

Stability of Merger Decisions

Presentation by Mateusz Błachucki
Office of Competition and Consumer Protection, Poland

UOKiK 1990
2010

20 years of the Office of Competition and Consumer Protection

Stability of merger decisions is of crucial importance for legal certainty of entrepreneurs engaged in concentrations. However there are situations where either competition authority or even entrepreneurs seek to change final merger decisions. The second is especially important during the time of economic crunch. The aim of this presentation is to explore the legal possibilities of changing final merger decisions in Poland.

Principle of stability of merger decisions

Appeals

Expiry of merger decisions

Abrogation, change of final merger decisions

Conclusions

Basic Facts Concerning Polish Merger Procedure

- The procedure is of administrative character.
- Proceedings are instituted upon a notification or *ex officio* (in case of non-obedience of the antimonopoly act).
- Merger control is of *ex ante* character and has a suspensive effect.
- Procedure is a one – phase process.
- There is no second administrative body – appeals are directed to the Antimonopoly Court.
- Antimonopoly Court is a civil court. Judgments of Antimonopoly Court can be appealed to Appeal Court.

Stability of merger decisions – what does it mean?

- Entrepreneurs expect merger proceedings to be fast, accountable and that merger decisions are stable.
- Stability of decisions is of great importance since merger decisions are legal source of rights and obligations of entrepreneurs on which they may rely conducting business.
- Merger decisions are stable when they are final.

■ Stability of merger decisions – what does it mean?

- According to art. 16.1 of Administrative Procedural Code final decisions are decisions which are not subject to appeal.
- The crucial issue is therefore to establish:
 - who is entitled to challenge merger decisions;
 - when merger decision becomes final.

Principle of stability of merger decisions

Appeals

Expiry of merger decisions

Abrogation, change of final merger decisions

Conclusions

Nature of Appeal in Antimonopoly Proceedings

- Decisions of the Antimonopoly Authority are subject to administrative appeal to the Antimonopoly Court. This means that the antimonopoly process is only a single-instance procedure and that the appellate procedure takes place before the Antimonopoly Court (the proceedings before the Antimonopoly Court constitute a quasi-second instance of the antimonopoly procedure).
- Appeal in the antimonopoly proceedings is a type of lawsuit typical of the civil procedure and its legal character is completely different from that of the administrative appeal described in the Administrative Procedural Code.

Persons entitled to lodge appeals

- Parties to the antimonopoly proceedings. Note that parties to the proceedings are hardly ever the same as parties to the concentration.
- Public prosecutor.
- Polish Ombudsman.

Entities deprived of the right to appeal

- Competitors.
- Consumers.
- Association of entrepreneurs that did not take part in merger proceedings is not entitled to lodge the administrative appeal in place of a party who is a member of such association and did take part in the said proceedings.

Deadline for Appeals

- An administrative appeal must be lodged with the Antimonopoly Authority within two weeks of the day the decision is delivered.
- The time limit to lodge an appeal is legally substantive in nature. Therefore, it cannot be extended by act of the Antimonopoly Court or by legal action of the party. The time limit may be restored pursuant to provisions in the Civil Procedural Code.

Principle of stability of merger decisions

Appeals

Expiry of merger decisions

Abrogation, change of final merger decisions

Conclusions

Expiry of Merger Decisions

- In general, Polish administrative law does not limit administrative decisions in relation to time in which they remain in force. However, sometimes particular provisions may regulate otherwise. This situation takes place with regard to merger decisions.
- Merger decisions are based on economic analysis. This analysis is of prospective character. This offers strong argument for limiting time of remaining in force of merger decisions.
- However the expiry of particular merger decision depends on type and nature of this decision.

Expiry of Merger Decisions cont.

- Polish Antimonopoly Act regulates only situation when concentration has not been implemented. According to Art. 22.1 clearance decisions issued upon Arts 18, 19.1 and 20.2 expire, if within 2 years from their issuance date, the concentration has not been implemented. This time limit may be extended by one year.
- The Antimonopoly Act does not expressly regulate the date of expiry of prohibition decisions and conditions (remedies) which may accompany conditional decisions.

Expiry of Merger Decisions cont.

