

## Consolidation of the Polish Electricity Sector. The Merger Law Perspective

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### *Abstract*

This article deals first of all with the most important characteristics, in terms of volume and quality, of all of those decisions issued by the Polish competition authority that were the basis for vertical consolidation of the Polish electricity sector, for which the authority gave unconditional or special approval between 2003 and 2007. This article also deals to a limited extent with the decision issued by the Polish competition authority prohibiting unconditionally the concentration of PGE and ENERGA, and which was referred for judicial review. This article attempts

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to verify the theory that the legal institution of special (exceptional) approval of a concentration, in the form in which it is created in Polish merger legislation (i.e. based mostly on the public interest test, but issued by the competition authority), is not the best formula for assessing whether there are legitimate grounds for consolidation, in particular consolidation of the Polish electricity sector.

### *Résumé*

L'article présente les caractéristiques quantitatives et qualitatives de toutes les décisions publiées par l'autorité de concurrence polonaise, qui ont constitué la base de la consolidation verticale du secteur de l'électricité en Pologne dans les années 2003 – 2007. L'article discute aussi la décision prise par l'autorité de concurrence polonaise, concernant l'interdiction inconditionnelle de la concentration de PGE/ENERGA. Cette décision a été soumise à la révision judiciaire. L'objectif de cet article est de vérifier la théorie selon laquelle l'institution légale de l'autorisation spéciale (exceptionnelle), dans la forme donnée par la législation polonaise concernant les fusions, i.e. fondée surtout sur le test de l'intérêt public, mais publiée par l'autorité de concurrence, n'est pas la meilleure formule pour juger s'il y a une base légitime pour la consolidation, notamment la consolidation du secteur de l'électricité polonais.

**Classifications and key words:** Polish electricity sector; concentrations between electricity undertakings; vertical consolidation; preventive concentration control; special approval.

## I. Introduction

When Poland entered the 1990s, its electricity sector was completely state-run, concentrated, and monopolized<sup>1</sup>. The major elements of the bituminous and lignite coal extraction sector, commercial power stations, and electricity supplies went into the state-owned organization called the 'Energy and Lignite Coal Community' ('Wspólnota Energetyki i Węgla Brunatnego'). This enabled the state monopoly on electricity to be exercised.

During the 1990s the economic reforms brought with them a concerted deconcentration of the Polish electricity sector, based on the British model<sup>2</sup>.

<sup>1</sup> For more see: P. Jasiński, T. Skoczny, G. Yarrow, *Konkurencja a regulacja w energetyce*, Urząd Antymonopolowy, Warszawa 1995, p. 105 ff; J. Popczyk, 'Od monopolu do rynku' [in:] *Elektroenergetyka*. Redakcja: P. Jasiński, T. Skoczny, Centrum Europejskie UW, Warszawa 1996, p. 235 ff.

<sup>2</sup> Ibidem. See also: K. Bobińska, 'The Defence of Monopoly as a Determinant of the Process of Transformation of State-owned Infrastructure Sectors', (2008) 1(1) *Yearbook of Antitrust*

The 'Energy and Lignite Coal Community' was disbanded. Bituminous and lignite coal mining companies and electricity producers (base load power stations) were given autonomy. They were separated from the transmission and wholesale undertaking 'Polskie Sieci Elektroenergetyczne' (PSE) and 33 local distribution and retail companies named 'Zakłady Energetyczne' (ZEs); the latter (the PSE and the 33 ZEs) retained their national or regional monopolies. Indeed, there was no significant change to their market position even after Poland's EU accession in 2004. However, EU membership did trigger the separation of the Transmission System Operator (TSO), which the PSE Operator became<sup>3</sup>, from which wholesale transactions were removed. This also included the separation of the Distribution System Operators (DSOs), which operated independently from the wholesale and retail companies trading in electricity, also separated within the ZEs. Some power stations and the ZEs were privatized and became part of foreign energy groups.

The decapitalization of both production assets and transmission and distribution networks meant that there was widespread support for measures to move away from the fragmentary structure of the Polish energy sector<sup>4</sup>. This was all the more important considering the investment needs in the energy sector, rapid economic growth and the resulting demand for electricity, the increasingly manifest political agenda of energy companies' special interests and of course Poland's EU accession. This was to be done by first performing horizontal concentrations (mergers) of the ZEs, and then vertical (re)consolidation based on the German model. Each consecutive government has introduced programmes to transform the electricity sector, and made them politically viable. Among these changes there are plans for further privatizations in the production of, as well as distribution and trade in electricity.

Despite being performed within the state-owned property, all of these consolidations required approval from the competition authority created in 1990 by the Anti-monopoly Act<sup>5</sup> and operating, from 2000 onwards, on the basis – firstly – of the CCP Act 2000 (the Act of 15 December 2000 on

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*and Regulatory Studies*, p. 131 ff; E. Mączyńska, *Restrukturyzacja przedsiębiorstw w procesie transformacji gospodarki polskiej*, Vol. 1, Warszawa 2001; T. Skoczny, 'The New Polish Energy Law (Including Its European Context)' (1998) 2 *Yearbook of Polish European Studies*, p. 173 ff.; A. Szablewski, *Mechanizmy rynkowe w energetyce i telekomunikacji*. Monografie, No. 8, INE PAN, Warszawa 1996.

<sup>3</sup> Currently PSE Operator fulfills the requirements for ownership split-off under the 3rd EC energy package.

<sup>4</sup> 'Transformacja systemu elektroenergetycznego'. Prezentacja kluczowych treści Raportu Ernst & Young. 31 stycznia 2011, pp. 3, 16. See also: A. Szablewski, *The Need for Revaluation of the Structural Canon of Electricity Liberalization* (published below in this volume of YARS).

<sup>5</sup> Consolidated text in Journal of Laws 1999, No 52, item 547 with amendments.

Protection of Competition and Consumers)<sup>6</sup> and – later – of the CCP Act 2007 (Act of 16 February 2007 on Competition and Consumer Protection)<sup>7</sup>. These statutes formed, among other things, a system of preventive control of concentrations between the undertakings, modelled on EU law<sup>8</sup>. It differed from EU law however in that the President of the Competition and Consumer Protection Office (Urząd Ochrony Konkurencji i Konsumentów; hereafter, UOKiK), unlike the European Commission, has the power not only to prohibit a concentration or to approve (without or with specific conditions) on the basis of a competition test, but also to decide not to prohibit a concentration when this is in the public interest (on the basis of the public interest test). The UOKiK President repeatedly exercised the option of issuing special approval, precisely in the cases of (re)consolidation of the Polish electricity sector that occurred between 2006 and 2007.

This present article aims firstly to present the most important characteristics, in terms of volume and quality, of all of those decisions issued by the UOKiK President that were the basis for vertical consolidation of the Polish electricity sector, for which the competition authority gave unconditional or special approval between 2003 and 2007. This article also deals to a limited extent with the decision issued by the UOKiK President prohibiting unconditionally the concentration of PGE and ENERGA<sup>9</sup>. This decision is not yet legally binding as it has been contested before the Court of Competition and Consumer Protection (Sąd Ochrony Konkurencji i Konsumentów, hereafter SOKiK). This article attempts to provide valuable insight into the theory that the legal institution of special (exceptional) approval of a concentration, based on the public interest test in the form in which it is created in the 2000 CCP Act and 2007 CCP Act, but issued by the competition authority, is not the best formula for assessing whether there are legitimate grounds for consolidation, such as in particular consolidation of the Polish electricity sector. Analyses have shown that the same circumstances and arguments can provide the basis for issuing decisions giving both special approval and absolute prohibition of concentrations. This depends on the appraisal of such circumstances and arguments by the Polish competition authority. As the UOKiK President is an authority specializing solely in issues relating to the application of the competition test, this gives rise to the open question of whether a competition authority should have the power to issue decisions based on the public interest test at all.

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<sup>6</sup> Consolidated text in Journal of Laws 2005, No. 244, item 2080 with amendments.

<sup>7</sup> Journal of Laws 2007 No. 50, item 331 with amendments.

<sup>8</sup> See A. Jurkiewicz, T. Skoczny, 'Poland' [in:] Rowley & Baker, *The International Mergers – Antitrust Process*, Vol. III, Chapter 48. Release 21. March 2011.

<sup>9</sup> Decision No DDK – 1/2011 of January 13, 2011 – PGE/ENERGA; available at [www.uokik.gov.pl](http://www.uokik.gov.pl).

## II. Merger law in Poland (preventive control of concentrations)

The UOKiK President assessed the cases analyzed in this article on the basis of the CCP Act 2000 (creation of the PGE and TAURON energy groups) or the CCP Act 2007 (creation of the ENEA group and takeover by PGE of control over the ENERGA energy group). However this is not relevant in any way to the scope and findings of this analysis, as both of these statutes have the same axiology<sup>10</sup>, the same objective,<sup>11</sup> subjective<sup>12</sup>, and geographical scope of application<sup>13</sup>, as well as create the same model for preventive control of concentrations<sup>14</sup>. The essence of this model is – firstly – the statutory obligation of undertakings, and this of course includes electricity undertakings, to file notification of the intention to concentrate<sup>15</sup> and refrain from implementing

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<sup>10</sup> Article 1(1) of both the CCP Act 2000 and the CCP Act 2007 provide that ‘The Act determines conditions for the development and protection of competition as well as the principles of protection the interests of undertakings and consumers in the public interest.’

