

# *Merger Control – Practical Aspects*

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# ***Contents***

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## **Mergers**

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Legal framework

---

What is a merger?

---

Substantive Assessment

---

When?

---

What?

---

Notification procedures – Poland and EU

---

Sanctions for failing to notify

---

## **Enforcement of Competition Law**

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UOKiK activities

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# What is a merger?

***Merger = concentration***

## Concentration may be in the form of

- Acquisition of control (sole, joint, *de facto*)
- Merger
- Acquisition of assets

## Full function joint venture

- Full-function joint venture, i.e. JV that performs on a lasting basis all functions of an autonomous economic entity
- No concept of full-function joint venture in Poland

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# ***Merger Control***

✓ **Regulation No. 139/2004** – the so-called EC Merger Regulation (“EC Merger Regulation” or “ECMR”)

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✓ **Implementing Regulation**

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✓ **The Polish Act on Competition and Consumer Protection** of 16 February 2007 (the “Polish Competition Act”), as amended

# ***Legal Framework***

## **EC Merger Regulation and the Implementing Regulation**

- EC Merger Regulation contains the main rules for the assessment of concentrations
  - The Implementing Regulation concerns procedural issues
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## **National competition laws**

- In Poland the Polish Competition Act and auxiliary acts and ordinances
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## **Best Practice Guidelines**

- The relationship between case team and parties/third parties during the procedure (pre-notification contacts, meetings, provision of documents).

## ***Legal Framework – con.***

### **Notices and Guidelines**

- Consolidated Jurisdictional Notice
  - Simplified procedure
  - Case referrals
  - Notices on substance
    - Non-horizontal Guidelines
    - Horizontal Guidelines
    - Relevant Market
    - Remedies
    - Ancillary restraints
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### **The role of the Hearing Officer**

### **Access to file**

### **Abandonment of concentrations**



## ***Substantive assessment***

### **Relevant market**

Legal framework

What is a merger?

### **Market shares**

### **Efficiencies**

### **Market power**

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## *Market definition and market shares*

»»» Commission looks at market shares in the relevant market(s)

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»»» In many decisions the Commission does not take a firm view on market definition

- However, in some cases the Commission may agree that there is no need for a market definition, if sufficiently argued
  - And there is no doctrine of precedent
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»»» Generally, in a difficult case, Commission's instinct is to go for the narrowest definition of the relevant market that has some support from the industry (competitors, customers)



## ***Substance – Situations when there may be problems***

### **The following raise warning bells, particularly for the EC**

- Combined market shares over 40% in the narrowest market
- High market shares in one country
- Concentrated industry (5 players or less)
- Hostile competitors and/or customers
- Competitor wants part of merged business
- Commission is investigating the same sector



In such cases, antitrust issues should be examined as early as possible

# ***Horizontal mergers***

***May establish, enhance or entrench dominance***

## **Single firm dominance**

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- 40% market share or less – little risk
- 40% to 50% market share – some risk of prohibition/remedies
- 50% to 70% market share – real risk of prohibition/remedies
- 75% plus market share – likelihood of prohibition/remedies

## **Collective dominance**

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- Requirements:
  - Market transparency
  - Cooperation sustainable

# Procedure

- ✔ Compulsory notification if turnover thresholds are met

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- ✔ Rule 3+

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- ✔ Implementation prohibited until clearance (so called *gun jumping* = implementation before clearance)

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- ✔ Strict time limits for Commission's review (UOKiK - recently changed)

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- ✔ Assessment
  - **Distinguish between:**
    - Horizontal mergers (parties competitors) – may establish, enhance or entrench dominance
    - Vertical mergers (parties not competitors) – may entrench existing dominance
    - Conglomerate mergers

# *When do we notify the transaction to Antimonopoly Authorities? Poland/EU*



**Intention to concentrate** – notification to be filed before closing

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**What is accepted as a demonstration of intention to notify?**

- Preliminary Agreement
- Letter of Intent
- Conditional Share Purchase Agreement



In case of tender, often more than one consent may be granted by the Authority

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## ***What is subject to notification? Poland/EU***

»»» Merger of two or more independent entities

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»»» Acquisition of control (direct or indirect)


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»»» Joint venture

- EU – only full-function joint venture, i.e. a JV which acts continuously as independent economic entity
  - Poland – any joint venture
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»»» Acquisition of assets (not at the EU level)

