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MERGER CONTROL ON ENERGY MARKETS (CASE STUDIES: VERTICAL CONSOLIDATIONS IN THE ENERGY SECTOR, PGE/ENERGA, NORD STREAM II, ORLEN/LOTOS, ORLEN/PGNIG)

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Abstract. Merger control is the competence of the antitrust authorities of the EU Member States or the European Commission. Antitrust authorities have horizontal competencies in this respect, which means that they can evaluate any concentration, regardless of the market on which it is planned. Concentrations on strategic markets from the point of view of the state, including in the energy sector, require evaluation not only from the point of view of pure substantive criteria but also the evaluation related to the need to rank values more critically from the point of view of the state over the value of effective competition.

Keywords: competition; concentration; relevant markets; energy sector

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1. Introduction

Mergers of companies are supervised by the authorities appropriate for competition protection so that there are no restrictions on competition, including obtaining a dominant position in the relevant markets (Gombar et al., 2022; Heckova et al., 2022).

In Poland, the President of the Office of Competition and Consumer Protection (hereinafter: "President of UOKiK") is legally empowered to control mergers and, at the European Union level, the European Commission. The relationship between the competent national authorities and the European Commission is characterized by the "one-stop-shop" principle. This means that the powers of national authorities to evaluate planned mergers end where the powers of the European Commission in this regard begin. The authorities' powers in matters of merger control are determined by the turnover of enterprises involved in the merger. According to the one-stop-shop principle, if the planned market transaction exceeds the turnover thresholds indicated in the Regulation of the Council of the European Union No. 139/2004 on the control of mergers between enterprises (hereinafter: the "Regulation"), (EU Council Regulation No. 139/2004) even when at the same time the turnover thresholds for the obligation to notify the intention of merger under national regulations are met, the national authorities lose their competence to evaluate the planned transaction. The European merger control

system is coherent and mutually complementary, also bearing in mind that in specific cases, the Regulation allows for referring cases to national authorities by the European Commission or by national authorities to the Commission (EU Council Regulation No. 139/2004).

The publication aims to analyze the planned mergers in energy markets evaluated by competition authorities. The article is cross-sectional, as it draws attention to the key decisions of the authorities in the matters of mergers of energy entrepreneurs, which, in particular, had an impact on the determination of relevant markets in the broadly understood energy sector (see Jurgilewicz M. et al., 2020) The study also focuses on the legally admissible rules for evaluating planned market transactions, taking into account - in specific cases - values superior to the existence of effective competition on the market.

2. Procedure and rules for evaluating mergers of enterprises

Disposition of art. 13 sec. 1 of the Act of 16 February 2007 on competition and consumer protection (hereinafter: the "Act") provides that the intention of the merger is subject to notification to the President of UOKiK if (1) the total worldwide turnover of the enterprises participating in the merger in the year preceding the year of notification of the intention to conduct it exceeds the equivalent of EUR 1 billion or (2) the total turnover in the territory of the Republic of Poland of the enterprises participating in the merger in the financial year preceding the notification year exceeds the equivalent of EUR 50 million. It follows that the legislator has adopted the principle that only mergers involving relatively strong market players should be subject to administrative control because only such mergers can, even hypothetically, affect the level of market competition. It should also be noted that the legislator rightly focuses on achieving optimal competition in the Polish market. It is done by introducing a turnover criterion, determining the obligation to notify the intention of a merger, which relates directly to the territory of the Republic of Poland. As already indicated above, the President of UOKiK loses his competence to evaluate the intention to implement a merger, despite the fulfilment of the conditions of Art. 13 sec. 1 of the Act, if at the same time the merger participants meet the conditions of trading specified in the Regulation, then the European Commission is responsible for the evaluation. The entrepreneurs' intention to conduct a merger is subject to the notification to the President of UOKiK and not to the fact of its implementation. This means that the competence of the President of UOKiK is ex-ante; before starting the activity on the market (acquisition), a decision of the body authorizing the merger must be issued.