<sup>11</sup> Both the Acts are addressed to the economic entities called ‘entrepreneurs’ (‘przedsiębiorcy’); as the official translation of these Acts, these entities will be called in ‘undertakings’ in this article as well. See Article 4(1) of the CCP Act 2007. ‘For the purpose of this Act: (1) ‘undertaking’ shall have the same meaning as under the provisions on freedom of business activity, as well as: (a) natural and legal person as well as organisational unit without legal status, to which the legislation grants legal capacity, organising or rendering services of public utility nature, which are not business activity in the meaning of the provisions on freedom of business activity, (b) natural person exercising profession on its own behalf and account or performing activity in the frame of exercising such profession, (c) natural person having a control within the meaning of the subparagraph 4 over at least one undertaking, even if not conducting a business activity within the meaning of the provisions on freedom of business activity, provided that this person is undertaking further activities subject to a control of concentrations referred to in Article 13’.

<sup>12</sup> Article 1(1) of both the CCP Act 2000 and the CCP Act 2007 provide that ‘The Act regulates principles and measures of counteracting competition restricting practices and practices violating collective consumer interests, as well as anti-competitive concentrations of undertakings and associations of thereof, where such practices or concentrations cause or may cause effects on the territory of the Republic of Poland.’

<sup>13</sup> *Ibidem*.

<sup>14</sup> See Articles 12–23 of the CCP Act 2000 and Articles 13–24 of the CCP Act 2007.

<sup>15</sup> See Article 13(1) of the CCP Act 2007 providing that ‘1. The intention of concentration is subject to a notification submitted to the President of the Office in the case where: 1) 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 2) 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.’

a concentration<sup>16</sup> of a national dimension, of which concentrations of the EU dimension, subject to European Commission review, are the upper limit<sup>17</sup>. Secondly – this model affords the UOKiK President the exclusive power to appraise the concentrations of which it receives notification in an anti-monopoly procedure and to issue the relevant decisions. The competition authority carries out this appraisal first and foremost on the basis of a competition test. The only change to this model (one which occurred in 2004 in connection with Poland's EU accession<sup>18</sup>) was actually a change regarding the competition test. As of May 1, 2004 notifications of the intention to concentrate are appraised from the point of view of implications for competition on the basis of the criterion used to assess whether the intended concentration would significantly impede competition in Poland as well. The previous criterion was the market dominant position test<sup>19</sup>.

As in the system of preventive control of concentration in place within EU countries and most other countries, Poland's competition authority can (absolutely) prohibit the concentration resulting in a significant impediment to competition, in particular by creation or strengthening of a dominant position in the market<sup>20</sup> or approve the concentration not resulting in significant impediments to competition, in particular by the creation or strengthening of a dominant position in the market<sup>21</sup>. Approval (so-called conditional approval) can also be issued when the concentration, upon fulfillment of the conditions laid down in the decision and specified as examples in the Act,

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<sup>16</sup> See Article 97(1) of the CCP Act 2007 providing that 'The undertakings whose intention of concentration is subject to a notification shall be under obligation to refrain from implementing the concentration until the issuance of the decision by the President of the Office or the lapse of the time limit in which such a decision should be issued.'

<sup>17</sup> The EU dimension of concentration is defined in Article 1 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24/1; it replaced the Council Regulation (EC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ [1990] L 395/1.

<sup>18</sup> See CCP (Amendment) Act 2000 of 2004, April 24 (Journal of Laws 2004 No. 93, item 891); for more see: T. Skoczny [in:] *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Pod redakcją T. Skoczny, C.H. Beck, Warszawa 2009, p. 756-757. 753 ff, 839 ff.

<sup>19</sup> According to Article 17 CCP Act 2000 (till 1.5.2004) the UOKiK President could approve an intended concentration when it does not create or strengthen a dominant position as a result of which competition on the market would be impeded.

<sup>20</sup> According to Article 20(1) of the CCP Act 2007 'The President of the Office shall, by way of a decision, prohibit the implementation of the concentration, if it results in a significant impediment to competition in the market, in particular by the creation or strengthening of a dominant position.'

<sup>21</sup> According to Article 18 of the CCP 2007 'The President of the Office shall, by way of decision, issue a consent to implement a concentration, which shall not result in significant impediments to competition in the market, in particular, by creation or strengthening of a dominant position in the market.'

will not significantly impede competition in the market, in particular by the creation or strengthening of a dominant position<sup>22</sup>.

The Polish competition authority also has the power and the obligation (especially when the undertaking that files notification of the intent to concentrate makes such a request) to approve a concentration as a result of which competition in the market will be significantly impeded, in particular by the creation or strengthening of a dominant position, in any case when there are grounds for not prohibiting the concentration. These include, in particular, when (1) the concentration is expected to contribute to economic development or technical progress, or (2) it may exert a positive impact on the national economy<sup>23</sup>. Approval of this kind (this means special or exceptional approval) is therefore issued in the public interest<sup>24</sup>. In light of the fact that none of the special approval decisions issued to date (and thus this also applies to those decisions giving approval for vertical consolidations in the electricity sector) has ever undergone review by any judicial body, the nature of this legal institution and of the two criteria specified in the Act justifying non-prohibition of a concentration is currently a matter of debate<sup>25</sup>. Indeed, this is a solution permitted under EU law as the Commission is restricted in its decision-making

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<sup>22</sup> Article 19(1) and (2) of the CCP Act 2007 ‘1. The President of the Office shall, by way of a decision, issue a consent to implement a concentration when, upon fulfillment of the conditions specified in Paragraph 2 by undertakings intending to implement the concentration, competition in the market will not be significantly impeded, in particular by the creation or strengthening of a dominant position. 2. The President of the Office may impose upon the undertaking or undertakings intending to implement a concentration an obligation, or accept their obligation, in particular: 1) to dispose of the entirety or part of the assets of one or several undertakings, 2) to divest control over an undertaking or undertakings, in particular by disposing of a block of stocks or shares, or to dismiss one or several undertakings from the position in the management or supervisory board, 3) to grant a competitor exclusive rights – determining in the decision referred to in Paragraph 1 the time limit for meeting the requirements.’

<sup>23</sup> Article 20(2) of the CCP Act 2007 provides that ‘The President of the Office shall issue, by way of a decision, a consent for the implementation of the concentration as a result of which competition in the market will be significantly impeded, in particular by the creation or strengthening of a dominant position, in any case that the desistance from banning concentration is justifiable, and in particular: 1) the concentration is expected to contribute to economic development or technical progress; 2) it may exert a positive impact on the national economy.’

<sup>24</sup> See Article 1(1) of the both CCP Acts 2000 and 2007.

<sup>25</sup> Best reflected in the commentaries on both CCP Acts 2000 and 2007. See: E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Twigger, Warszawa 2-02, pp. 172; K. Kohutek [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, LEX a Wolters Kluwer business, Warszawa 2008, pp. 559 ff; *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Pod red. C. Banasińskiego i E. Piontka, LexisNexis, Warszawa 2009, pp. 372 ff; T. Skoczny [in:] *Ustawa o ochronie konkurencji i konsumentów. Komentarz...*, pp. 891 ff; A. Stawicki, E. Stawicki, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, LEX a Wolters Kluwer business, Warszawa 2011, pp. 495 ff.

power, when appraising concentrations of EU dimension, by the Member States' right to 'take appropriate measures to protect legitimate interests other than those taken into consideration' by the Merger Regulation<sup>26</sup>. 'Public security' is considered to be one of these 'legitimate interests'<sup>27</sup>. Such 'public security' certainly includes 'energy security'<sup>28</sup>. This does not mean however that the solution used in the Polish legislation is correct, and there are many reasons for this. This is firstly because it suggests that 'economic development and technical progress' should not be included in the evaluation of the implications of the concentration under the competition test; in the EU (and in most EU Member States) 'development of economic and technical progress' is *expressis verbis* a criterion which must be taken into account when appraising concentrations<sup>29</sup>. The second reason is that the power to decide not to issue a decision prohibiting concentration on the grounds of public interest has been conferred on a competition authority and not a political administration body, as is the case in other countries. In my view the special approval on the basis of the public interest test is a 'foreign body' for competition protection by an independent competition authority; thus, this instrument should be used sparingly and wisely.

### III. Consolidations in the electricity sector between 2000 and 2006

#### 1. Approval of concentrations between electricity undertakings from 2000 onwards

The processes of reconsolidation in the Polish electricity sector commenced just over a decade ago. Due to the scale and value of electricity undertakings and heat-energy undertakings (cogenerated electricity) most horizontal and vertical concentration in the energy sector had to be notified and evaluated on the basis of the Polish merger law. The UOKiK activity reports and online lists of decisions (available at the UOKiK website since 2003) reveal that between January 2003 and March 2006<sup>30</sup> the UOKiK President issued 38 unconditional

<sup>26</sup> See Article 21(3) of Regulation 4064/89 and Article 21(4) of Regulation 139/2004.