# *What does not require antimonopoly consent? Poland*

-  Temporary purchase of shares by financial institutions with a view to sell them
-  Acquisition of shares in an entity whose turnover in Poland in either of 2 financial years preceding the notification did not exceed EUR 10 million
-  Joint venture if the turnover in Poland of each of the parties to the JV did not exceed EUR 10 million in either of 2 financial years preceding the year of the notification
-  Temporary acquisition of shares as security
-  Concentration taking place as a result of bankruptcy proceedings (except for acquisition by competitors)
-  Concentration of entities within the same capital group



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## ***What does not require antimonopoly consent? EU***

 **Bankruptcy proceedings**

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 **Acquisition of control by financial holdings**

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Only in order to protect the investment

## ***Turnover thresholds – Poland***

- ▶▶▶ Aggregate worldwide turnover of parties in a year preceding the concentration exceeds EUR 1,000 million, **or**

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- ▶▶▶ Aggregate turnover generated by the parties in Poland exceeds EUR 50 million, **and**

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- ▶▶▶ In an asset deal, turnover generated by the assets in question in any of the two years preceding concentration exceeds EUR 10 million

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- ▶▶▶ In a joint venture, turnover generated in Poland by parties to the joint venture in any of the two years preceding concentration exceeds EUR 10 million



## *Primary thresholds – EU*

- ▶▶▶ The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million; **and**
- ▶▶▶ The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million



Unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State

## *Secondary thresholds – EU*

- ▶▶▶ The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million
- ▶▶▶ In each of at least three Member States the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million
- ▶▶▶ In each of at least three Member States included for the purpose of point (b) the aggregate turnover of at least two of the undertakings concerned is more than EUR 25 million, **and**
- ▶▶▶ The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million



Unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State

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## ***Notification procedures before the Commission and the National Competition Authority („the NCA”)***

- ✔ **Detailed notification needed** – the Commission’s Form CO or the Relevant NCA’s Merger Notice locally

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- ✔ **Possible contacts on the form and substance with the Commission before signing**
  - Aim is to take issues off the table, to reduce information required in the filing and to avoid an in-depth investigation
  - Discuss relevant markets: consider early input from the economists
  - Can drag on for complex cases, which may interfere with timing

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- ✔ **No consultation procedure as a part of proceedings with the NCAs in some countries, e.g. Poland**

## ***EU Procedure (I) – Phase 1, Phase 2***

### **Phase I**

After a complete notification has been submitted, the Commission has **25 working days** in which to assess the transaction

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This period may be extended to **35 working days** if the notifying party offers remedies within **20 working days** after notification

### **Phase II**

90 working days in total

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+ 20 working days if requested by parties (or Commission with parties' consent)

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+ 15 working days if remedies offered after 54th day of investigation

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The process includes the following steps:

1. Statement of Objections (SO);
2. Oral hearing
3. Political stage with Advisory Committee and
4. Final Decision

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## ***Final Point on Notification – Pressure points for the Commission***

### **Case Team makes assessments on basis of information obtained from**

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- Notification Form: (detailed market data, often on a country-by-country basis)
- Questionnaires sent to competitors + customers (several in a complex case)
- Complaints (given great weight, especially if from customers)
- Press (e.g. CEOs speaking about the deal)
- General views of the Company and the sector
- Investment bank and other reports to the acquiring company's board
- Other competition authorities' precedents

## ***National level filing: Poland (I)***



Mandatory for acquiring entity or, in case of merger, jointly on behalf of all parties

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Urząd Ochrony Konkurencji i Konsumentów (the „Antimonopoly Authority” or „UOKiK”) has jurisdiction when the following thresholds are met:

- The parties’ aggregate worldwide turnover in the year preceding the notification exceeds EUR 1,000 million **OR**
  - The parties’ aggregate Polish turnover in the year preceding the notification exceeds EUR 50 million **AND**
  - **(only applicable in case of takeover of control)** The target’s Polish turnover thresholds during at least one of the two years preceding the notification exceeds EUR 10 million **OR**
  - **(only applicable in case of asset deals)** The turnover generated in Poland by the assets to be purchased during at least one of the two years preceding the notification exceeds €10 million **OR**
  - **(only applicable in case of joint ventures)** The turnover generated in Poland by the parties to the joint venture in at least one of the two years preceding the notification exceeds €10 million
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**NB:** There are detailed principles of calculating the turnover. The target’s turnover only includes the turnover of the target and its subsidiaries

