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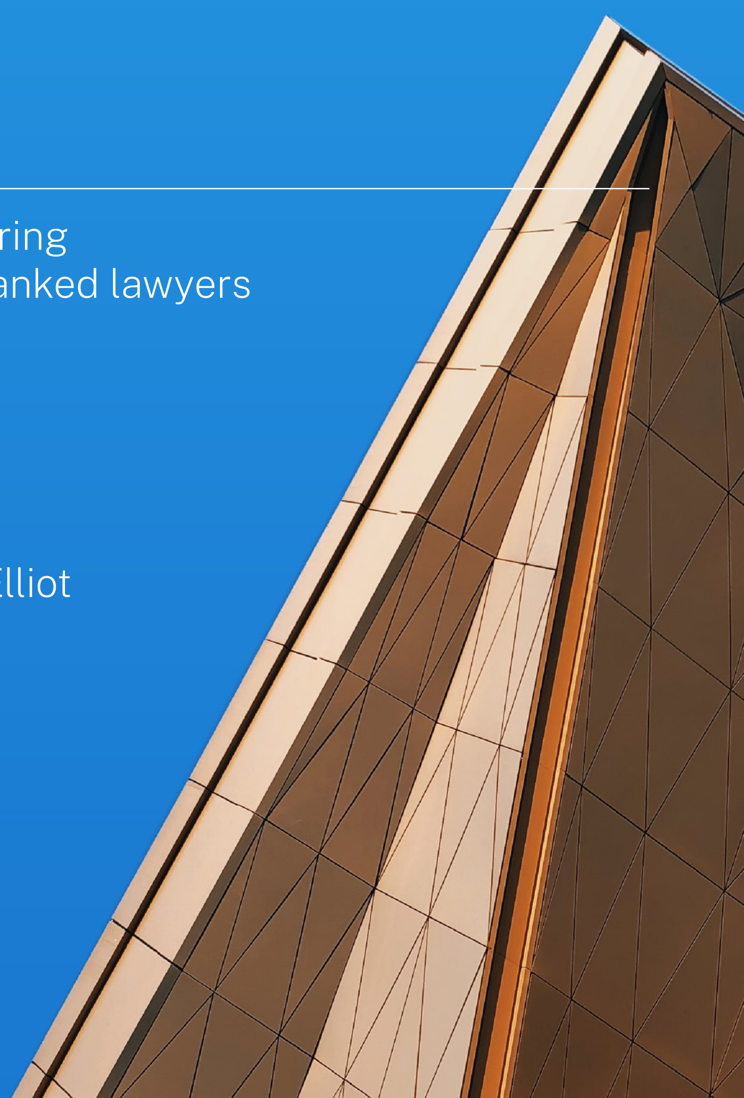

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POLAND

Trends and Developments

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Sołtysiński Kawecki & Szlęzak (SK&S) is an independent Polish law firm with a team of more than 180 lawyers offering legal services to businesses from Poland and abroad. The firm has 30 years' experience in providing comprehensive advisory services in all aspects of Polish and EU competition law, as well as representing domestic and international clients before the OCCP, the European Commission and the courts. It obtains European Commission 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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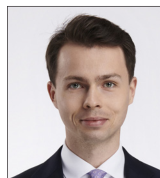

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Introduction

Competition law enforcement is still going strong in Poland. Ever since 2020 and the establishment of new stewardship, the Polish Competition Authority (*Prezes Urzędu Ochrony Konkurencji i Konsumentów* – PCA) has increased its activity. This past year has proven that the PCA is happy to engage in ever more enforcement measures and is keen to expand on its earlier practices as well as being willing to open up new avenues of co-operation.

Importantly, the PCA has increased its reach out towards the market and practitioners to incorporate the voices of various stakeholders in how enforcement policies and guidelines are designed and later implemented.

The past year has been challenging in terms of merger control. An ever-increasing workload of cases to be handled by the department, a continuation of previous policy switches and the handling of a couple of interesting cases have all contributed to a merger control landscape of rising PCA scrutiny. This has resulted in increased lead times, and also the need for practitioners to deal with and propose ever more novel or market-focused solutions to the PCA's objections.

This summary provides a short account of the applicable regulations, discusses general developments in the field of merger control practice and comments on the PCA's recent outreach to the market in shaping guidelines for foreign direct investment control proceedings.

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

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

The notification obligation still covers also foreign to foreign joint ventures, even when the joint undertaking will not be based or doing business directly in Poland. The prevalent approach of the PCA is to claim jurisdiction wherever general turnover thresholds are met, irrespective of where the given joint venture is set to operate.

Simple, uncontroversial or competitively immaterial mergers are cleared in Phase I proceedings with a one-month deadline. In practice, consents are issued within six to eight weeks from filing, as requests for information (stopping the review clock) remain a fairly standard practice of the PCA, even in uncomplicated transactions. If the PCA believes the concentration is likely to have anti-competitive effects, requires a market analysis or otherwise sees the case as complicated, Phase II proceedings can be initiated, extending the deadline by another four months.