<sup>27</sup> *Ibidem*.

<sup>28</sup> Energy security ('security of supplies') is considered to be an indication of 'public security' also in case law giving the Member State right to restrict free movement of goods within the EU; see especially the ECJ judgment of 10 July 1984 in case 72/83 – *Campus Oil Limited and others v Minister for Industry and Energy and others*, ECR 1984, 2727.

<sup>29</sup> Article 2(1)(b) of both Regulation 4064/89 and Regulation 139/2004.

<sup>30</sup> I.e. until the 'Programme for the Electricity Sector' was put into place; see below footnote 32.



approvals of concentrations in this sector<sup>31</sup>. This group also included approvals of concentrations in the form of privatizations of electric power stations or distribution companies (ZEs), by selling them to foreign firms (for example EdF, Electrabel, RWE, Vattenfall), as well as the first national consolidations of the distribution companies (ZEs).

As stated above, over the past decade there was a significant rise in the pressure for vertical consolidation of the Polish electricity sector within the sector itself. This met with a favourable response in government circles following the 2005 election. Vertical consolidation in fact became a major element of the government's 'Programme for the Electricity Sector' (*Program dla elektroenergetyki*) adopted by the Council of Ministers on March 28, 2006.<sup>32</sup> This Programme involved plans for a vertical consolidation of specific undertakings (referred to by name) owned by the State Treasury – i.e., generators of electricity (electric power stations), sometimes associated with mines that supplied them with coal and with its distributors. The Programme was intended to bring about the creation of four powerful energy groups, now operating under the commercial names PGE, TAURON, ENERGA and ENEA. Approval decisions issued by the UOKiK President were a condition for their creation, however.

The creation of the ENERGA group – which took the form of a takeover by ENERGA of 'Koncern Energetyczny ENERGA' and 'Zespół Elektrowni Ostrołęka' – received unconditional approval from the UOKiK President<sup>33</sup>. This was because the authority concluded that the small share in the electricity generation market (just over 2%, and sold mainly to the TSO) and the fact that ENERGA would continue to have to buy from generators from outside its capital group, were not grounds for the conclusion that there would be significant impediment to competition in the markets affected by the concentration.

Despite the widespread opinion that the vertical consolidations planned by the government in the electricity sector would lead to excessive concentration of the electricity generation market and impede competition in its wholesale distribution market, the UOKiK President gave special approval for:

- a) takeover by 'Polskie Sieci Energetyczne' (PSE) of control over 'BOT Górnictwo i Energetyka' (extraction of lignite coal and use of it to generate electricity), 'Zespół Elektrowni Dolna Odra' (a major producer

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<sup>31</sup> The legal basis for these decisions was Article 17 of the CCP Act 2000.

<sup>32</sup> Available at <http://www.mg.gov.pl/node/5307>.

<sup>33</sup> Decision No DDK – 19/07 of February 16, 2007– ENERGA/KE ENERGA/Zespół Elektrowni Ostrołęka; available at [www.uokik.gov.pl](http://www.uokik.gov.pl).

- of electricity from bituminous coal) and 8 ZEs in central and south-east Poland (distributing and selling electricity undertakings)<sup>34</sup>;
- b) takeover by ‘Energetyka Południe’ of the – integrated beforehand – ZEs of the regions Małopolska and Dolny Śląsk, as well as the electricity power stations ‘Elektrownia Stalowa Wola’ and ‘Polski Koncern Energetyczny’<sup>35</sup>;
- c) takeover by ENEA of the electricity power station ‘Elektrownia Kozienice’<sup>36</sup>.

At this time the UOKiK President reached the conclusion that these consolidations could significantly impede competition but determined that there were justified reasons for not prohibiting them.

## 2. Competition concerns not enabling unconditional approval

In the view of the UOKiK President these concentrations gave rise to competition concerns on particular markets in the electricity sector in Poland affected by the concentration horizontally (mainly generation of electricity) and/or only vertically (national electricity generation; national electricity wholesale market, local electricity retail markets, and local electricity distribution markets).

The largest of the consolidations performed under the government ‘Programme for the Electricity Sector’ – the creation of the energy group PGE – was deemed by the UOKiK President to be a concentration that would lead to the creation of a dominant position on the electricity generation market. The authority based this view on the market share criterion, which – according to sources other than the published version of the decision – would have been approximately 40% following the concentration. Due to the fact that at the moment of appraisal no undertakings had an electricity generation market share that was even close to the market share of the created group, and the combined market share of the other three groups created under the Programme was approximately 25%, the UOKiK President decided the PGE

<sup>34</sup> Decision No DKK – 163/06 of December 22, 2006 – *PSE/10 other entities*; available at [www.uokik.gov.pl](http://www.uokik.gov.pl). Following the split of PSE Operator (the transmission system operator) from PSE SA, on the basis of the assets that remained in PSE SA and assets of the holding company BOT, Elektrownia Dolna Odra and the distribution companies described above the PGE Energy group was formed. It operates under the commercial name PGE.

<sup>35</sup> Decision No DOK – 29/07 of March 8, 2007 – *Energetyka Południe/4 other undertakings*; available at [www.uokik.gov.pl](http://www.uokik.gov.pl); it operates now under the commercial name TAURON.

<sup>36</sup> Decision No DKK 32/07 of September 28, 2007 – *ENEA/Elektrownia Kozienice*; available at [www.uokik.gov.pl](http://www.uokik.gov.pl). This decision was then issued on the basis of Article 20(2) of the CCCP Act 2007. It still operates under the commercial name ENEA.

could operate independently of competitors and of its contracting parties<sup>37</sup>. In the view of the competition authority the concentration in question would also lead to the creation of a dominant position on the national generation market for electricity from renewable sources and on the national market for provision of systemic services, as well as to strengthening a dominant position on the national wholesale market<sup>38</sup>.

In each of these cases of special approval decisions (PGE, ENERGA, ENEA)<sup>39</sup> the UOKiK President stated clearly that the danger of significant impediment to competition through vertical consolidation of generators<sup>40</sup> (in the case of PGE and the TAURON group also having access to lignite coal or bituminous coal) and distributors of electricity<sup>41</sup> was justified. The decision was above all based on the fact that as of the day each was appraised, the principle of Third Party Access (TPA)<sup>42</sup> was not yet applicable in Poland because the majority of electricity users still remained so-called 'tariff' users, i.e. buyers of electricity from distribution companies to whose networks they were connected. In practice vertical relations between electricity generators, wholesalers, and retailers create a threat for (a) electricity generators not covered by the vertical consolidation; (b) distribution companies not covered by the vertical consolidation; (c) undertakings operating on the trading market;

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<sup>37</sup> He deemed the quality-related prerequisites for a dominant position (Article 4(9) CCP 2000) to be fulfilled, stating that the entry to this market of new entities was capital- and time consuming and the existing generation capacity was decreasing. These assertions were not supported by any evidence, however.

<sup>38</sup> Also the reasons for these effects of the concentration were not given in the published version of the decision.

<sup>39</sup> It should be emphasized that in each of these decisions the wording of the statement of reasons is identical.

<sup>40</sup> At this point the UOKiK President cited also the EC standpoint presented in in the report on the electricity and gas markets published a little earlier ('DG Competition report on energy sector inquiry' (SEC(2006)1724, 10 January 2007) pointing clearly to vertical relations as a substantial barrier to further liberalization of those markets.

<sup>41</sup> It is worth noting the generally negative standpoint of the UOKiK President towards vertical concentrations in sectors in which business activity depends on access to infrastructure. He prohibited for example the takeover by the dominant producer of crude oil (PKN Orlen) over the only Polish marine port through which crude oil is imported to Poland (NAFTOPORT). See decision No DDI – 38/2001 of June 29, 2001 – *PKN Orlen/ NAFTOPORT* (Dziennik Urzędowy UOKiK (2001) No 2, item 44).

<sup>42</sup> In accordance with the Electricity Directive (Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, [2003] L 176/37) and norms laid down in the Polish Act of 10 April 1997 – Energy Law (Journal of Laws 1997 No 54, item 348; unified text of 2011 available at [www.sejm.gov.pl](http://www.sejm.gov.pl)) in Poland as well first the industrial users (from July 1, 2004) and then households (July 1, 2007) were given the formal option of selection of a supplier.

and (d) users of electricity connected to a distribution network covered by the vertical consolidation.

In the view of the UOKiK President, all of these concentrations constituted a threat to the electricity generators not included in the vertical consolidation<sup>43</sup> because those generators could have problems with access to users connected to the distribution network of distribution companies covered by the vertical consolidation, and thus restricted market access.

It was assumed in the decision that the intended concentrations would present a threat to distribution companies not covered by the vertical consolidation<sup>44</sup> because those distributors could have problems buying electricity or buying electricity on non-discriminatory terms.

The intended concentrations also presented a threat for undertakings operating on the trading market because, in the view of the UOKiK President, the consolidated groups would try to eliminate those intermediaries in trading in electricity.

The threat for users of electricity connected to the networks of distribution companies covered by the vertical consolidation would, in light of those decisions, be that they would be forced to buy energy from generators being members of the distribution company's capital group.

