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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Poland

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Poland --

1. General points

1. Merger control system has existed in Poland since 1990. At the moment, it corresponds to the standards elaborated in the OECD and the ICN. Merger control is a part of competition policy together with separates the anti-cartel provisions. The merger control includes all concentrations, which might have an effect on the Polish territory and meet the working criteria set out in the Act of 16 February 2007 on competition and consumer protection. The antimonopoly law does not introduce the definition of concentration, but indicates what kind of transactions are concentrations. Pursuant to Article 13(2) concentrations cover the following cases:

- a merger of two or more independent undertakings;
- takeover – by way of acquisition or entering into a possession of stocks, other securities, shares or in any other way obtaining direct or indirect control over one or more undertakings by one or more undertakings;
- creation by undertakings of one joint undertaking;
- acquisition by the undertaking, of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland, the equivalent of EUR 10,000,000.

2. The criteria for the notification obligation are objective in nature and are based on the turnover of enterprises engaged in concentration. Pursuant to Article 13(1) of the antimonopoly law, the concentration is subject to notification if:

- the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1,000,000,000, or
- the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50,000,000.

3. Merger control system in Poland is mandatory, and entrepreneurs have an obligation to refrain from carrying out the transaction until its evaluation by the antitrust authority. Transactions must be notified using a special form, which also determines what kind of documents should be submitted. Notification applications are subject to a fee of around EUR 1,250.

4. Evaluation of concentration is based on the test of a significant restriction of competition. The wording of the test and its fundamental interpretation is consistent with the European law. An additional and complementary test to assess the concentration is a test of public interest, which allows authorizing anticompetitive mergers, if it is in other overriding public interest, such as national security.

5. All transactions are treated in the same manner. There are no separate rules for transnational transactions.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

6. The Polish system of merger control is independent of other national systems of merger control. The Polish legal system recognizes and does not infringe the rights of other national competition authorities to control and decide whether the notified mergers are anti-competitive. In terms of jurisdiction over concentrations, there have never been any problems in cooperation with other national competition authorities.

7. Poland is not a party to any bilateral international agreements on competition law. The Polish competition authority (UOKiK) has the right to cooperate with other antitrust authorities and conclude agreements, but they are non-binding international agreements. In the opinion of Polish competition authority, there was no need to conclude such agreements, so far. The current legal system provides the possibility of effective collaboration in dealing with transnational mergers. However, certain restrictions apply to: 1. the inability to transfer evidence containing protected information; 2. Inability to benefit from waivers. In the present practice, however, restrictions do not adversely affect the cooperation with other national competition authorities in merger cases.

8. Polish merger control test does not take into account interests of other countries. Evaluation of a given concentration is dependent on the designation of geographic aspect of the relevant market. If the relevant market in a given case is the supranational market, then the Polish antitrust authority examines the effect of a concentration outside Polish borders. In the administrative practice, the Polish antitrust authority, whenever possible, tries to cooperate in good faith with other national antitrust authorities.

9. The Polish competition authority has taken an active part in international initiatives and forums of cooperation for the protection of competition, namely the OECD and the ICN. Authority's staff is involved in the work of the working groups of the forums devoted to merger control. The international standards and best practices amending the Polish antitrust legislation are a important source of inspiration of these changes.

10. In terms of regional initiatives in the field of multijurisdictional merger control, the most important is the membership in the European Union and the division of powers between the Commission and national authorities. Cooperation between national authorities occurs especially when using the system for referrals of cases to the Commission or the taking of cases from the Commission by national authorities. In this context, principles of cooperation developed in the ECA forum are important. The UOKiK is not a party to other agreements, which in any way affect the jurisdiction or lay down the rules for cooperation with other competition authorities.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

11. The Polish system of merger control is based on compulsory notification of all transactions meeting the notification thresholds. Notification turnover thresholds were significantly increased over the

past 10 years. Because of this, all transnational transactions, which even slightly could affect the markets on the Polish territory are subject to notification. The increase of turnover thresholds served to reduce business transaction costs by limiting the obligation of notification. However, a problem can be noticed that by increasing the working turnover thresholds and adapting them to transnational transactions, they have become too high for certain transactions of a purely local nature. The result is that it becomes reasonable to restore the notification criteria based on objective indicators, such as the market share.