On the other hand, the intention to implement a merger, which is notified to the President of UOKiK, must be specific, i.e. the notification must contain a probable intention, such as a document from which it results (letter of intent, preliminary agreement, call for the sale of shares, etc.). The Act does not contain a definition of a merger, but it indicates the facts which are subject to the notification obligation. It is a closed catalogue contained in Art. 13 sec. 2 of the Act, according to which the obligation applies to (1) a merger of two or more entrepreneurs, (2) the acquisition - by purchasing or taking up shares, other securities, shares or in any other way - control over one or more entrepreneurs by one or more entrepreneurs, (3) establishment of a joint entrepreneur by entrepreneurs, and (4) acquisition by an entrepreneur of a part of the property of another entrepreneur if the turnover generated by this property in any of the two financial years preceding the notification exceeded the equivalent of EUR 10,000,000 in the territory of the Republic of Poland. The merger of entrepreneurs may consist of a consolidation or incorporation. As a consequence, two or more separate legal entities become one. The obligation to notify the intention to merge entrepreneurs rests on all active participants of the merger, i.e. all merging entrepreneurs. (Act of 16 February 2007 on competition and consumer protection).

Taking control is – as it seems – the most common form of a merger. Control is a state in which one entrepreneur exerts a decisive influence on another entrepreneur or entrepreneur, with the proviso that it does not matter how this influence is exercised. Although the Act lists typical facts of control (exerting influence), it is not an exhaustive list (Act of 16 February 2007 on competition and consumer protection). The most common ways of taking control occur as a result of the acquisition of assets of another entrepreneur in the amount giving control (as a rule, 50% plus one share) or as a result of a personal union (identity or majority of members of the management bodies of two entrepreneurs). In any case, however, a merger involving the acquisition of control

requires a behavioural test of "decisive influence by one enterprise over another". In the case of an intention of a merger consisting in taking control, the enterprise (or enterprises) taking over control (active enterprises) is obliged to notify it to the President of UOKiK.

The establishment of a joint venture is *de jure*, the establishment of a new legal entity and the acquisition of assets in the amount agreed in the founding agreement. Certainly, in most cases, an inherent feature of creating a joint venture is that the founding enterprises take up an equal number of assets of the entity being created. However, it is permissible for the ownership of the acquired assets not to be distributed evenly in the newly created enterprise. Consequently, after the creation of a new entrepreneur, there may be a situation in which one of the shareholders will have a number of assets giving control over the new entrepreneur and the other founders will be only minority shareholders. However, even in such a case, due to the fact that a new enterprise is created, the basis for the obligation to notify the intention of a merger is the provision establishing the joint enterprise and not the provision concerning the acquisition of control over another enterprise. All entrepreneurs - founders are obliged to notify the intention to establish a joint enterprise.

The last form of a merger provided for in the Act is the acquisition of a part of the property of another entrepreneur. It is a non-standard form as it does not refer to the broadly understood combination of legal entities. In this case, we are dealing with the takeover of *de facto* control over a part of the market, as it should be noted that the acquisition of a part of the property that is independently capable of generating a turnover is subject to notification, i.e. it is an organized property (e.g. a production line, a brand); the turnover generated by this property is included in the annual value of the relevant market. The active participant, i.e. the acquiring enterprise, is obliged to notify the intention of a merger consisting of the acquisition of assets. The evaluation of merger intentions notified to the President of UOKiK is based on – as a rule – substantive and objective criteria (Act of 16 February 2007 on competition and consumer protection). During the proceedings, the President of UOKiK examines the market in a horizontal arrangement, the impact of the planned merger on the market in a vertical arrangement and the impact of the planned merger on the market in a conglomerate arrangement. For administrative decisions concluding the proceedings (more below), the most important is the analysis of the impact of a merger on the market in a horizontal and vertical arrangement. The impact of the planned merger on the market in a horizontal arrangement occurs if two conditions are met jointly. Firstly, the enterprises participating in the merger operate on the same relevant markets (they are competitors). Secondly, their total share in any common market after the merger exceeds 20%. The result of the analysis confirming that the planned merger affects the market horizontally does not mean, however, that it is a merger that the President of UOKiK will not approve. Finding such an impact means that the relevant market in the case, including its structure of entities, production capacity, and degree of development, must be thoroughly examined during the proceedings. The impact of the planned merger on the relevant market in a vertical arrangement means that at least one enterprise participating in the merger is active on it, and it is at the same time a purchase or sale market on which any of the other enterprises participating in the merger operates and at the same time the market share of the enterprises participating in the merger on any of these markets exceeds 30% (Regulation of the Council of Ministers of 23 December 2014). In this case, as in the case of determining the impact of the planned merger on the market in a horizontal arrangement, meeting the conditions of a vertical impact is not equal to prohibiting the planned market transaction (Decision of the President of the Office of Competition and Consumer Protection No. DOK-123/05 of September 30, 2005).

