI) review regime was introduced in Poland under rather unusual circumstances – ie, during the COVID-19 pandemic – and was motivated by the need to protect strategically important Polish businesses during the predicted economic turmoil.

The act introducing FDI review stipulated that the regime will be in force for two years – ie, until July 2022. Despite the rather limited reach of FDI control regulations (eg, only eight cases in 2021 and three in 2022), the application of the FDI review regime was extended for another three years. No changes to the regime have been introduced alongside the extension.

The Polish FDI review system might come as a surprise, given that the responsibility for reviewing FDI cases usually lies in the hands of ministries in other EU jurisdictions. Moreover, FDI review regulations include two concurrent regimes – namely, a ministerial one for selected companies and the parallel regime introduced during COVID-19.

The Polish legislator decided to entrust the review of broad FDI notifications to the PCA, which has not even created a specific FDI department. As such, FDI cases notified to the PCA are reviewed by the merger control department. In most instances, therefore, transactions subject to merger control and FDI review will be handled by the same department.

The relatively low number of FDI submissions may be attributed to the long list of countries exempt from the procedure. Investors from the

OECD are effectively not covered by the FDI rules, meaning that US, Japanese or South Korean investments in Poland are not subject to FDI clearance – unlike in numerous other EU jurisdictions.

However, an upsurge of Ukrainian investments in Poland is likely to lead to an increased number of FDI cases in Poland during the next few months.

Recent merger control decisions by the Polish Competition Authority

2022 was relatively uneventful in terms of significant merger control decisions. Even though the PCA issued 327 decisions (which is a large number in comparison to other competition authorities in EU), there were no decisions outright forbidding the conclusion of a transaction – with only one conditional approval being issued.

This does not mean that there were no interesting decisions. The PCA has reviewed several decisions concerning joint ventures, confirming its previous practice and interpretation of the law – whereby the PCA continued to claim jurisdiction over review of foreign-to-foreign joint ventures with no anticipated effects in Poland and also retained an expansive interpretation of what constitutes the creation of a joint venture.

In this respect, one noteworthy decision pertained to the creation of a joint venture company, which runs the popular BLIK payment system. The joint venture in question had already been established many years ago by Polish banks and successfully entered the market of secure e-payments. The recent notification made by the same parties in 2022 concerning the "establishment" of the same company may be considered counterintuitive, especially given that the structure of control in the joint venture remained unchanged and no shares were transferred.

The parties decided to formally notify the PCA of the fact that the joint venture intended to enter a new market by starting to offer its customers buy-now-pay-later services. According to the PCA's guidelines, a significant change or extension of an existing joint venture company's scope of activity requires merger clearance by the PCA – even in the absence of a change of control in the joint venture or any other developments. The banks applied this interpretation and filed a notification, upon which the PCA accepted and reviewed the case.

The case in question was cleared following relatively short and smooth proceedings, thanks to a lack of competition concerns. It proves, however, that the PCA maintains its long-standing interpretation and is willing to review changes to the activity of existing joint venture companies in merger control proceedings.

Recent court judgments involving the Polish Competition Authority

Although perhaps somewhat slower in terms of notable merger review decisions issued by the PCA, the year featured two major highlights – namely, the resolution of the appeal proceedings in the Agora/Eurozet case in May 2022 and February 2023, along with the first instance judgment in the NordStream 2 case in November 2022. Both those judgments are highly consequential for the merger appeal landscape in Poland.

Agora/Eurozet

In 2019, Eurozet's minority shareholder Agora filed a notification of its intention to acquire control over Eurozet by buying the remaining shares from the majority shareholder. After a preliminary analysis of the case, the PCA concluded that the case required a market survey and initiated Phase II proceedings.

After more than a year of proceedings, the PCA expressed its objections with regard to the planned concentration – indicating that competition may be restricted as a result of the concentration. Finally, in January 2021, the PCA issued a prohibition decision.