In all of these three decisions the UOKiK President did indeed note that future amendments to Polish law and EU law might at least partially neutralize the significant impediment to competition anticipated at the moment those decisions were issued. This included amendments aiming, for example, at greater integration of the energy markets within the EU and strengthening of the regulatory powers of the energy regulatory authorities (in Poland: President of the Energy Regulatory Office), as well as at the envisaged ownership structure unbundling of energy network operators. The UOKiK President did not however consider it possible to issue unconditional clearance for those concentrations<sup>45</sup>.

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<sup>43</sup> In these decisions the example given of those generators privatized through sale to foreign firms are the electricity power stations 'Elektrownia Rybnik' (sold to EdF) and 'Elektrownia Połaniec' (sold to Electrabel).

<sup>44</sup> In these decisions the example given of those distributors privatized through sale to foreign firms are ZEs 'STOEN' (sold to RWE) i 'GZE' (sold to Vattenfall).

<sup>45</sup> These decisions do not show that the UOKiK President even considered using remedies as base for conditional clearance.

### 3. Fulfillment of criteria for deciding not to prohibit concentrations on the basis of the public interest test

Within the notifications of each of the concentrations discussed above the applicants stated that even if the UOKiK President came to the conclusion that they might cause significant impediment to competition, there were justified grounds for not prohibiting them. This was because the adverse implications in the case of these concentrations were outweighed by their positive effects, of which some were among the examples given in Article 19(2) of the CCP Act 2000 or Article 20(2) of the CCP Act 2007. The UOKiK President concurred with most of the arguments presented by the applicants regarding positive effects of the notified concentrations. His view with regard to the creation of the PGE group was that generally that ‘the concentration would contribute [...] to the ensuring of the country’s energy security and to creation of new jobs’<sup>46</sup>. The special clearance decisions for concentrations establishing the TAURON and ENEA groups were based solely on the fact that they ‘would support [...] the ensuring of Poland’s energy security’<sup>47</sup>. The detailed arguments in support of the potential positive outcomes of those concentrations were presented entirely (with respect to the creation of the PGE and TAURON groups) or were divided into three sets of criteria: ‘economic development and technical progress’, ‘impact on the national economy’ and ‘other positive outcomes’ (according to Article 20(2) of the CCP Act 2007). All those outcomes can be placed in a number of categories, contributing – as defined in the ‘Programme for the Energy Sector’ – towards **ensuring energy security** for the country through development and renovation of the generation assets and transmission and distribution networks. This will enable undertakings and households to be properly supplied with electricity in terms of both volume and quality (this includes being in accordance with rising environmental protection standards)<sup>48</sup>.

It can therefore be no surprise that the principal argument for the decision by the UOKiK President not to prohibit the notified concentrations was the **rise in investment potential**, resulting above all from the combination of the

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<sup>46</sup> Decision approving the creation of PGE Group (see footnote 34).

<sup>47</sup> Decisions approving the creation of TAURON and ENEA groups (see footnotes 35 and 36).

<sup>48</sup> Compare the ECJ judgement in case *Campus Oil* (see above footnote 28), in which the Court stated clearly: ‘(...) in light of their special role as a source of energy for the modern economy, crude oil products are a key asset for the functioning of a country, particularly as not only is the economy dependent on them, but above all the state institutions, its most vital public services, and even the physical survival of the civilian population (...)’. See also: *Transformacja systemu elektroenergetycznego*, p. 5–8.

economic potential of the undertakings being consolidated. 'The creation of a large undertaking should raise its financial standing and credibility as perceived by the financial sector'<sup>49</sup>, due among other things to the strengthening of generators (for example 'BOT' or 'Dolna Odra') who were in debt as a result of pro-ecological<sup>50</sup> investments initiated during the 1990s. 'Only undertakings with considerably greater capital and cash flow than that demonstrated by the undertaking currently existing in the Polish electricity sector would be able to handle the necessary generation and network investments'<sup>51</sup>. However, no calculations of the credit rating of the created groups were presented in any of the analyzed special clearance decisions.

In the decisions giving special approval for the creation of the TAURON and ENEA groups other positive effects of the concentration were also described for the undertakings being consolidated, and indirectly for the overall national economy. They were seen as arising first and foremost thanks to the creation of a undertakings active along the entire energy sector value chain (generation, trading, distribution). The most important of these are the following:

- a) **mitigation of risks** (mainly in the area of trade in electricity), resulting from the expected rise in energy prices, originating from the deficiency in electricity production or growing investment and ecological burdens;
- b) **taking advantage of the scope and dimension** (for example with respect to negotiation of the conditions for purchasing electricity as well as other goods and services);
- c) **enhancing of a competitive position** with respect to the strong – predominantly vertically integrated – energy groups operating in EU Member States, whose electricity sector structure is typically much more concentrated than that of Poland.

The last of these<sup>52</sup> could or should have been appraised within the – more difficult – economic competition test, and only after that with the – much easier – public interest test.

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<sup>49</sup> Decision approving the creation of ENEA group (see footnote 36).

<sup>50</sup> Decision approving the creation of PGE group (see footnote 34).

<sup>51</sup> Decision approving the creation of TAURON group (see footnote 35).

<sup>52</sup> Along with certain other possible effects of the consolidation of electricity undertakings (for example the positive effects on economic development and technical progress) which were not however supported by specific economic analyses.

#### IV. The Polish competition authority against further concentrations in the electricity sector; the PGE/ENERGA case

In mid 2008, during preparatory work on the ‘Competition Policy for 2008–2010’<sup>53</sup>, the UOKiK President drew up a preliminary report on the findings of a sector inquiry concerning the condition and prospects for growth of competition on the energy market. Following many months of discussions the report was finally published in 2010<sup>54</sup>. Among the UOKiK Report’s findings are the characteristics of the most vital elements of the electricity sector (including its structure, resulting from the government’s 2006 ‘Programme for the Electricity Sector’<sup>55</sup>). More over the UOKiK Report reveals the problems of further growth of competition in this sector. For instance, it addresses the question of further potential changes in the way the sector is structured, as well as the problems of liquidity of the wholesale electricity market. In that UOKiK Report the authority left no doubt that the UOKiK President would oppose further consolidation of the sector, especially enhancement of the PGE Group, for example by way of takeover of the ENEA or ENERGA groups. According to the UOKiK President consolidation of this kind ‘would mean that in practice all electricity could be sold to users connected to distribution networks of undertakings being members of the PGE group’<sup>56</sup>. It should be noted at this point that during 2007–2011 the UOKiK President also gave unconditional approval for further concentrations that strengthened groups competitive to PGE – TAURON<sup>57</sup>, ENEA<sup>58</sup> and ENERGA<sup>59</sup>.

The UOKiK Report states clearly that for the UOKiK President, even in the event that TPA was introduced with respect to all energy users as of July 1, 2007, competition in the electricity sector would only be possible if

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<sup>53</sup> ‘Polityka konkurencji na lata 2008–2010’. Available at: [www.uokik.gov.pl](http://www.uokik.gov.pl).

<sup>54</sup> ‘Kierunki rozwoju konkurencji i ochrony konkurentów w polskim sektorze elektroenergetycznym (2010)’ [‘Directions of the development of competition and protection of consumers in the Polish energy sector (2010)’]. UOKiK, Warszawa 2010; available at: [www.uokik.gov.pl/](http://www.uokik.gov.pl/) (hereafter, UOKiK Report).

<sup>55</sup> As a result of this Programme the transmission company PSE Operator (OSP) and the 4 above-mentioned integrated energy groups PGE, TAURON ENERGA and ENEA groups were created.

<sup>56</sup> See UOKiK Report, p. 17.

<sup>57</sup> Decisions DKK-68/2007 and DKK-69/2007 of December 21, 2007 – *Energetyka Południe/heat power stations of Nowa Sól and Słbrowa Górnica*; available at [www.uokik.gov.pl](http://www.uokik.gov.pl).

<sup>58</sup> Decision No DKK – 15/2008 of February 2, 2008 – *ENEA/litigate coal generators Adamów and Pątnów*; decision No DKK – 59/2011 of May 26, 2011 – *ENEA/heat power station Białystok*; available at [www.uokik.gov.pl](http://www.uokik.gov.pl).

<sup>59</sup> Decision No DKK – 7/09 of February 23, 2009 – *ENERGA Elektrownie Ostrołęka/heat power station of Ostrołęka*; available at [www.uokik.gov.pl](http://www.uokik.gov.pl).

there was the ‘appropriate market structure’ (no single or more than one vertically integrated producers were in a dominant position), ‘wholesale market liquidity’<sup>60</sup> and ‘effective separation of trade in energy from energy distribution’; the Report itself (as well as subsequent case law) says that the UOKiK President saw the ‘assurance of fluidity on the market, guaranteeing the appropriate level of energy was in trade’ as playing a special role<sup>61</sup>. It was also announced in the UOKiK Report that the UOKiK President would be supporting at least partial privatization both of electricity generators and of electricity distributors, of which a large majority were still owned by one owner – the State Treasury.