The impact of the planned merger on the market in a conglomerate arrangement, although analyzed in each proceeding, can be assumed that it has never been the reason for the President of UOKiK to issue a decision prohibiting the merger. The impact of a merger on the market in a conglomerate arrangement is nothing more than establishing that any of the merger participants have a share in the relevant market of 40% or more, and this is a market where there are no horizontal or vertical links between the enterprises participating in the merger. In other words, it is the market - despite the high share of the merger participant in it - in the vast majority of cases irrelevant to the state of competition on the market because, as a result of its implementation, there will be, at most, a change in the ownership structure of this market share and not an accumulation of market shares.

3. Decisions of the President of UOKiK on the control of mergers of enterprises

In principle, considering the substantive and objective premises resulting from the Act, the President of UOKiK may issue three types of decisions concluding merger control proceedings. The first of them is consent to the merger. It is issued in cases where the result of the conducted proceedings has shown that as a result of the merger, the competition on the market will not be significantly limited, in particular by the creation or strengthening of a dominant position on the market (Act of 16 February 2007 on competition and consumer protection). The dominant position is understood as "the position of the entrepreneurs, which enables them to prevent effective competition on the relevant market by allowing them to act to a large extent independently of competitors, contractors and consumers" (Act of 16 February 2007 on competition and consumer protection). The Act additionally introduces a legal presumption according to which an entrepreneur has a dominant position if his share in the relevant market exceeds 40%. It should be remembered that, as only a presumption, it can be rebutted by evidence to the contrary in a given proceeding. The provision of art. 18 of the Act indicates that the President of UOKiK gives consent to a merger if it does not lead not only to the creation but also to the strengthening of a dominant position. In the simplest example, therefore, it is not only about situations in which the entrepreneur, as a result of a market transaction, exceeds the 40% market share threshold but also about situations in which he has already exceeded this threshold before the transaction, and as a result of the transaction his market share will increase even further. It should be emphasized that in cases where the market share of the enterprise before the merger was high anyway, and the strengthening of market power as a result of the merger is insignificant, the President of UOKiK, as a rule, allows for issuing consent to such mergers (Decision of the President of UOKiK No. DOK-46/07).

The President of UOKiK issues, by a decision, conditional approvals for the notified mergers. According to Art. 19 of the Act, the President of the Office may, on an enterprise intending to implement a merger, impose an obligation or accept an obligation, among others, to sell all or part of the assets of one or several enterprises, divest control over a given enterprise, or grant a license of exclusive rights to a competitor. Such situations occur when the President of UOKiK decides during the proceedings that the merger, in its planned scope, will restrict the competition, but at the same time, either the authority or the enterprise will find a way to eliminate these restrictions. In such cases, the President of UOKiK issues consent to the merger, provided that the enterprise, after its implementation, performs the actions set out by the decision. Most often, these are structural liabilities, i.e. an obligation to sell some of the acquired assets/property (Decision of the President of UOKiK No. DKK-4/2014).

However, there are also behavioural conditions, i.e. obligations to behave in a specific way for the period indicated in the decision (Decision of the President of the Office of Competition and Consumer Protection No. DOK-123/05). The institution of conditional decisions often saves the merger, allowing it to be conducted, but not fully. Of course, it is always up to the entrepreneur to decide whether it is possible to accept and execute the conditions; it is he who must be convinced that the proposed conditions are possible to meet because he is under an absolute obligation to perform them within the time limit specified in the decision. Decisions prohibiting the merger (Act of 16 February 2007 on competition and consumer protection) are rarely issued by the UOKiK president. As it should be assumed, this is due to the fact that mergers which, based on the applicable provisions, may not be approved by the authority are not notified and are not implemented. The merger control regulations are so transparent in terms of substance that it can be concluded from them whether the authority will approve the planned transaction. Few merger prohibitions result from borderline facts when the decision depends on the approach to the definition of the relevant market, which is not yet established, or the market necessity to change it (Decision of the President of UOKiK No. DKK-12/2011).