The legislative framework concerning merger control remains unchanged since the implementation of the ECN+ Directive mid-2023. Moreover, there have been no legislative or other material changes to practice guidelines, which would affect the formal aspects of how notifications ought to be made and how the PCA reviews them.

As such, in recent years, noteworthy changes in relation to the notification include the following:

- ensuring that complete documents (eg, executed agreements governing the transac-

tion) are provided and translated in full when drafted in a foreign language;
- adequate and up-to-date documentation proving a proper execution of the power of attorney; or
- providing a complete set of financial data.

This approach requires from practitioners a more thorough process of collecting documentation and drafting in order to cover potential avenues of questioning by the PCA during proceedings. Such increased thoroughness at the drafting phase should then result in a more streamlined and quicker review process once the notification is filed and handled by the PCA.

PCA in 2023 – Increased Detail and Formalisation of Proceedings

In 2023, the PCA issued 310 merger approvals, of which three were conditional decisions. In total, 321 new proceedings were initiated. By comparison, in 2022, the PCA issued 327 approvals for concentrations, of which only one decision was conditional. This clearly shows that the workload of the PCA is ever more increasing, with the number of incoming cases still larger than the number of decisions issued.

This trend, coupled with the rotation of case handlers and the slow intake process for new recruits joining the merger control department, means that wait times for decisions increase, even in cases that are uncontroversial in terms of their merits.

The inquisitiveness of the PCA is most apparent in merger control proceedings becoming increasingly formalised and detailed. Given that Polish Merger Control proceedings follow the Code of Administrative Proceedings, ensuring formal compliance was always important.

Moreover, the large workload of the Merger Control Department means that proceedings need to be prolonged in order to meet internal procedures and statutory deadlines. Given that requests for information (RFIs) result in a clock-stop, the PCA not only receives information it requires to review cases thoroughly, but it also gains some additional time to review decisions within the set deadlines.

Furthermore, the PCA is becoming ever more precise with its questions and requests for supporting data for the notification. In particular, the PCA requests increased information on the market structure and more precise market data, as well as, in certain relevant cases, asking for projections of the market structure a couple of years in advance in order to assess potential future effects of a given transaction.

This has the unfortunate effect of prolonging proceedings in all types of merger review cases, making even the most straightforward (in competition law terms) cases being subject to lengthy proceedings, potentially extending to longer than two months. The timing of the proceedings is one issue to be kept in mind in planning the post-signing period.

The PCA's Thorough and Holistic Market Review

Regardless of the increasing workload and length of proceedings, the PCA has not relinquished its thoroughness nor inquisitiveness. It is apparent that the PCA is willing to go into more detail in assessing the submitted concentrations. This is apparent in a few different ways.

Phase II proceedings are more commonplace

Firstly, the recent year has shown a readiness to refer uncertain or close-call cases to Phase II proceedings, which used to be rather rare but

is increasingly becoming a daily occurrence in proceedings before the PCA.

In turn, this has led to a noticeable increase in the PCA issuing decisions containing conditional approvals. A sign of the PCA's increasingly stringent approach, this should translate into the PCA issuing clarifications on conditional approvals for concentrations by entrepreneurs, to make the process more transparent and understandable to all entrepreneurs.

Adoption of a more market-focused approach rather than a case-by-case assessment

Secondly, a more comprehensive approach to assessing mergers in similar fields as well as ensuring continuity between previous filings and market approaches has been observed. This approach has been prompted, in the first instance, by market developments. Given that certain industries – eg, the animal-waste processing sector – have seen a wave of consolidations conducted in nearly the same timeframe, the PCA has decided to practically review these cases together as part of a wider market research exercise.

This was apparent as the simultaneous review of a couple of transactions in the same sector, as well as follow-on deals touching on the conclusions reached as part of these market investigations, were handled by the PCA as part of a wider competitive assessment of the market. Having initiated and concluded market investigations, and subsequently dealing with less controversial cases in the same sector, the PCA most likely cross-checked information across the various notifications and conducted its own fact-finding exercise to confirm these conclusions. Moreover, subsequent transactions relating to this market were later analysed with these findings and topics fresh on its mind and affecting the review process in the subsequent proceedings.

This is evidence of a more market-focused approach and, potentially, a readiness to use its own database of data and conclusions in cross-checking an applicant's assertions in merger control notifications.

An additional consequence of the above is the PCA's internal cross-referencing of cases involving or filed by the same capital group. The PCA recognises that global conglomerates or multinational capital groups might file independently for the review of unrelated transactions with various attorneys drafting the notifications. Yet, in a couple of proceedings the PCA has directly indicated that it is willing to cross-reference any filings made with previous notifications in order to confirm the completeness and accuracy of data pertaining to the same undertaking.

A New Approach to Assigning Market Power?

An interesting example of an important decision, from the perspective of merger control, is the conditional approval issued by the PCA in October 2023 for Wienerberger's acquisition of Terreal Holding, as the PCA directly assigned market share to the trade mark in this transaction. The concentration involved Wienerberger's acquisition of 100% of Terreal Holding's shares but certain subsidiaries of the acquired company, including Creaton Polska, were excluded from the transaction. The condition was that Wienerberger continues to license the Creaton brand to Creaton Polska.

