

POLAND

Polish provisions on company mergers

BY DOMINIK GAŁKOWSKI

Polish regulation on the process of merging companies does not differ from solutions applied in other European states. Furthermore, these laws are influenced by changes to similar European regulation. However, in analysing the company merger control process in Poland, it is important to differentiate two significant issues: first, the control of the registry court, and second, competition law.

First, the merger process is subject to the control of the registry court, which ensures the process adheres to the law. A merger plan is submitted to the registry court which then appoints experts who examine the correctness and reliability of the plan. Next, the resolutions on the merger are submitted to the registry court which examines whether the documents attached to the motion are compliant with the provisions of law in terms of form and content. The registry court also examines whether the information contained in the motion for the entry into the Register is accurate. In addition, if the registry court has any doubts, it examines whether the submitted information reflects the current status. This gives the registry court authorisation to examine the impact of any violation of the procedure for adopting resolutions in a general meeting of shareholders of a joint

stock company.

Moreover, the registry court will assess whether all the required merger documents were prepared and attached to the motion, and also examines their content. Further, the registry court will determine whether the companies have adhered to their statutory requirements for undertaking the merger. It also assesses the validity of the legal transaction covered by the document constituting the basis of the merger.

The examination outlined above aims to ensure that the merger procedure is conducted in accordance with the relevant provisions of the Code of Commercial Companies. A well prepared merger process reduces problems for the registry court to resolve.

Second, for larger transactions, an issue of key importance is ensuring that the merger satisfies the provisions which regulate business concentrations, under the Act on Competition and Consumer Protection (the Anti-Monopoly Act).

The merger will be submitted for review to the president of the Office of Competition and Consumer Protection in the event that: (i) the total global turnover of the companies participating in the concentration in the turnover year preceding the year of the submission exceeds the equivalent of €1bn or; (ii) the total turnover in the territory of Poland of the companies participating in the concentration in the turnover year preceding the year of the submission exceeds the equivalent of €50m.

In turn, in accordance with *de minimis* regulation, the intent of concentration is not subject to submission if the turnover of the target company did not exceed €10m within the territory of Poland during either of the two turnover years preceding the submission. Transactions involving the temporary purchase of shares or stocks for the purposes of their further resale (with some exceptions) are also exempt from the obligation of submission. The purchase of an enterprise in the course of bankruptcy proceedings (unless it leads to the takeover of a competitor or the buyer belongs to a capital group to which the competitors of the acquired enterprise belong) is also not subject to submission. Of course, the merger of enterprises belonging to the same capital group is also exempt from the submission.

In determining whether there is a need to submit the merger for review, the provisions

will consider the existing capital relations between the companies. In estimating the level of turnover, any additional companies belonging to the capital group to which the companies participating directly in the merger belong, are also considered.

The president of the Office of Competition and Consumer Protection will allow the merger if it does not significantly limit market competition. Specifically, the merger must create an entity with a dominant position in the market, or strengthen the dominant position of an existing entity. This is evaluated on a case by case basis. The president then examines the impact of the concentration, among others, on the level of prices, demand, and also the quality or the innovativeness in the relevant market.

The president's decision may be issued under specific conditions, such as the obligation to transfer an indicated asset or dispose of control (i.e., through a sale or by dismissing of a member of the management body of one or several companies) or granting a competitor a licence to certain excluded rights.

Although the president is charged with prohibiting concentrations that limit market competition, approval for a merger may be granted if it will lead to economic development or technical progress or will have a positive impact on the national economy. Such a decision would be an exception to the rule and the grounds for issuing such a decision must be interpreted strictly. The president must consider whether the public interest is better served by permitting a merger of an anti-competitive nature, or banning it, having considered and analysed all the aspects of a specific case. Such a decision may be applied only when a particular interest of the company participating in the merger speaks in favour of such an action. The possibility of issuing this decision differentiates Polish regulation from the wider EU community law, wherein the Commission cannot agree to allow a concentration of an anti-competitive nature. The existence of this regulation is criticised in Polish legal literature. Whether failing to limit market competition actually serves the public interest will continue to be a subject of debate.

The decisions of the president of the Office of Competition and Consumer Protection shall expire if the merger does not take place

within two years from the date of the issuance of a decision (even though this deadline can be exceeded at the request of the merging companies, if they can prove that a change in

circumstances has occurred which means that significantly limiting competition).

In conclusion, Polish provisions regarding company mergers and competition are well

constructed and effective in practice, and do not differ from other European regulations. That said, as is the case with any regulation, they are not free from uncertainty. ■



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Kubas Kos Gaertner (KKG) is a law firm with a strongly grounded position confirmed by rankings conducted both in Poland and abroad, as well as numerous recommendations for KKG as well as its attorneys. The careful selection of employees possessing the highest competences and experience gained all over the world ensures the outstanding quality of legal services provided by KKG in

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