Despite the publication of the UOKiK Report containing the findings of energy sector inquiry, the Polish government continued work on changes to Poland’s energy policy, including improvement of the capacity to ensure Poland’s energy security over the next 10 and 20 years, and instruments for putting this into practice. At first the ENEA and ENERGA energy groups were intended to be privatized. Privatization of the ENEA group has been underway – with intervals – since 2010; one of the large vertically-integrated energy groups (for example EdF) will probably be its buyer. Due to the fact that the highest bid for the ENERGA group came from the PGE group – also state-controlled – the ‘Energy Policy of Poland until 2030’<sup>62</sup> was amended<sup>63</sup> and the government decided to continue with concentrations by allowing PGE to take over ENERGA by way of the market sale by the Minister for the State Treasury of shares amounting to 84.19% of ENERGA’s capital. The fundamental reasons the government and the parties to that transaction gave for the concentration were as follows: the need to respond to the challenge presented by the progressive regionalization of the energy markets; the need for the PGE and ENERGA groups to go along with the government’s energy policy; the need to carry out development and rejuvenation investments and the resulting need to ensure a stable market profile of the PGE and ENERGA groups; the potential for making use of the unique synergy between the PGE

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<sup>60</sup> The term ‘fluid’ is sometimes used in EU law for meaning ‘liquidity’. For instance in the opinion of the Economic and Social Committee in which it is declared: ‘The EU will certainly gain from being able to count on a wholesale electricity and gas market which is fluid, orderly and functional and above all protected from manipulation.’ See: ‘Opinion of the European Economic and Social Committee on the ‘Proposal for a regulation of the European Parliament and of the Council on energy market integrity and transparency’ COM (2010) 726 Final, OJ [2011] C 132/21, pont 3.1.

<sup>61</sup> See UOKiK Report, p. 22 ff.

<sup>62</sup> See Resolution No 202/2009 of the Council of Ministers; available at:<http://www.mg.gov.pl/Gospodarka/Energetyka/Polityka+energetyczna>.

<sup>63</sup> See Resolution No 157/2010 of the Council of Ministers amending the Resolution No 202/2009 (unpublished).



and ENERGA groups. The government's expectation was that the UOKiK President would give clearance for the transaction according to rules similar to those applied with respect to the past consolidations of the Polish electricity sector.

Meanwhile, as of early 2011, the UOKiK President prohibited a takeover of ENERGA by PGE<sup>64</sup>, because the proceedings led the competition authority to the conclusion that the concentration 'would however lead to a significant impediment to competition' on two national markets. Firstly, it would lead to a 'significant impediment to competition on the national electricity retail market'. Secondly 'the vertical relations that existed between the players on the national wholesale electricity market and the national retail electricity market would lead to significant impediment of competition'. By the same token the UOKiK President could not approve the transaction under Article 18(1) of the CCP Act 2007.

In the published statement of reasons for the decision in the PGE/ENERGA case the UOKiK President analyzed the option of not prohibiting that concentration on the basis of the prerequisites described in Article 20(2) of the CCP Act. 2007. The competition authority did not concur however with the standpoint adopted by the applicants – namely, that the concentration would also contribute to 'economic development and technical progress' and give rise to direct benefits for customers, as well as help to bring about greater energy security for Poland.

The UOKiK President also decided not to impose conditions on the applicants, since this would have made it possible to issue conditional clearance under Article 19 of the CCP Act 2007, as 'it was not possible to apply any conditions whatsoever that could be deemed appropriate'.

The applicants contested the decision prohibiting the PGE/ENERGA concentration; they appealed against the prohibition to the SOKiK. The SOKiK has the power to amend it and give approval or to annul it if it finds that the degree of error in observance of principles of procedural justice in the proceedings pertaining to the concentration means that the implications for competition might have been appraised wrongly<sup>65</sup>.

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<sup>64</sup> Decision No DKK – 1/2011 of January 13, 2011 – *PGE/ENERGA*; available at: [www.uokik.gov.pl](http://www.uokik.gov.pl).

<sup>65</sup> This is not an issue addressed in this article, however.

## V. Factors that need to be taken into account when appraising concentrations in the electricity sector under merger law in Poland

### 1. The market structure

To put it very simply, evaluation of any concentration of which a competition authority receives notification comprises two kinds of factors: the market structure and functional factors. The less the anti-competitive nature of the concentration is determined by the market structure, the more important it becomes to account for functional factors. However, even in this case threats to competition can be eliminated by applying remedies of a structural nature. In any case the potential competition (new entries), the strength of the demand (purchase power) side and the so-called efficiency gains can take prevalence over the anti-competitive structural consequences.

Looking at the matter from a historical point of view the structure of the market was the sole or fundamental criterion for appraisal of concentrations, especially on the basis of the Harvard School. Despite the fact that in the US and in the EU the fundamental grounds for economic theory of competition are today formed by the Chicago or NeoChicago School<sup>66</sup> (mostly concerning understanding of effective competition, market power and the relevant market<sup>67</sup>), the market structure criterion still plays a major role in the process of appraisal of intended concentrations, especially – but not only – horizontal concentrations. In the EU this has been confirmed in guidelines for evaluation of horizontal and non-horizontal concentrations<sup>68</sup>. In Poland this can be seen by the entire decision-making policy adopted up to now by the UOKiK President, based particularly strongly on the statutory presumption that a dominant position exists at 40%. This continued to be the prevalent practice even after May 1, 2004 (when Poland joined the EU), since when, as a result of the statutory change to the competition test for appraising concentrations, the structural criterion for market dominance has now been rendered merely

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<sup>66</sup> See for instance G. Monti, *EC Competition Law*, Cambridge University Press, Cambridge 2007, p. 53–88.

<sup>67</sup> See: S. Bishop, M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, University Edition, Sweet & Maxwell 2010. Part I. Concepts; A. Lindsay, *The EC Merger Regulation: Substantive Issues*. Second edition, Sweet & Maxwell, London 2006, passim; U. Schwalbe, D. Zimmer, *Law and Economics in European Merger Control*, Oxford University Press, Oxford 2009, part I.

<sup>68</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2004] C 31/5, p. 21; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2008] C 265/7.

an example test of ‘significant impediment to competition’ which if proven can lead to a concentration being prohibited unless the criteria for conditional or special approval have been met.

Unilateral effects of a concentration with respect to market structure prior to and post concentration may be analyzed using three measures: the number of market players, market share and degree of concentration<sup>69</sup>.

The UOKiK President has never raised the argument of the number of market players in any of the past unconditional or special approval decisions issued. The first time the competition authority decided to do this was in the decision prohibiting the PGE/ENERGA concentration. The UOKiK President deemed the reduction of the number of market players on the retail market – from 4 to 3 – when there are approximately 30 active players on that market selling electricity to end users – to be an important (but of course not the only) factor indicating a ‘significant impediment to competition’. Meanwhile the reduction of the number of market players cannot by itself be considered sufficient evidence of a ‘significant impediment to competition’, but a great deal of importance is attached to the shares of the parties to the concentration in relevant markets prior to and post the concentration. It is difficult to dispute this standpoint when the post-concentration market share exceeds 50%, and especially 70–80%<sup>70</sup>; and this is also practice of the European Commission. A critical view must be taken of this standpoint when the ascertained market shares following the concentration, which were the main grounds for prohibiting it, fluctuate around 40% (the level of the rebuttable presumption defined in Article 4(8) of the CCP Act 2000 and Article 4(9) of the CCP Act 2007). In the analyzed decisions regarding electricity sector concentrations it was only in the case of decisions giving special approval for creation of the PGE group that it was confirmed to be anti-competitive in nature. One of the reasons for this was that this concentration would give PGE a total share in the generation market of approximately 40%, which – in the view of the UOKiK President – would lead to a creation of a dominant position on this market.

It needs to be stressed that, although the market share in the electricity generation markets would rise to approximately 42% following the PGE/ENERGA concentration, the UOKiK President did not find ‘strengthening of a dominant position’ and neither did the authority deem that market share to be sufficient to conclude that there was ‘significant impediment to competition’. Perhaps this is a symptom of the thinking that even the national leaders have the right (and even the obligation towards their stockholders)

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<sup>69</sup> Ibidem. For more see: S. Bishop, M. Walker, *The Economics of EC Competition Law...*, s. 366 ff; A. Lindsay, *The EC Merger Regulation...*, s. 268 ff; U. Schwalbe, D. Zimmer, *Law and Economics in European Merger Control...*, p. 175 ff.

<sup>70</sup> As in case 85/76 *Hoffman La Roche v. EC Commission*, ECR 1997, 461.

to expand and increase their market share even up to the level of a dominant market position; the issue is only that they may not abuse a dominant position.

The criterion for the market share was however highly relevant to the determining of a ‘strong market position’ (and not market ‘dominant position’) of the undertaking to be created following the takeover of the ENERGA group by PGE. The total share in the retail electricity market of the PGE/ENERGA group would be slightly above 40%, while the market shares of the two remaining key players on this market (TAURON and ENEA) would be comparable (ca 42–43%)<sup>71</sup>.