According to the PCA, the investigation showed that the concentration could lead to a breach of competition on the market for the sale of ceramic and cement roof tiles in Poland. Wienerberger owns the Koramic brand, while the acquired

company holds the rights to the Creaton brand. Their combined share in this market exceeds 40%. The PCA indicated that, due to the fact that Creaton Polska currently enjoys a license for the Creaton brand, the condition imposed is intended to oblige Wienerberger or its subsidiary to continue licensing the Creaton trade mark to Creaton Polska. The license will be free of charge and will cover all permitted uses, including the production, distribution and advertising of clay and cement roofing tiles, roofing underlays and accessories, and photovoltaic products.

This outcome was interesting in that market power was assigned neither to the production capacities nor actual distribution of products, but to the trade mark itself. Given that the transaction, in the scope of pertaining to Poland, concerned no tangible production or distribution business or assets, the PCA ascribed the market share to the trade mark alone and thus concluded that a potential anti-competitive effect could transpire.

It is a novel approach to assessing market power. While indeed in certain regulated markets IP rights could be sufficient to ascribe market power – eg, in pharmaceuticals, where IP and regulatory assets are key to a given product – it is more controversial to claim that a trade mark on its own, in a mature, unregulated and fairly straightforward market, holds sufficient market power to warrant a Phase II investigation and an imposition of remedies.

Finally, the case is material in that it presents a rare acceptance by the PCA of a behavioural remedy in place of a structural one. Divestment-based remedies were largely the PCA's preferred option, yet this case confirms that the authority is ready to negotiate and seek to find remedies that will address the core of the alleged anti-competitive effect.

Foreign Direct Investment Guidelines and Legislative Problems

The PCA has shown its openness to market concerns in recently issuing updated guidelines onthe notification of foreign direct investment (FDI) control transactions and the PCA's requirements in this regard. The May 2024 update is due to several years of practice and experience gained in this regard as well as voices from the practitioners' community, which prompted the PCA to supplement the guidelines with issues related to, among other things, the obligation to send the FDI Form to the European Commission. Additional topics addressed relate to determining who is obliged to submit a notice of planned investment to the PCA, which is addressed more broadly, and additional clarification of procedural and practical issues, including in particular the obligation to legalise foreign official documents.

This represents a welcome instance of the PCA's sensitivity to the voices of stakeholders and willingness to clarify any uncertainties or new developments arising from its practice in this relatively new and potentially unclear area of the law.

The experiences of the last few years have also shown another problem related to FDI. For context, the FDI control process was put in place as part of various COVID-19 pandemic-related regulations and almost arbitrarily vested with the PCA. This initial system, intended to be in force for two years, was extended, yet no major legislative changes were implemented.

A problem with the investment control process, as stated currently, is one of competence. The law requires from the PCA an assessment of a proposed transaction, generally speaking, in

respect of its influence on national and EU safety, interests and public health considerations. These competencies, however, fall outside the scope of traditional antitrust enforcement.

While the relevant legislation has assigned the PCA a new requirement, it does not explicitly provide for a procedure for the PCA to obtain or access information relating to national interests. It is furthermore likely that, with many national safety reports or reviews being confidential or otherwise privileged, the PCA is simply not explicitly entrusted with the right to access the necessary information. Moreover, these considerations are arguably better assessed by other policymakers, including members of government, or by specialised agencies (such as various intelligence authorities). This situation leads to an actual impasse, where the PCA ought to perform an analysis of national interest yet finds its hands tied when attempting to perform the task. The uncertainty leads to problems in foreseeing how and how quickly cases will be handled and what factors will be taken into account by the PCA in reviewing FDI control cases. Hopefully, the coming year will bring some developments.

Resolution of Controversial Cases

Although the year passed at a slower pace in terms of the issuance of important merger control decisions by the PCA, and the PCA focused on antitrust enforcement and consumer protection cases, it faced an important test in front of the courts, defending its appeal of the first instance judgment repealing its decision in the Nord Stream 2 case.

As a reminder, back in 2020 the PCA 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 maximum fines, with Gazprom fined over PLN29 billion, and total fines amounting 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, but stated that such actions do not amount to a creation of joint venture under the Act.

In November 2022, the Competition Court (court of first instance for PCA decisions) annulled the PCA's decision in full. The PCA appealed this judgment to the Appeal Court and in October 2023 received an unfavourable judgment. The Appeal Court upheld the decision of the Competition Court, amending the judgment only to a limited extent, finding that the PCA's decision was not issued in gross violation of the law. This judgment represents a significant blow to the PCA's approach, showcasing a readiness of the courts to rein in too wide an interpretation of the law by the PCA, moreover in a very high-profile and significant case.

At the time of publication of this chapter of the guide (July 2024), no public comments have been made with regard to the PCA filing a cassatory appeal to the Supreme Court.

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