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## ***National filing: Poland (II)***

- ▶▶▶ No deadline to file (However, the subject of notification is the intention of concentration)

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- ▶▶▶ Suspension of the transaction until clearance

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- ▶▶▶ Currently clearance timeframe: Implementation is suspended pending the decision of the authorities, which have 1 month to issue a Phase 1 decision or to conduct an investigation in Phase 2 which can take up to additional 4 months

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- ▶▶▶ The review period is also suspended in case the Antimonopoly Authority asks additional questions

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- ▶▶▶ Therefore, in case the Antimonopoly Authority starts market investigation, the procedure might take even half a year. There is no official term for conducting the market investigation, thus the Antimonopoly Authority may use the suspension to prolong the deadline and to ask additional question while investigating the market



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## *Appeals*

### **Possible to appeal against a negative (or positive) decision:**

- To the Court of First Instance in Luxembourg (Commission decisions) or
  - National Antimonopoly Court
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### **Procedural rules in the EU enable quick decisions in such cases**

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### **National Appeal Courts may not be very swift**



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# *Phase II investigations and prohibitions*

## EU level

Out of 6,747\* cases notified since September 21, 1990 till October 31, 2017, the Commission opened Phase 2 investigations in only 251 cases (<5%) and prohibited only 27 transactions



In 2016, the Commission opened 8 Phase II investigations in 8 cases out of 362 notified transactions (2,2%)

## Polish level

In 2016\*\*, UOKiK opened Phase II investigations in only 10 cases out of 196 notified transactions (<5%)

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Other types of decisions:



- Remedies
- Compatible
- Compatible with commitments
- Prohibitions
- Out of scope

\*Source: <http://ec.europa.eu/competition/mergers/statistics.pdf>

\*\*Source: [https://www.uokik.gov.pl/aktualnosci.php?news\\_id=12939&news\\_page=13](https://www.uokik.gov.pl/aktualnosci.php?news_id=12939&news_page=13)

## *Sanctions for failing to notify – Poland*



Concentration which was not cleared by the Antimonopoly Authorities is valid but...

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Within 5 years from the date of concentration the President of UOKiK may order a division of a joint venture, sale of its property or shares

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Financial penalty for the parties – up to 10% of the annual turnover

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Financial penalty for management members:

- Up to 50 times of an average salary or
- For people in managerial positions – up to 2 million PLN

## *Sanctions con. – EU*



Validity depends on subsequent decision of the Commission:

*An approval validates the concentration,  
a prohibition makes it invalid*

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Financial Penalty – up to 10% aggregate turnover of the parties

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## ***Enforcement in the EU/EEA***

»»» EC competition law applies in 28 EU Member States and 3 EFTA States

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»»» National Competition Laws are modeled on EC Competition Law and apply in parallel

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»»» EC Competition Law is enforced by

- The European Commission
- The European Courts (since 2004)
- National Competitions Authorities (since 2004)

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»»» National competition law is enforced by

- National Competition Authorities
- National Courts

# ***Enforcement of antitrust law in Poland***

- 2014** **Adam Jasser appointed as the President of UOKiK, continued strategy of the Office as far as:**
- UOKiK's priority: to increase the discovery of anticompetitive behaviour in the market and its prosecution – both country-wide and in local markets
  - Improvement of merger control system
  - Quality of proof in antimonopoly proceedings
  - Increase of functionality and transparency of procedures in proceedings before the UOKiK

**2016** **Marek Niechciał as the current President of UOKiK**

## Summary - UOKiK Activities 2009 – 2017



Further development of the leniency program – stronger incentives to cooperate

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January 1, 2009 – Guidelines for fixing fines

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February 24, 2009 – Ordinance of the Council of Ministers and UOKiK leniency guidelines (the Leniency Program)

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2015 – Guidelines on notification of concentrations

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Increasing transparency and efficiency of proceedings before UOKiK

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January 2015 – modernization of the Polish merger control procedure

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Increase of consumers' protection in dealings with entrepreneurs

*Thank you for your attention*

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