An exception to the legally guaranteed substantive evaluation of concentration intentions is the disposition of Art. 20 sec. 2 of the Act as follows: "The President of the Office issues, by a decision, consent to the merger, as a result of which compete on the market will be significantly limited, in particular by the creation or strengthening of a dominant position on the market, where the withdrawal from the prohibition of merger is justified". even though the cited provision gives two examples further on ("in particular") of "justified" cases, it still – in

accordance with the principles of legislation - gives the President of UOKiK freedom to withdraw from the prohibition of a merger, even if the competition as a result of its implementation will be significantly limited; The President of UOKiK has only to present (arbitrary) arguments in the decision that the withdrawal from the prohibition of a merger is "justified".

4. Mergers in the energy sector

Like telecommunications, media or railway markets, energy markets are strategic industries in every state organization. They play an important role in ensuring security, especially in real internal or external threats (Grega, Nečas, 2022; Somogyi, Nagy, 2022; Radchenko et al., 2023; Sikimić, M. 2022). These markets and any other (non-strategic) markets are subject to the provisions on the control of merger of enterprises without statutory exclusions. This means that regardless of political decisions, even those related to state security, the merger control regulations are directly applicable, possibly considering the provisions of Art. 20 sec. 2 of the Act (see above). In the decision-making practice of antitrust authorities, cases concerning the control of mergers in energy markets have been considered many times. The decisions concerned various sectors of the broadly understood energy sector; the cases were evaluated in different ways, and, finally, the decisions were issued on various legal grounds corresponding to the evaluation conducted and resulting from the conclusions of the analyzes. One of the first important merger decisions related to the energy market was decisions regarding vertical consolidation in the energy sector. The consolidation was the implementation of the "Programme for the power industry" adopted by the Council of Ministers.

The program provided for the merger of entrepreneurs from the power industry owned by the State Treasury into four energy groups, i.e.: (1) the creation of the Polish Energy Group, which was to be established based on the Bełchatów - Opole - Turów holding company, Power Plant Complex Dolna Odra, assets remaining after the separation from Polskie Sieci Elektroenergetyczne (PSE) the Transmission System Operator together with the assets and distribution companies from the region of Białystok, Łódź, Wrocław, Zamość, Rzeszów, Lublin and the Radom-Kielce district, (2) merger of Southern Energy Complex S.A. with ENION S.A. distribution companies and ENERGIA-PRO S.A. and Power Plant Stalowa Wola S.A., (3) merger of ENEA S.A., Power Plant Kozienice S.A. and the Bogdanka Coal Mine S.A. and (4) merger of KE ENERGA S.A. and ZE Ostrołęka S.A. (Decision of the President of UOKiK No. DOK-163/2006).

The consolidation aimed to create strong, vertically integrated energy entrepreneurs who could effectively compete with entrepreneurs from other European Union Member States. It is obvious that such spectacular and large mergers were subject to notification to the antitrust authority in order to obtain consent for their implementation. As they were not excluded from the scope of the Act, they were subject to substantive evaluation based on the applicable regulations, even though they resulted from the government programme. On December 22, 2006, the President of UOKiK issued a decision (Decision of the President of UOKiK No. DOK-163/2006), which approved the merger consisting in the acquisition by PSE S.A. with its registered office in Warsaw of the control over: BOT Mining and Energetics S.A., Power Plant Complex Dolna Odra S.A., Power Station Białystok S.A., Power Station Łódź - S.A., Power Station Warszawa - S.A., Zamojska Energetics Corporation S.A., Rzeszowski Power Station S.A., Lubelski Power Station S.A., Łódzkie Power Station S.A. and Power Plants of the Radomsko-Kielce District S.A. It was the first of four vertical mergers in the energy sector. During the proceedings, the antitrust authority determined that the planned merger would affect a number of markets, both horizontally and vertically. As noted by the antitrust authority, the planned merger will lead to the creation of a dominant position of Polish Energy Group S.A. (hereinafter: "PGE") on the market for the generation and marketing of electricity, on the domestic market for the provision of bottom-up services, on the domestic market for the generation and marketing of electricity from renewable sources, as well as to strengthen the dominant position of the participants of the merger on domestic wholesale market. The President of UOKiK concluded that after granting the consent to the merger, PGE could operate to a large extent independently of competitors, as well as from contractors who would have a limited choice of electricity producers. The above conclusions did not give grounds for the antitrust authority to issue a decision approving the merger pursuant to Art. 18 of the Act (previously Art. 17), i.e. consent resulting from the determination that the planned merger does not