The level of concentration on the markets on which further consolidations are to be carried out is measured in the traditional way using the Herfindahl-Hirschman Index (HHI) and its change (Delta indicator) directly brought about by the intended concentration. These indicators are well-known and applied in concentration proceedings in Poland. However, they were applied neither in any of the discussed special approvals nor in the decision prohibiting the PGE/ENERGA concentration. If the HHI had been calculated during these proceedings it would have demonstrated a high level of concentration of many of the electricity markets affected by this concentration.

Also the indicator  $C_3$  and  $C_5$  were not examined in the proceedings described in this article.

The low number of market players, the significant market shares (for example at the level of the rebuttable presumption of a dominant position) as well as the high level of concentration, do not however necessarily exclude efficient functioning of the market under conditions of effective competition. This seems to be the predominant view of the modern competition economy. All of these factors only constitute the ‘an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns’<sup>72</sup>. This is because they only show the structural ‘macro’ relations of markets. Only consideration of the issue at ‘micro’ level – of the competitive position of specific undertakings offering specific groups of products – demonstrates the proper level of ‘market power’ (or ‘increased market power’). In order to show the true picture of the market structure the following questions also need to be asked, in the view of S. Bishop and M. Walker: ‘are some firms closer competitors to one another?; are rival firms able to expand in response to any putative price increase?; can rival firms alter their product offerings?; can new firms enter the market in

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<sup>71</sup> Approximated on dates available at [www.ure.gov.pl/portal/pl/424/3553/Przedstawiamy\\_informacje\\_dotyczace\\_charakterystyki\\_krajowego\\_ryнку\\_energii\\_elekt.html](http://www.ure.gov.pl/portal/pl/424/3553/Przedstawiamy_informacje_dotyczace_charakterystyki_krajowego_ryнку_energii_elekt.html) and [www.cire.pl/rynekenergii/podstawa.php?smid=207#dostarczenie](http://www.cire.pl/rynekenergii/podstawa.php?smid=207#dostarczenie).

<sup>72</sup> ‘Guidelines on the assessment of horizontal mergers...’, point 21.

response to any post-merger price increase?; what actions can consumers take to undermine any attempt to increase prices post-merger?’<sup>73</sup>

The reducing of the analysis of the effects of the concentration to a calculation of market shares following the concentration is a sign of belief in the traditional (and today highly criticized) Harvard School and its paradigm “structure-conduct-performance” (SCP). Nowadays there is a definite swing towards the view that a ‘high level of concentration does not necessarily mean that markets cannot function effectively’<sup>74</sup>. The reduction in the number of basic electricity suppliers on the market, for example from 4 to 3 in the case of the PGE/ENERGA merger, cannot therefore be considered to be sufficient evidence of ‘a significant impediment to competition’.

Basing the evaluation of the concentrations (for instance, concentrations in the electricity sector) almost solely on the indicators that give a picture of the market structure means that they are appraised above all from the point of view of whether they give rise to unilateral effects<sup>75</sup>. According to economic competition theory such effects arise when an undertaking ‘has the ability to increase price or reduce quality to the detriment of consumers despite the responses of the remaining competitors’<sup>76</sup>; in other words if the concentration gives rise to increased market power, which is the ‘ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods or services, diminish innovation, or otherwise influence parameters of competition’<sup>77</sup>. At the core of every decision prohibiting a concentration of which anti-competitive coordinated effects do not constitute an essential aspect, there should therefore be the assertion that the ‘mostly liked’<sup>78</sup> result is the creation or strengthening of a dominant position on any of the defined relevant markets.

Meanwhile since May 1, 2004 the UOKiK President has rarely presented evidence of the ‘creation or strengthening of a dominant position’ as a result of the concentration being evaluated. The modification of the test, carried out after all to determine the anti-competitive coordinated effects of concentrations

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<sup>73</sup> S. Bishop, M. Walker, *The Economics of EC Competition Law...*, p. 364.

<sup>74</sup> *Ibidem*, p. 366.

<sup>75</sup> The Polish antitrust authority did not look at the coordinated effects in any of the decisions issued cases regarding concentrations on the energy markets and for this reason these issues cannot be addressed at all in this article.

<sup>76</sup> S. Bishop, M. Walker, *The Economics of EC Competition Law...*, p. 350.

<sup>77</sup> ‘Guidelines on the assessment of horizontal mergers...’, point 8.

<sup>78</sup> More for the standard of proof in concentration cases see in my case comment on the EJC judgement in case C-413/06 P *Bertelsmann/Sony v. European Commission*: T. Skoczny, ‘*Bertelsmann AG i Sony Corporation of America przeciwko Komisji Wspólnot Europejskich*’ [w:] *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 2004–2009*, Oficyna a Wolters Kluwer company, Warszawa 2010, p. 126 ff, as well as the European literature cited therein.

on oligopolistic markets<sup>79</sup>, is treated by the Polish competition authority as an opportunity to prohibit concentrations that do not create or strengthen a dominant position, and only enlarge a market share. I do not see any reason why derogation from the requirement to produce evidence that a dominant position is created or strengthened would help to lower the evidentiary threshold in the case of concentrations giving rise only to unilateral effects, i.e., its two substantive prerequisites – of either statutory<sup>80</sup> or case law<sup>81</sup> origin: (a) the ability to ‘prevent effective competition within a relevant market’ and (b) the capacity ‘to act in a significant degree independently of competitors, contracting parties and consumers’. If the market share can indicate the ‘ability to prevent effective competition’, then this does not in any way determine the ‘capacity to act in a significant degree independently of competitors, contracting parties and consumers’. Nor in the case of the prohibited PGE/ENERGA concentration did the UOKiK President find a dominant position to have been created post concentration. The competition authority only found an increase in market share, albeit balanced by the market shares of main competitors. Also, the level of concentration in the Polish electricity sector is lower than in other EU Member States on the generation markets<sup>82</sup> or moderate on the wholesale markets.

## **2. Other factors indicating whether or not there is a threat of ‘significant impediment of competition’**

While limiting the discussion to unilateral effects of intended concentrations, one may say that the structural consequences of each concentration (creation or strengthening of a dominant position or at least a strong market position) can be always corroborated or countervailed mainly by the following three

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<sup>79</sup> See: S. Bishop, M. Walker, *The Economics of EC Competition Law...*, s. 390 ff; A. Lindsay, *The EC Merger Regulation*, s. 294 ff; U. Schwalbe, D. Zimmer, *Law and Economics in European Merger Control...*, p. 221 ff.

<sup>80</sup> According to Article 4(10) of the CCP 2007 ‘a ‘dominant position’ shall mean a position of the undertaking which allows it to prevent the efficient competition within a relevant market thus enabling it to act in a significant degree independently of competitors, contracting parties and consumers; it is assumed that undertaking holds a dominant position if its market share exceeds 40%’.

<sup>81</sup> See ECJ judgements in cases 27/76 *United Brands v. EC Commission*, ECR 1978, 207 or 85/76 *Hoffman La Roche v. EC Commission*, ECR 1997, 461.

<sup>82</sup> According to Technical Annex to the Communication from the Commission to the Council and the European Parliament. Report on Progress in creating the internal gas and electricity markets of 11 March 2010; SEC (2010)251 Final; see also Communication from the Commission to the Council and the European Parliament. Report on Progress in creating the internal gas and electricity markets of 11 March 2009. SEC (2009)115 Final; *Transformacja systemu elektroenergetycznego*, p. 12.

factors: potential competition, purchasing power and efficiency gains<sup>83</sup>. In the unconditional and special approval decisions analyzed above, issued for the notified concentration between electricity undertakings, those factors were not, unfortunately, considered – and if so only to a small degree (efficiency gains for example under the public interest test).

A fundamental element of the evaluation of the consequences of the intended concentrations by the competition authorities is or should be the possibility of new entries to given markets (**potential competition**)<sup>84</sup>. Where there is that possibility, even large market shares do not bring market power. Where there is no such possibility or there are severe barriers to market access, an undertaking can have market power even with low market shares. In decisions giving special approval for creation of the PGE, TAURON and ENERGA groups this argument appeared only in reference to the European Commission's Report giving the findings of the inquiry into the internal electricity and gas markets, and which identified vertical relations as a substantial barrier to further liberalization of these markets<sup>85</sup>. In Polish conditions the UOKiK President therefore already concluded at that point that to the extent, if at all, that the share in the electricity generation market and share in the retail electricity market were similar, the consolidated energy groups were not interested in entry of new market players to the market.

In the decision prohibiting the PGE/ENERGA concentration the UOKiK President stated only that 'entry into the electricity generation market by new parties was limited by substantial barriers (capital- and time-consuming – investments in production capacity require relatively high investment outlays, and the construction takes a long time)'. The authority deemed however only the historical argument to be evidence for this assertion, this historical argument being that recent entries by new undertakings to the electricity generation market amounted as a rule to takeover of Polish energy generators or distributors by foreign firms (EdF, Electrabel, Vattenfall, RWE). The UOKiK President did not however provide a detailed analysis of availability of capital loans or the potential for building generation capacity in short investment technologies, which could have undermined those arguments.

