Report from the meeting of the Open PhD Candidates' Seminar of CARS "Conditional merger approval in legislation and decision-making in Poland", 16 November 2010

Meeting of the Open PhD Candidates' Seminar of CARS, which took place on November 16, 2010 was dedicated to the basic problems arising in relation with conditional merger decisions in Poland. The opening lecture of professor Tadeusz Skoczny was based on his empirical study, the subject of which was quantitative and qualitative analysis of decisional practice of the Polish Competition Authority with respect to conditional merger decision.

During the presentation professor Tadeusz Skoczny presented assumptions underlying his empirical study, legal justification and basic principles governing conditional merger decisions, types and nature of conditions. In addition, prof. Tadeusz Skoczny offered his thoughts on construction and imposition of conditions and sanctions for their infringement. At the end of the presentation professor Tadeusz Skoczny presented conclusions and drew attention to the following subjects:

1) the number of conditional merger decisions in Poland is insignificant, mainly due to the small number of controversial mergers notified,
2) the quality of the Polish regulation on conditional merger decisions is low (lack of compatibility with the European Union regulations, lack of clarity as to the type and nature of conditions, imperfect procedure of construction and imposition of conditions);
3) practice of imposing conditional merger decisions is improving from the efficiency point of view (prevention against anticompetitive concentrations).

The presentation of professor Tadeusz Skoczny is available on the CARS internet website.[1]

After the presentation the participants of the Open PhD Candidates' Seminar of CARS took part in a discussion (their remarks are presented below in order of appearances).

Jarosław Sroczyński: During his appearance Jarosław Sroczyński drew attention to insignificant role of judicial review in the merger control proceedings ("Does the Court have anything to say in the merger control proceedings?"). Insignificant role of the Court is a consequence of the objectives of the parties in the merger control proceedings. Due to the dynamic nature of transactions, decisions should be well-timed. If the decision is not issued within the required period of time, later judicial intervention may not be an effective remedy.

[1] http://www.cars.wz.uw.edu.pl/osd/pdf/SkocznyDecyzjewarunkowe.pdf

Jarosław Sroczyński also emphasized the importance of the "economic approach" in the merger control proceedings. In cases where concentration raises concerns, the Polish Competition Authority should open an economic dialogue with the parties. Such approach would also benefit the Polish Competition Authority by partly relieving the burden of responsibility for analyzing the economic effects of concentration.

Jarosław Sroczyński also indicated that in practice there are instances where in the course of proceedings parties are willing to reshape a transaction in order to address concerns of the Polish Competition Authority. Such voluntary modifications result in unconditional merger clearances. Jarosław Sroczyński expressed his opinion that in such cases the conditions are created in the course of merger proceedings before the final decision is issued (concentration notified is different than concentration declared as compatible). Similar situation can take place in case of prohibitive decision, if the parties reasonably expecting negative outcome decide to withdraw notification before the final decision is issued.

In his final remark Jarosław Sroczyński drew attention to cases, in which the Polish Competition Authority imposed conditions of the "social nature". The true intention behind such conditions is not protection of competition but granting of additional compensatory benefits to entities affected by concentration (example: Heineken merger in Poland –parties of the concentration were obliged to make investments into the Polish sector of production of hop).

Małgorzata Modzelewska de Raad: Małgorzata Modzelewska de Raad expressed an opinion that the merger control proceedings in Poland should be modified towards more flexibility. The proceedings should involve informal elements such as consultations with the parties. "Increased flexibility" should also be understood as diversified approach to various concentrations depending on the level of their complexity. The majority of concentrations fall into category of simple cases and therefore they should be analyzed in the simplified proceedings, while in cases more complex the procedure should provide for special analytical tools.

Małgorzata Modzelewska de Raad cited the case of Foodcare/Rieber Foods concentration as an example of an inadequate competitive assessment conducted by the Polish Competition Authority. In this case the competition authority analyzed the cost of entry to the market (costs of constructing a factory), but it did not consider other important factors such as a supply substitutability.

In Małgorzata Modzelewska de Raad's opinion, the wording of the Polish competition law regulation should reflect the presumption of merger clearance – in such case the burden of proof of circumstances preventing a concentration would be on the competition authority. At the same time parties to concentrations should be responsible for providing economic knowledge on relevant markets, because of their better understanding of sectors concerned by concentration.