significantly restrict the competition. However, taking into account that the planned transaction took place on a strategic market from the point of view of the state, and that it was part of a broader government program, the President of UOKiK found it justified to consider granting consent for it pursuant to Art. 20 sec. 2 of the Act (formerly Art. 19(2)), i.e. extraordinary consent (see above), when the circumstances of the case indicate that it is necessary to prefer other publicly protected values over the value of the competitive market. The President of UOKiK noted that the planned transaction, despite the restriction of competition it generates, will contribute to ensuring the country's energy security. In the course of the proceedings, the President of UOKiK concluded that (at the time of issuing of the decision) part of the generation capacity in Poland had to be closed due to the requirements related to environmental protection regulations. At the same time due to the forecasted increase in electricity demand, it was necessary to build the additional generation capacity. Without such actions, disturbances resulting from diminishing reserves were inevitable in the energy system. The President of UOKiK also pointed to the inefficient import of electricity due to the low capacity of cross-border interconnectors, which was considered insufficient to cover the current demand. According to the authority, establishing PGE enabled the implementation of the above tasks due to its significant investment potential. The merger - as a result of consolidation - of the capitals of indebted production companies with non-indebted distribution companies (the essence of vertical consolidation) increased the possibilities of financing new investments based on the equity of distribution companies. Arguing for the extraordinary consent to the merger, the antitrust authority stated that "the existence of a consolidated entity will ensure its economic and financial stability, which will positively affect the country's energy security. If the consolidation did not take place, the producers, due to the high level of debt and the lack of investment opportunities, would find themselves in a difficult economic and financial situation, which could threaten the security of energy supplies on a national scale" (Decision of December 22, 2006, no. DOK-163/2006).

Importantly, in the context of the decision, the President of UOKiK also notes that the planned merger will have a negative impact on the market. First, the authority did not share the opinion of the merger participants that the merger would reduce electricity prices. In the right opinion of the authority, the degree of subjective merger of the market impacts prices. If there is an entity with a dominant position in the market, it can impose higher prices. The President of UOKiK also did not notice the relationship between the planned transaction and faster resolution of problems arising from long-term contracts in the energy sector, as claimed by the parties to the transaction (Decision of 22 December 2006, no. DOK-163/2006).

The merger discussed above was the only one, since the creation of modern competition law in Poland, in the case of which the President of UOKiK issued a decision expressing consent to its implementation, taking as a basis the disposition of Art. 20 sec. 2 of the Act, i.e. a "non-substantive" basis, assuming a different value than the value of effective competition on the relevant market. Other mergers within vertical consolidations in the energy sector were evaluated through a thorough analysis of their impact on the market in a horizontal, vertical and conglomerate arrangement. In each of these cases, the President of UOKiK did not notice competition restrictions that could affect the decision on the prohibition of the transaction and issued substantive approvals for their implementation, pointing to art. 18 of the Act (previously Art. 17) (Decision of the President of UOKiK of February 16, 2007, No. DOK-19/07; Decision of the President of UOKiK of March 8, 2007, No. DOK-29/07, Decision of the President of UOKiK of 29 May 2007, no. DOK-66/07, Decision of the President of the Office of Competition and Consumer Protection of 28 September 2007, no. DOK-32/07).

Another ground-breaking judgement of the Polish antimonopoly authority on the energy market was the decision on merger consisting in the acquisition by PGE S.A. of the control over Energa S.A. (hereinafter: "PGE/Energa") (Decision of the President of UOKiK of January 13, 2011, No. DKK-1/2011). The decision of the antitrust authority was made pursuant to Art. 20 section 1 of the Act [prohibition of concentration], without taking into account the provisions of art. 20 sec. 2 of the Act [extraordinary consent]. The decision prohibited the merger, recognizing, on one hand, the restrictions of competition that the merger entailed and, at the same time, not seeing the value of others that could be preferred over the value of effective competition on the market. This decision of the authority is significant because, despite the fact that the merger was conducted with the participation of State Treasury companies and obviously - which should be assumed - had the support of the

State Treasury, the authority within the structures of government administration issued a ban on its implementation. This could prove the actual judicial independence of the President of UOKiK, who - in accordance with the applicable regulations - is only formally supervised by the Prime Minister; the latter cannot and does not influence the substantive decisions of the antitrust authority.