The case deserves special attention on its own, irrespective of the outcome of the judicial review. This was one of the few prohibition decisions issued by the PCA and one in which emphasis was placed on reducing the number of competitors on the market.

This decision could have been seen as a departure from the PCA's previous approach and could have had a significant impact on the assessment of future proposed transactions. Up until that point, only the potential risk of strengthening of a dominant position seemed to be a prevailing criterion.

Following this decision, it seemed likely that more varied and exhaustive competitive assessments might be required by the PCA in order to approve certain transactions. Assessments looked set to involve consolidation of No 2 and No 3 players in certain markets, assessing the potential for collective dominance, oligopolistic markets, or judging potential co-ordination effects.

Moreover, as was inferred from Agora's statements, it appears that the prohibition decision came as a surprise – given that it was issued during what Agora described as ongoing discussions.

The decision was appealed to the Competition Court. In May 2022, the Competition Court issued its first instance judgment – amending in full the original PCA decision, reversing the outcome, and approving the merger. The court ruled on several issues but primarily came to the conclusion that any theory of harm resulting in a prohibition decision cannot be speculative and highly unlikely to occur.

The court held that, if assumptions made by the PCA during the review of the merger are not sufficiently credible and substantiated, a speculative and unsubstantiated belief voiced by the PCA that the assessed transaction will result in a significant impediment of competition in the relevant market cannot form the basis for an administrative decision – especially one that pre-supposes that a transaction will be anti-competitive and, as such, prohibits it.

The Competition Court was explicit in pointing out that any theory of harm applied by the PCA has to be rational, highly probable, and well-grounded in the specifics of the market to which it relates. The PCA's approach was highly criticised in the judgment for:

- stretching well-established (and judicially verified in Poland and the EU) standards for assessment of merger control and dominance cases;
- not applying a factual analysis;
- relying excessively on subjective assessments made by PCA employees; and
- failing overall to meet the required standard of proof in substantiating its decision.

It is important to note that appeals concerning the PCA's decisions are reformatory in their nature – meaning the Competition Court is not limited to reviewing whether the decision was within legal limits or not but, rather, rules on the merits (and facts) of the case presented both during administrative and appeal proceedings. This essentially allows the PCA to supplement evidence and upgrade its reasoning during

appeal proceedings. The PCA has failed to do so during both the administrative proceedings leading up to the contested decision and the appeal hearings.

The PCA has appealed against the ruling of the court of first instance; however, the Court of Appeal has rejected this appeal and ruled to uphold in full the first instance judgment. While the full judgment of the Court of Appeal has yet to be published, it is safe to assume that the argumentation provided by the Competition Court was confirmed without major deviations.

This is an important development within the field of merger control. Aside from constituting a landmark case where the PCA was overruled by the courts (which remains a rare occasion in Poland), this outcome reaffirms high standards for assessing merger control cases in Poland that the PCA must follow.

In essence, the Competition Court has confirmed that the PCA – despite enjoying some degree of administrative discretion as an administrative governmental body – has to ensure that its decisions are well-researched, well-written and (most importantly) fully substantiated. The judgment confirms the PCA must be held to a high evidentiary and formal standard. The Competition Court specifically stated that it is not enough to claim that a particular outcome "is possible" or "is not impossible" or that the "given information does not suggest that it is impossible".

This might have a significant impact on how cases, especially close-call mergers and acquisitions, are assessed and must be subject to a high standard of economic and factual analysis if the PCA decides to oppose the case. While this might prolong already fairly lengthy proceedings, it should in theory result in greater certainty in merger cases and instil a more factual and economic approach to merger review in Poland.

Interestingly, the general line taken by the Competition Court in this judgment – ie, imposing higher standards of proof on the PCA to substantiate its claims, as well as placing limits on the exercise of its discretion – turned out to be a recurring theme.