It is typical that the UOKiK President only conducted discussions surrounding potential competition (new entries to the market) when defining

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<sup>83</sup> Inaczej niż Komisja Europejska in 'Guidelines on the assessment of horizontal mergers...', points 89–91, I see that 'failing company defence' serves more as 'absolute defence' than factors corroborating or countervailing results of SIEC analyses.

<sup>84</sup> See: 'Guidelines on the assessment of horizontal mergers...', points 68–75; S. Bishop, M. Walker, *The Economics of EC Competition Law...*, s. 384 ff; A. Lindsay, *The EC Merger Regulation*, s. 480 ff.

<sup>85</sup> 'DG Competition report on energy sector inquiry' (SEC(2006)1724, 10 January 2007).

the geographical dimension of the relevant markets (above all the generation and the wholesale market). It is difficult to contest the classification of those markets as national markets due to the currently negligible level of import of electricity to Poland (2–3%) and the low level of transmission capacity on cross-border connections in the direction of import. The evaluation of the intended concentrations differs from assessment, for example, of abuse of a dominant position in that it is prognostic and probabilistic in nature. While modification (extension) of the definition of a market does in fact require a major change to the above-described levels of import and cross-border transmission capacity, even a small increase in these could have a positive effect in terms of competition on the behaviour of the undertakings that hold the strongest position on the electricity retail market. If this were not the case the Commission would not be so determined in its efforts to bring about liberalization of the electricity and gas markets, including through imposing structural modification remedies on vertically integrated energy enterprises in the form of commitment decisions issued on the basis of Article 9 of Regulation 1/2003<sup>86</sup>.

The UOKiK President did not examine the impact the **position of the contracting parties**<sup>87</sup> would have on the market position of those groups in any of the decisions giving special clearance for the creation of the PGE, TAURON and ENERGA groups. These contracting parties include in particular industrial (commercial) electricity **users** (buyers) who, since July 1, 2004, had the TPA to the network. In all of those decisions the UOKiK President stated only that the phenomenon of change of supplier was still negligible in Poland, due among other things to the barriers existing in this respect, or even the lack of awareness among electricity users that such a change can be made.

This argument was in essence repeated in the decision prohibiting the PGE/ENERGA concentration. Although the so-called migrations are increasing year by year – to a significant extent in the case of industrial users and slightly in the case of households – the UOKiK President did not acknowledge this as being an argument favouring growing pressure of demand.

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<sup>86</sup> See: U. Scholz, S. Purps, 'The Application of EC Competition Law in the Energy Sector', [2010] 1(1) *Journal of European Competition Law & Practice*, p. 37 ff.; J. Ruiz Calzado, R. Motta, M. E Leoz Martin-Casallo, 'The European Commission's Recent Activity in the Electricity and Gas Sectors: Integrated Approach, Pragmatism and Guidance in EU Competition Enforcement', *The European Antitrust Review*, GCR 2011, p. 90 ff.; K. Kloc-Evson, D. Koška, 'Kontrola koncentracji + regulacja = LIBERALIZACJA. Kontrola koncentracji na tle reform regulacyjnych w europejskim sektorze energetycznym' [in:] *Prawo i ekonomia konkurencji. Wybrane zagadnienia*. Redakcja B. Kurcz, LEXa Wolters Kluwer business, Warszawa 2010, p. 457 ff.

<sup>87</sup> See: 'Guidelines on the assessment of horizontal mergers...', points 68–75; S. Bishop, M. Walker, *The Economics of EC Competition Law...*, s. 388 ff.; A. Lindsay, *The EC Merger Regulation*, s. 467 ff.



It is typical that in all of the decisions granting special approval also the **efficiency gains**<sup>88</sup>, if any, were not analyzed until the stage of examination of the grounds for not prohibiting under Article 19(2) CCP of the Act 2000 or Article 20(2) of the CCP Act 2007. It is difficult to say, but it also cannot be ruled out, that if that analysis had been carried out during the basic competition test analysis stage, significant impediment to competition would not have been found – at least in the case of creation of the TAURON and ENERGA groups.

With respect to the decision prohibiting the takeover by PGE of the ENERGA group as well, the applicants pointed out the numerous efficiency gains. The UOKiK President concluded however that at best they were gains for the parties to the concentration, and did not translate into benefits for the public and the economy at large, and that therefore there were no grounds for justifying not prohibiting the concentration. Neither in this scope was the issue supported by specific and detailed economic evidence.

## VI. Conclusions

The discussion of the issues presented above shows that the scale of threats to competition that might arise due to the vertical reconsolidation of the Polish electricity sector that occurred in 2006–2007 in the form of the creation of four vertically integrated energy groups was not great. Furthermore, the question shall be left unresolved as to whether allowing their creation under the Polish competition protection law (especially merger law) – in three instances, and particular in the case of the TAURON and ENEA groups – required special approvals, or whether that could have been achieved due to unconditional approval or – in the case of the PGE group – conditional approval from the UOKiK President. This is probably not the case but applying the legal institution of special approval for evaluating those transactions was relatively easy, and in any case easier than issuance of unconditional or conditional approval. There are many reasons for this. First, in none of these cases did the UOKiK President take a great regulatory risk even at the stage at which it was established that those consolidations were a potential source of ‘significant impediment to competition’. This is because the competition authority concluded that unilateral structural effects of those consolidations (a lower

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<sup>88</sup> See: ‘Guidelines on the assessment of horizontal mergers...’, points 68–75; S. Bishop, M. Walker, *The Economics of EC Competition Law...*, s. 412 ff; A. Lindsay, *The EC Merger Regulation*, s. 510 ff; U. Schwalbe, D. Zimmer, *Law and Economics in European Merger Control...*, p. 318 ff.

number of market players, increase in the market shares to the level in the range of the presumed market dominance) were enough for the competition test to be proved. Second – as in the case of all of the decisions issuing clearance – in the end the intended consolidations could have been performed within the scope of implementing government policy (contribution to ensuring the country's energy security) and meeting the economic expectations of the players themselves (a rise in the value of their businesses and their investment capability). Third, under the Polish merger law it was also evident that, being positive decision, special approval is not contested by applicants and is not subject to judicial review. It can be of no surprise therefore that none of these decisions contains detailed economic analyses confirming both 'a rise in investment capability' and other efficiencies.

This is all the more reason why it is surprising that in the case of the PGE/ENERGA concentration the UOKiK President decided to prohibit the transaction. That consolidation does not give rise to a substantial shift in the balance of market power, apart from the fact that indeed the number of major players on the electricity production and marketing markets will go down from 4 to 3. Even if it was acknowledged that in this case as well the scale of potential competition, purchasing power and – in particular – efficiency gains, which should be analyzed during the stage of analysis of fulfillment of the competition test, does not completely eliminate the threats to competition, there is no doubt that proving the fulfillment of the public interest test (ensuring the country's energy security) should be even easier today than it was in 2006–2007. In any case the need for investment in generation capacity and electricity networks is of course now greater, which fact cannot be without relevance when evaluating the 'rise in investment capability' argument, which was the decisive factor in the issuance of special approvals for the creation of the PGE, TAURON and ENEA groups. The rejection of that argument, without carrying out detailed economic analyses to determine whether it is correct, could be considered a violation of Article 20(2) of the CCP Act 2007 due to failure to account for arguments relating to government energy policy. From the formal point of view the UOKiK President has the independent power to decide to prohibit a concentration or – but only in exceptional cases – to decide not to prohibit a concentration if he believes that there are justified grounds as defined in Article 20(2) of the CCP Act 2007. He cannot however simply reject government energy policy arguments because – precisely due to his decision-making autonomy with regard to competition issues – the UOKiK President is not a political administration authority<sup>89</sup>. The burden of proof of fulfillment of the prerequisites of those provisions is on the applicants, who

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<sup>89</sup> See Ustawa o ochronie konkurencji i konsumentów. Komentarz pod redakcją C. Banasińskiego, E. Piontka, p. 489.

have the right to expect that as they are implementing the energy policy of the state – acting as a political authority and owner – the arguments pointing out that further consolidation is needed in the electricity sector will be considered properly. By refusing not to prohibit the concentration, the UOKiK President questioned the instruments of implementation of energy policy, and only the government has the authority to select those.

Although it sounds demagogic, the statement made by the UOKiK President, that adoption of that stance could lead the applicants to rightly expect further potential consolidations of the existing energy groups, and that the UOKiK President should also give special clearance for those consolidations, is certainly not far from the truth. With the exception of the conditions existing due to EU law, as long as the public authorities with a democratic mandate, and therefore also accountable to the electorate (who are the final consumers of electricity) retain ownership control over the undertakings that are important for its national energy security policy, they should have the power to decide what position those undertakings have within the national energy market structure. The government can in principle only dispose of that power when it disposes of ownership control over those undertakings by way of privatization. It will then be possible to apply the rules for protection of competition without hindrance for the purpose of preventing further (excessive) concentration or abuse of market power.