In the decision of PGE/Energa, the authority clearly indicates that "since the issuance by the President of the Office in 2006-2007 of decisions on the merger-related to the so-called vertical consolidation in the electricity sector, there were no significant changes that could alter the position of this authority with regard to the evaluation of the geographical definition of the electricity generation and the market". This means that the criteria that influenced the decision made in 2011 regarding the designation of the relevant markets were the same as between 2006-2007. In particular, the President of UOKiK found that there are significant restrictions on energy exchange between Poland and neighbouring countries, which exclude the possibility of extending the geographically relevant market beyond the territory of the Republic of Poland, which means that possible restrictions on the competition are identified and evaluated from the perspective of the domestic market. After analyzing the market, the antitrust authority concluded that the merger would reduce competition in the domestic electricity retail market. According to the authority, after the merger of PGE/Energa, one of PGE's biggest competitors, next to Tauron and Enea, would disappear from the market. PGE's takeover of control over Energa would adversely affect the structure of the market and, to a large extent, limit electricity consumers' ability to choose their energy supplier. This, in turn, would have a negative impact on the implementation of the promoted TPA rule. When prohibiting the planned merger, the President of UOKiK also took into account the vertical links between its participants, and they prevailed in terms of the direction of the decision. As noted in the decision, "vertical links between electricity producers, entrepreneurs operating in the field of wholesale trading and distribution companies, pose risks, particularly concerning electricity producers not covered by vertical consolidation (these producers may have problems selling electricity)". Therefore, the President of UOKiK drew attention to independent energy enterprises outside a given vertically consolidated group. During the proceedings, a large part of the electricity generated by PGE was sold outside its capital group because PGE's share in electricity generation was greater than its share in the sale of electricity to consumers connected to its group's distribution network. As noted, consent to the merger would result in an internal market closure because, after the merger of PGE with Energa, almost all electricity could be sold to customers connected to the distribution network of the enterprises included in the merger with Energa of the PGE group. This contradicted the idea of vertical consolidation in the energy sector, which was creating an imbalance between generation and distribution, which was supposed to contribute to the stability of the electricity market (Decision of the President of the Office of Competition and Consumer Protection of 13 January 2011, no. DKK-1/2011).

The Nord Stream II case was also the subject of proceedings by the antitrust authority - the President of the Office of Competition and Consumer Protection in terms of merger control of enterprises. The notification of the intention of merger was submitted to the President of the Office of Competition and Consumer Protection by 6 enterprises which applied for consent to the establishment of a joint enterprise whose activity was to be the construction and operation of subsea Nord Stream II gas transmission pipelines. The President of UOKiK raised objections to this transaction, pointing to the restrictions of competition that would result from it. Therefore, the participants in the proceedings, in the letter of August 12, 2016, withdrew the notification of the intention of a merger. According to Art. 75 sec. 1 item 1 of the Act, in such a situation, it is necessary to discontinue the proceedings, which the antitrust authority did. In 2017, the authority initiated proceedings concerning the suspicion of "gun jumping". In the opinion of the President of UOKiK, the parties of the merger, even though they withdrew the notification application, conducted - in the opinion of the authority – the merger without consent, which took the form of cooperation, such as financing agreements (decision of the President of UOKiK of 6 October 2020, no. DKK-178/ 2020).

According to the antitrust authority, the financing agreements, although they constitute a flexible type of cooperation rather than cooperation based on examining a joint venture, in the present case, fulfilled similar economic functions. The President of UOKiK closed the proceedings with a decision (Decision of the President of UOKiK of 6 October 2020, No. DKK-178/2020) imposing penalties on participants for conducting a

merger without the required consent and ordering the termination of concluded agreements related to financing the construction of the Nord Stream II gas pipeline (https: //www.prawo.pl/biznes/postepowania-w-uokik-w-spraw-nord-stream-2-opinia-bernadeta,496222.html, as of June 28, 2023; https://www.prawo. pl/biznes/kary-za-nord-stream-2-for-gazprom-and-the-rest-of-companies,503636.html, as of June 28, 2023).