The Competition Court, in reviewing the Nord Stream 2 case, has doubled down on its approach by once again countering the PCA's expansive reading and application of competition law.

Nord Stream 2

In 2020, the PCA issued perhaps the most widely discussed decision in its history, both in Poland and abroad. The authority found that the conclusion of agreements related to financing the construction of the Nord Stream 2 offshore gas pipeline amounted to the creation of a joint venture, for which neither Gazprom nor the remaining financial investors (companies from the Engie, Shell, Uniper, OMV and Wintershall capital groups) had received merger clearance in Poland.

The PCA imposed the maximum fines. Gazprom was fined more than PLN29 billion, bringing the total amount of fines to almost PLN30 billion – a world-record fine. The PCA also ordered all parties to terminate their contracts related to financing the construction of the Nord Stream 2 pipeline.

The parties involved in the project appealed the PCA decision. The arguments raised were relatively straightforward. The appellants did not question the facts of the case determined by the PCA and confirmed that they had concluded the

financing agreements. However, they stated that such actions do not amount to creation of a joint venture under the Act. The appellants repeated that – as they did not acquire shares in the alleged "joint venture" (with Gazprom remaining the sole shareholder of the NS2 AG company) – no JV was created and thus merger control clearance had not been necessary in the first place.

On the other hand, the PCA claimed that the conclusion of financing contracts (featuring market-recognised safeguard mechanisms) is sufficient to create a "quasi" joint venture, which – in the PCA's view – constitutes a notifiable transaction. The PCA also raised the concept of circumvention of law, claiming that the conclusion of financing agreements had a very similar effect to the acquisition of shares and that the parties' intentions were clearly aimed at escaping the merger control regime in Poland.

In November 2022, the Competition Court annulled thr PCA's decision in full. In a rather laconic justification of the judgment, the court assumed that the parties had not formed a joint venture and therefore were not obliged to obtain approval for the concentration – thereby determining that the decision was issued in "gross violation of the law" and resulting in its revocation.

In its rationale, the court referred to the definition of an undertaking contained in the Act. It stated that the concept of "creation of a new undertaking" should be interpreted narrowly – ie, the establishment of a legal structure in which the shares are not acquired by more than one entity does not lead to the establishment of a joint venture. However, in its legal analysis, the court went one step further and pointed out that it was contradictory for the PCA to claim that the consortium members had created a joint venture – given that the entity (NS2 AG) already existed on the date the financing agreements were concluded.

Also noteworthy is the PCA's consideration of the alleged circumvention of the law by the consortium members. In the court's view, it is irrelevant whether they fulfilled the original purpose of forming the joint venture, as the overriding principle in trade remains the constitutionally guaranteed principle of economic freedom – a derogation from which requires a statutory form and the occurrence of an important public interest. Accordingly, the adoption of a legally permissible form for the fulfilment of business objectives cannot be considered a "circumvention of the law"; rather, it is an action within the sphere permitted by law.

Consequently, in the court's view, it should have been assumed – in accordance with the Constitution of the Republic of Poland – that administrative bodies (including the PCA) may act only on the basis and within the limits of the law. Taking action against the effects of circumvention of the law does not – in the opinion of the court – have the valour of a statutorily granted competence and, as such, did not fall within the permissible scope of acting "on the basis and within the limits of the law".

It is also worth noting that the court omitted to consider the market effects of the alleged concentration in its analysis and did not refer to the extensive evidence in this respect. Instead, the court assumed that – given there was no formation of a joint venture – this issue remains irrelevant to the content of the judgment.

The judgment may potentially have far-reaching consequences with regard to notifications of

establishment of a joint venture company, as the Competition Court explicitly stated that a joint venture can only be established as a completely new entity. It goes against a well-established decisional practice of the PCA – according to which, a joint venture company may also in certain circumstances be established on the basis of an already existing entity (eg, when the existing joint venture materially changes its scope of activity, even in the absence of a change in the quality of control).

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