The examples of experiences and problems presented above, relating to competition (merger) law assessment of vertical reconsolidation of the electricity sector in Poland, require that the issue again be raised of whether the solution that presently exists under Polish merger law (which affords the UOKiK President twofold authority to appraise concentrations which indeed might represent a threat to competition, but bring with them gains for the economy and public at large) is a legitimate one<sup>90</sup>. Poland is among the few countries in which the competition authority is forced to apply the public interest test in concentration cases. It is true that there are countries in which concentrations that do not pass the competition test are allowed on the basis of the public interest test. In these countries however it is the political administration authorities (the government, ministers) that have power to issue special approval of this kind. In order to mitigate the risk that could arise due to overly frequent and easy exercising of those powers, in some of those countries the relevant institutional and procedural safeguards have been put in place.

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<sup>90</sup> For more see: A. Stawicki, E. Stawicki, *Ustawa o ochronie konkurencji i konsumentów. Komentarz...*, pp. 500 ff; T. Skoczny [in:] *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, p. 900 ff.

Among the countries that use not only the competition test but also the public interest test to evaluate a concentration are such EU countries as Belgium, Germany, and the United Kingdom – as well as non-EU countries such as Switzerland and Ukraine<sup>91</sup>. In all of those countries, the national competition authorities make concentration decisions on the basis of the competition test. In Belgium the Competition Council has to present a decision prohibiting a concentration to the government, which can issue clearance within 30 days of the date on which it is delivered to the parties if the public good (public security, competitiveness in that sector, consumer interests, the labour market) takes priority over the damage done by the detrimental effect on competition. The Federal Minister for Commerce can also grant special approval for a concentration prohibited by the Federal Cartel Authority, while prior to issuing that decision it is required to seek the opinion of the Monopolies Commission (Monopolkommission). In the United Kingdom there are three categories of public interest cases (general, special and ‘legitimate interest’) which involved the Secretary of State being in charge for business. They have in common, first, the issuing of a notice by the Secretary of State. The effect of such a notice is to require the Office of Fair Trading (OFT) to investigate the merger and provide a report. After receiving a report from the OFT a reference may be made by the Secretary of State to the Competition Commission (CC). If the CC decides that the merger is against the public interest, it must then answer questions relating to remedies. Upon receipt of the CC’s report, the Secretary of State has 30 working days in which to make a decision on the questions CC tabled. However, the Secretary of State is not bound by the CC’s views on the public interest test<sup>92</sup>. The Swiss government (Federal Council) also has the power to give ‘special authorization’ for a concentration if it will have a positive impact on the market. Finally, the Council of Ministers in Ukraine has the power to grant clearance for a concentration prohibited by the Ukrainian Antimonopoly Commission if the parties to the concentration manage to demonstrate the positive outcomes of the concentration for the public interest, and this outweighs the adverse effects of the concentration for competition (1<sup>st</sup> condition) and will not present a danger to existence of the market economy in Ukraine (2<sup>nd</sup> condition).

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<sup>91</sup> See national chapters in *Internationale Comparative Legal Guide to ‘Enforcement of Competition Law 2009’* available at [www.iclg.co.uk](http://www.iclg.co.uk) and in Rowley & Baker, *International mergers...* For more in Polish see T. Skoczny, ‘Instytucjonalne modele wdrażania reuł konkurencji na świecie – wnioski dla Polski’, (2011) 73(2) *Ruch Prawniczy Ekonomiczny i Socjologiczny*, p. 77 ff.

<sup>92</sup> See also Merger Assessment Guidelines. A joint publication of the Competition Commission and Office of Fair Trading, September 2010; available at [www.oft.gov.uk/OFTwork/mergers/publications/substantive/](http://www.oft.gov.uk/OFTwork/mergers/publications/substantive/), p. 65 ff.

Incidentally, the Polish competition authority seems to prefer to counter threats to competition caused by concentrations by way of prohibition, and not conditional approval. Since 2000 the UOKiK President in fact issued 5 decisions prohibiting concentrations and 9 decisions granting conditional approval (a ratio of 1 to 2)<sup>93</sup>. As we see the European Commission and many competition authorities in EU Member States have different understandings of their mission to protect competition, preferring to issue decisions giving conditional approvals on the basis of which the applicants undertake or are obliged to undertake the remedies which, on the one hand, are intended to eliminate in an effective way the threat to competition, and on the other hand allow applicants to achieve acceptable commercial goals. The ratio of decisions prohibiting concentrations to decisions granting conditional clearance in the Commission's practice is 1 to 10<sup>94</sup>.

In none of the decisions concerning consolidations in the energy sector in 2006–2007 did the UOKiK President even consider the option of conditional approval. The competition authority did do this however in a decision prohibiting the takeover by PGE over the ENERGA group. In that case the UOKiK President acknowledged that there were no remedies that could eliminate the competition concerns presented by that concentration (mainly those that were the result of vertical integration). The reasons for this decision were based however on speculative statements and not on specific economic evidence.

It is typical that the negative stances cited in the decision (for example lack of liquidity and transparency of wholesale market) taken with respect to the concentration by influential competitors – market players that were strong not only in Poland (for example RWE, E.ON or CEZ) – demonstrated that in order to amend them ‘mechanisms for releasing energy in groups through sale of energy in a competitive manner have to be imposed’ or ‘through making an undertaking that guarantees that liquidity and transparency of the Polish energy trading market will not deteriorate as a result of the concentration’. This commitments made by PGE/ENERGA ‘could infer that a specified percentage of electricity it generated would be sold to a platform that was publicly accessible and free from discrimination’. E.ON believes that ‘this undertaking should apply (including the already existing statutory obligation) to approximately 15–20 TWh of electricity per year’. According to the CEZ Trade's opinion ‘PGE should be ordered to sell all electricity... on the stock exchange... in a competitive and equal manner’. Organizations representing

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<sup>93</sup> For more see T. Skoczny, ‘Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy’, (2010) 5 *Europejski Przegląd Sądowy*, p. 15.

<sup>94</sup> See statistics of the EU merger cases available at <http://ec.europa.eu/competition/mergers/statistics.pdf>.

users of electricity also opposed the only ‘unconditional takeover of the market’, suggesting that any potential consent ‘could only be granted on a conditional basis’, for example ‘by imposing specific obligations on the new entity’. The UOKiK President did not address these ‘proposals’ in any way in his prohibition decision.

In my view a modifying behavioral condition (remedy) could and should be applied in this case. The commitment of the PGE group to ensure that for the next 10 years, i.e. 5 years longer than provided for in Article 49a(2) of the Act of 10 April 1997 – Energy Law (Energy Law)<sup>95</sup>, energy generators in the PGE group will sell all of their energy in accordance with Article 49a(2) of the Energy Law, i.e. through the commodities market, the regulated market and online trading platforms on the regulated market<sup>96</sup>, would be sufficient and effective and easy to monitor<sup>97</sup>. This remedy could ensure public and equal access to that energy, a transparent role of PGE in electricity trading, and successful elimination of the threats to competition mentioned in the decision – threats caused by lack of market transparency. Of course that would mean specific economic evidence would have to be produced to prove that this assumption was correct. Moreover, the effective conditions would have to be put in place to guarantee that PGE complied with the imposed modification conditions (for example appointing – for the first time in Poland – a so-called monitoring trustee).

In the context of the PGE/ENERGA concentration it can also be seen clearly that there would also be a great need in Poland for a formal two-stage control procedure<sup>98</sup>. The current procedural legislation in fact renders impossible a discussion between the applicants and the competition authority regarding the true merits of the case, as they do not place on the latter an obligation to present competition concerns during the proceedings that should be the basis for a proposal for conditions put forward by the parties to the

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<sup>95</sup> Unified text available at [www.ure.gov.pl/portals/pl/25/17/Ustawa\\_z\\_dnia\\_10\\_kwietnia\\_1997\\_r\\_Prawo\\_energetyczne.html](http://www.ure.gov.pl/portals/pl/25/17/Ustawa_z_dnia_10_kwietnia_1997_r_Prawo_energetyczne.html).

<sup>96</sup> PGE’s argumentation, at the core of the appeal against the decision prohibiting the PGE/ENERGA concentration seems to be going in this direction. See ‘*Komentarz PGE do stanowisk i obaw UOKiK*’ [‘PGE Commentary to UOKiK stance and fears’] available at websites: <http://www.pgesa.pl/pl/PGE/CentrumPrasowe/InformacjePrasowe/Strony/KomentarzPGEdoobawistanowiskaUOKiK.aspx>; <http://www.pgesa.pl/pl/PGE/CentrumPrasowe/InformacjePrasowe/Documents/Prezentacja%20odwołanie%20UOKiK.pdf>.

<sup>97</sup> This means it would fulfill prerequisites defined in Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ [2008] C 267/1.

<sup>98</sup> There is a two-stage control proceedings in concentration cases in the EU (see Council Regulation 139/2004) and a substantial number of its Member States.

concentration<sup>99</sup>. Fortunately, the introduction of such a two-stage procedure in concentration cases has been announced lately in the Polish ‘Competition Policy for 2011–2013’<sup>100</sup>.

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<sup>99</sup> In the EU (see Council Regulation 139/2004) and in EU Member States the rule is for the parties to propose conditions of the concentration and not the competition authority, although that happens in exceptional cases.

<sup>100</sup> ‘Polityka konkurencji na lata 2011–2013’. UOKiK, April 2011; available at [www.uokik.gov.pl](http://www.uokik.gov.pl).

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