As a result of the appeal against the decision, on November 21, 2022, the Court of Competition and Consumer Protection issued a judgement in which it overturned the decision, stating that it was issued in gross violation of the law. The decision is not final. A significant merger in the energy industry was the acquisition by PKN Orlen S.A. (hereinafter: "Orlen") of sole control over Lotos Group S.A. (hereinafter: "Lotos"). The case - due to the turnover of the merger participants - was evaluated by the European Commission (Journal of Laws C 196/8, of May 25, 2021), excluding the competence of the President of UOKiK in this regard. The Commission has identified several relevant markets where the proposed transaction would significantly reduce the competition. This concerned: the market for wholesale supplies of diesel oil in Poland, the market for wholesale supplies of gasoline in Poland, the market for wholesale supplies of light fuel oil in Poland, the local and national retail markets for supplies of engine fuels in Poland, the market for supplies of aviation fuel for jet engines at the "loco-refinery" level in Poland and the Czech Republic and the market for the supply of aviation fuel for jet engines for aircraft at all airports in Poland and the market for the supply of standard bitumen in Poland, the market for the supply of modified bitumen in Poland and the supply of industrial bitumen in Poland. In connection with the threats arising from the planned merger, the European Commission raised objections to the concentration. As a result of the Commission's objections, the merger participants decided to propose countermeasures (obligations) which, on the one hand, were to eliminate the identified restrictions of competition, but on the other hand, were to prevent the merger from taking place. After a thorough analysis, the European Commission accepted commitments and issued a decision approving the merger, provided that: With regard to wholesale supplies of diesel oil, gasoline and light fuel oil in Poland, the participants of the merger will sell 30% of shares in the Lotos refinery in relation with an agreement that will ensure a buyer the access to an amount of diesel and gasoline equivalent to about half of the refinery's output. At the same time, the merger participants were obliged to sell a total of 9 terminals owned by Lotos and Orlen to an independent provider of logistics services. The Commission obliged the merger participants to release the fuel storage capacity, which was reserved with other suppliers of storage space in Poland. Concerning retail supplies of engine fuels in Poland, the Commission obliged the merger participants to sell 389 retail stations at the national and local level, with the proviso that the buyer would still be able to make wholesale purchases from the participants. Concerning jet fuel deliveries at the "loco-refinery" level in Poland and the Czech Republic and jet fuel supplies to aircraft in Poland, the commitment included the divestment of Lotos' assets in a joint venture that Lotos had with BP, a commitment to continue the delivery of aviation fuel for jet engines to that company and an obligation to offer that company and other suppliers the aviation jet fuel access to storage services. In addition, Orlen undertook to build a terminal enabling the import of aviation fuel for jet engines, which was to be transferred to an independent logistics service provider. The Commission stipulated that the buyer of 30% of the assets in the Lotos refinery (see point 1 above) must have access to a share in the production of aviation fuel for jet engines of this refinery. As regards the commitments concerning the territory of the Czech Republic, Orlen undertook to make available, through a tender, quantities of aviation fuel for jet engines equivalent to the sales volume of Lotos before the transaction. With regard to the supply of various types of bitumen in Poland, the commitment included the divestiture of two bitumen production and distribution plants in southern Poland and a supply contract. As stated by the Commission, the commitments proposed by the merger participants and finally expressed in the decision were sufficient to eliminate the identified threats to more effective competition in the markets affected by the potential restriction. An important decision in the energy sector was the decision expressing conditional consent to the merger consisting in the consolidation of Polish Oil Company ORLEN S.A. and Polish Oil and Gas Company S.A. (Decision of the President of UOKiK of March 16, 2022, no. DKK-82/2022). The authority issued a decision to conduct the planned merger, provided that the participants of the merger divest or cause the divestment of control over Gas Storage Poland LLC The President of UOKiK identified a number of relevant markets affected by the merger in a horizontal, vertical and conglomerate arrangement. Not all of these influences would lead to a significant restriction of competition, which could imply the issuance of a decision prohibiting the planned merger. With regard to horizontal influences, the antitrust authority noted that the ac-

tivities of the merger participants "overlaid on the natural gas wholesale market in Poland. Their total share in this market significantly exceeds 50%"; however, the high total shares of the merger participants resulted from PGNiG's strong position in this market so far. However, the President of UOKiK noted that Orlen, despite its smaller market share, was a significant player in the market and a close competitor of PGNiG. For this reason, as stated by the President of UOKiK, the planned merger would lead to the elimination of a significant potential competitor from the market. It thus could affect the conditions of competition in the natural gas wholesale market.