12. The UOKiK has no legal opportunities to oblige entrepreneurs from outside Poland to cooperate during the investigation. However, in many cases, such cooperation took place on a purely voluntary basis. In a few cases the Polish office helped foreign authorities to obtain a response from Polish entrepreneurs, as well. In half of the cases, through persuasion of the UOKiK, Polish entrepreneurs have responded to the call by foreign authorities.

13. The UOKiK has a full legal independence in exercising the jurisdiction over merger transactions affecting the Polish territory. In this sense, decisions taken by other competition authorities may not bind the Polish competition authority in while making any decision. Nonetheless, UOKiK take into account any decisions taken by the foreign competition authorities. Furthermore, this does not preclude an effective cooperation with other national authorities and the coordination of activities relating to a notified transnational concentration. In the present practice, however, there was no need to make the decision of the Office dependent on the position of other foreign competition authorities.

14. The UOKiK is an independent body and the political influence from other public administration or government bodies is limited. Moreover, any political intervention is excluded in reference to examination of transnational mergers notified to the UOKiK. There is no legal basis in the Polish system of competition protection for any other authority to change the decision of the UOKiK or impose obligations on it. It should be noted, however, that in addition to merger control exercised from the standpoint of competition protection, there is a possibility of merger control under other legislation. For example, the Financial Supervisory Authority also controls the concentration of entrepreneurs from the financial sector in terms of transaction safety and consumer protection. Those two perspective, do not necessarily lead to the same conclusions. Such a situation occurred in relation to the concentration of the Unicredit/HVB.

15. Transnational transactions are not regulated differently from domestic transactions and the same rules apply. For this reason, non-economic issues can be taken into account if the concentration is assessed on the basis of public interest test. In applying this test, the UOKiK may approve the anti-competitive concentration if:

- the concentration is expected to contribute to economic development or technical progress;
- it may exert a positive impact on the national economy.

16. In practice, the UOKiK relied on public interest test when assessing mergers in energy sector. In this context the Polish energy security and social security and the fight against unemployment were invoked. However, the public interest test may not be a basis for blocking a concentration, including transnational concentration.

17. In the current practice of the Polish competition authority, transnational transactions were not particularly complex cases. However, they could potentially be a challenge in coordinating the activities of many national bodies and the protection of the rights of entrepreneurs. In particular, this protection must involve regulation of the transmission of data containing business secrets.

2.3 Remedies (types, consultation, monitoring and enforcement)

18. In the current practice, the UOKiK has never issued a conditional decision in relation to a transnational merger. The Polish competition authority may use both the structural and behavioural conditions. Structural conditions consist in obliging an entrepreneur to give up certain assets, e.g. sale of stores or production line. Behavioural conditions rely on the imposition on an entrepreneur of the duty to act in a specific manner, such as providing distribution networks for third parties.

19. Structural conditions are the primary type of conditions applied by the UOKiK. Behavioural conditions are accepted only if the structural conditions cannot be adopted. Preference for structural conditions is due to the fact that they provide a permanent modification of the market structure and effectively counteract the anticompetitive effects of concentrations. Behavioural conditions are usually temporary and are much more difficult to monitor. Also, the determination of the wording of behavioural conditions is more difficult than in the case of structural conditions.

20. The practice of the UOKiK shows that very often the discussions with entrepreneurs concentrate on the period to implement the condition. Overseeing the implementation of structural conditions is easier than in the case of behavioural conditions. Entrepreneurs often want to avoid a detailed description of conditions, since it facilitates their evasion of commitments. The more accurate the description of all the commitments, the easier it is to monitor their implementation.

21. The primary instrument for monitoring the performance of the conditions covers the obligation imposed on entrepreneurs to periodically report progress in the implementation of conditions. In case of doubt the UOKiK may request the entrepreneur to produce all documents related to the implementation of conditions or may carry out an audit at entrepreneur's premises. As regards the monitoring of conditions, no additional agreements with other national antitrust authorities have ever been concluded. This situation resulted from the fact that the previously imposed conditions had to be implemented on the Polish territory, and so there was no need to involve other bodies. Moreover, there were no such situations under which other foreign competition authority asked the UOKiK for help in monitoring the implementation of conditions.

22. In the practice of the UOKiK, there has been no coordination of the activities of the Polish authority with other national competition authorities in terms of joint setting of conditions.