Maciej Bernatt: Maciej Bernatt drew attention to the issue of procedural justice in merger control proceedings and to the role of the target undertaking in these proceedings. Since under the Polish competition regulation only the notifying entity has a status of the party in the merger control proceedings, rights of the target undertaking are not duly protected. In addition, such entity is deprived of its right to judicial review.

Maciej Bernatt also pointed out that on the basis of art. 6 of the European Human Rights Convention the proceedings concerning anticompetitive practices are considered to be quasi-penal while merger control proceedings are civil in their nature. Different nature of these two types of proceedings might justify different structure of judicial review.

Marcin Kolasiński: Marcin Kolasiński indicated that mistakes of the Polish Competition Authority cannot be remedied in the judicial proceedings. In particular, the court is unable to negotiate with parties any possible conditions modifying a concentration. Such structure of judicial review is incompliant with the mindset of the competition authority officials, who believe that their potential mistakes can be remedied by the court. Marcin Kolasiński drew attention to the consultation process, which is available for the parties to the merger control proceedings before the European Commission. Consultations allow the parties to obtain knowledge about the possible final decision already in the course of proceedings.

In Marcin Kolasiński's opinion an insignificant number of conditional merger decisions issued by the Polish Competition Authority results from lack of appropriate approach to such cases. The Polish Competition Authority is not obliged to inform entrepreneurs whether a decision will be conditional. In cases, where the authority considers a possibility of conditional or prohibition decision, it should allow the parties to address its concerns. Dialogue between the Polish Competition Authority and the parties minimizes the risk of economic mistakes.

Rober Gago: Rober Gago emphasized the importance of pre-notification consultations. Such consultations facilitate a proper fact-finding. In addition, if implemented to the Polish procedure, such consultations would give the authority a chance to conduct a market research before a concentration is notified. This could substantially reduce the time necessary to review a notification. In Robert Gago's opinion, time prescribed for a merger review should not be extended, since the authority in many cases is not aware of the urgency of concentration and the effective judicial review is not available. Robert Gago also suggested that third parties should be granted access to the proceedings. Their participation will stimulate discussions, which may result in better assessment of economic circumstances of a case.

Jacek Giziński: Jacek Giziński posed two questions: 1) whether the right to concentrate exists and 2) whether competition authority is obliged to consider a conditional merger clearance. There is also a question whether the court should analyze a possibility of granting a conditional merger clearance.

Jacek Giziński argued against extending the scope of entities with the status of a party in the merger control proceedings. In his opinion, the interest of the notifying undertaking is crucial, since only this entity is able to suggest suitable adjustments if concentration raises anticompetitive concerns.

Jacek Giziński also agreed with the previously expressed proposal to introduce more flexibility into the merger control proceedings. In these proceedings the Polish Competition Authority fulfills its public mission and should be able to decide which mode – standard or simplified – is appropriate in a given case. Jacek Giziński also emphasized that only the parties know what the ultimate economic goal of the concentration is. Therefore, while consultations with third parties are helpful, they should not interfere with such goal.

Patrycja Szot: Patrycja Szot suggested that cases, in which a negative clearance is issued, should be open to settlement before the court.

Piotr Borowiec: Piotr Borowiec noted that the notifying undertaking should not be the only entity with a status of a party in the merger control proceedings, since the Polish Competition Authority is entrusted with an obligation to protect the public interest.

Robert Gago: Robert Gago suggested that the right to be heard should be offered also to "the silent part of the market" and by that he meant the entities which do not have a status of a party in merger control proceedings.

Małgorzata Modzelewska: Małgorzata Modzelewska explained why entrepreneurs are not eager to appeal from prohibition decisions. The basic reason is their conviction that chances to obtain compensation are insignificant.

Conclusions from the discussion:

Prof. Tadeusz Skoczny: Prof. Tadeusz Skoczny summarized the discussion by pointing out that the merger control proceedings do not correspond with requirements for which they were created – they are inadequately designed. A new direction of actions should be determined: there is a need to introduce better regulation, which will take account of distinction between simple and complicated cases (increased flexibility of proceedings). In addition, third parties should be granted access to proceedings, since their participation motivates the authority. Moreover, competition concerns should not be notified in the final phase of evidence hearing – such construction of the proceedings limits the parties' ability to address issues identified by the competition authority.

Other important subjects identified in the discussion were 1) the necessity to develop economic analysis in the merger control proceedings and 2) inefficiency of judicial review.

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