Similarly, the natural gas retail market situation would deteriorate after the merger. The authority's analysis shows that the position of the merged entity would enable it to act almost completely independently of its competitors. Although - as the authority notes - Orlen's share of this market is several per cent, it is a close competitor of PGNiG. The President of UOKiK also noted the vertical effects of the merger on the market, one of which would be a vertical link between the natural gas sales market and the gas storage market, limiting the competition. As the authority notes, the statutory obligations to guarantee storage space when importing gas are a fundamental element that blocks the development of the competition for PGNiG and Orlen. Maintaining stocks is necessary to ensure that foreign companies can operate on this market (Decision of the President of UOKiK of 16 March 2022, No. DKK-82/2022). The decision also identified a number of markets affected by the merger in a conglomerate arrangement. However, this impact was not linked to a possible restriction of the competition, which would condition the issuance of a decision prohibiting the merger.

In conclusion, it should be stated that the President of UOKiK, analyzing the case, identified three relevant markets on which the merger would have a negative impact in terms of effective competition, i.e. the market for wholesale of natural gas, retail sale of natural gas (horizontal impact) and the market for natural gas storage (vertical impact). As it should be assumed (business confidentiality information), the total share of merger participants in markets with identified horizontal influences significantly exceeded 40%, i.e. the threshold with which the Act associates the emergence of a dominant position. At the same time, the justification of the decision allows for the statement that, according to the President of UOKiK, the fact of guaranteeing the ownership independence of the entrepreneur from the PGNiG capital group, Gas Storage Poland LLC, which operates on the gas storage market, will compensate for the negative effects of the merger (identified by the authority itself). As can be concluded, according to the President of UOKiK, the mere fact that the enterprise responsible for the storage of natural gas will have (as independent of the merger participants) storage capacity for foreign enterprises will intensify the competition to such an extent that the significant strengthening of the merger participants on markets with the existing horizontal impact will be balanced by their foreign competitors; their entry into the gas sales market due to independent (released) storage capacity will counterbalance the strong dominant position of the combined PGNiG and Orlen on the retail and wholesale natural gas markets. Although it should be recognized - bearing in mind that the authority is equipped with legal instruments that allow it to be effectively examined - that, in fact, the condition contained in the decision is a countermeasure for the restrictions of the competition brought about by the planned and implemented transaction, it is worth considering theoretically whether in this case, it would not be appropriate to issue a decision pursuant to Art. 20 sec. 2 of the Act (extraordinary consent). Extraordinary consent on strategic markets and the energy sector is undoubtedly one of them, and, in principle, more justified than conditional consent, which may raise doubts due to the disproportion between competition restrictions and those adopted by the antitrust authority countermeasures.

5. Summary and conclusions

In the Act of August 24, 2001 on the restructuring of the iron and steel industry (Journal of Laws of 2001, No. 111, item 1196) (Article 22(3)) it was decided that the intention to merge, on behalf of the State Treasury S.A., Smelter Plant Cedler, Smelter Plant Florian S.A., Smelter Plant Katowice S.A. and Smelter Plant of Tadeusz Sendzimir S.A. in PHS S.A., by obtaining their assets or shares, is not subject to notification to the President of the Office of Competition and Consumer Protection. Therefore, a statutory exemption from the obligation to obtain the consent of the antitrust authority for the execution of a transaction considered significant from the point of view of the state's interests was constructed in this case against the value of the existence of the effec-

tive competition. Therefore, assuming that there are situations in which values other than effective competition should, for various important reasons, be prioritized over the value of competition as such, it may be worth considering establishing statutory exemptions from the obligation to notify the intention of certain sensitive mergers - similar to that of 2001 - instead of creating constructions of antitrust decisions in merger cases that may raise doubts in the doctrine and jurisprudence.

This article does not exhaust the topic of the merger of entrepreneurs in the energy industry because there are many of them. It presents only the most spectacular rulings of the antitrust authorities concerning this industry. Mergers in strategic industries from the state's point of view usually raise doubts among practitioners and theoreticians of competition law, who view them puristically through the prism of only substantive evaluation, just like any other transactions unrelated to strategic markets. The pragmatic point of view, related in particular to state security, may be different. Bearing in mind this different perception, it is worth ensuring that it is clearly stated in the antitrust adjudication process that the evaluation of certain transactions is not substantive. Still, it is a necessary balancing of goods. In some cases, it will be essential to prioritize the considered good more important than the competition.

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