- The gist of the problem of expiry of conditional merger decisions relates to expiry of imposed conditions. It will depend on the nature of remedies. For example structural remedies always provide a strict deadline for fulfillment of remedies. Determination of expiry of behavioral remedies may be a more complex issue.
- The problem with expiry of prohibition decision. Analogy with clearance decisions?
- Possibility of „sunset clauses” in Polish law.

Principle of stability of merger decisions

Appeals

Expiry of merger decisions

Abrogation, change of final merger decisions

Conclusions

- The extraordinary form of antimonopoly proceedings may only be initiated *ex officio*, and the party has no right to demand institution of such proceedings. It has been argued that such regulation ensures legal certainty by preventing the possibility of the Antimonopoly Court and the Antimonopoly Authority revising the same decision at the same time.
- It is possible for the public prosecutor to lodge an „objection” against the final merger decision. When objection is lodged the Antimonopoly Authority is obliged to initiate extraordinary form of proceedings.
- The extraordinary form of antimonopoly proceedings is regulated partially in the Antimonopoly Act, but the most important provisions are in the Administrative Procedural Code.

Abrogation of Merger Decisions upon the Antimonopoly Act

- The Antimonopoly Act regulates in Art. 21.1 that merger decisions may be abrogated providing that, they were based on unreliable information for which undertakings participating in the concentration were responsible or where undertakings did not comply with the conditions (in case of conditional clearance). In the case of revoking the decision, the Antimonopoly Authority adjudicates on the merits of the case.
- Art. 21.2 stipulates that if the merger is already implemented and restoration of the competition in the market is otherwise impossible, the Antimonopoly Authority may order in particular:

Abrogation of Merger Decisions upon the Antimonopoly Act

- separation of the merged undertaking under conditions defined in the decision;
- disposal of the entirety or part of the undertaking's assets;
- disposal of stocks or shares ensuring the control over the undertaking or undertakings, or dissolution of the company over which the undertakings have joint control;
- It is important to remember that structural sanctions may not be imposed after the lapse of 5 years from the day the concentration was implemented.

Resumption of Proceedings

The resumption of antimonopoly proceedings is a process establishing the legal opportunity to re-adjudicate the antimonopoly case that was settled by way of a decision if the antimonopoly proceedings leading to issuance of this decision were conducted in violation of procedural norms listed in the Art. 145 and 145a of Administrative Procedural Code

Assessment of Invalidity of Decision

The assessment of invalidity of a decision is a process establishing the legal opportunity for the Antimonopoly Authority to eliminate decisions afflicted with significant legal defects, as listed in the Art. 156 of Administrative Procedural Code.

Abrogation and Change of Decision

- In cases of the resumption of proceedings and the assessment of invalidity of decisions, the decisions were afflicted with significant legal defects in relation to either substantive law provisions or process law norms.
- The third type of extraordinary form of antimonopoly proceedings, regulated in Arts 154 and 155 of Administrative Procedural Code, seeks to abrogate or to change either a decision afflicted with significant, although not listed, legal defects or a correct decision.
- This regulation offers the best opportunity for the party to change the final merger decision.

Abrogation and Change of Decision cont.

A final decision by virtue of which a party has not acquired a right may be abrogated or changed by the Antimonopoly Authority, which issued it, when this is justified by a social interest or by a just interest of the party.

Abrogation and Change of Decision

- If, on the basis of a final decision, a party has acquired a right, this decision may be abrogated or changed:
 - upon this party's consent, unless specific provisions are contrary to the abrogation or change of such a decision, if this is justified by a social interest or a just interest of the party; or
 - irrespective of the party's opinion, if there is no other way to eliminate the state dangerous to human life or health or to prevent significant damage to the national economy or other various interests of the state.

Principle of stability of merger decisions

Appeals

Expiry of merger decisions

Abrogation, change of final merger decisions

Conclusions

Conclusions

- Principle of stability of merger decisions is not of absolute character.
- Stability of merger decisions creates legal certainty. However, in particular circumstances it may be the party who is willing to change the final decision. And sometimes even the final decision may have a manifest error.
- Exemptions to the principle of stability are limited and justified.
- Competitors may take more active role during proceedings but it would be controversial to allow them to challenge merger decisions.

Conclusions cont.

- Regulation of expiry of merger decisions is underdeveloped and should be expanded.
- Open question is whether the party to the proceedings should be entitled to demand change of final merger decisions.

■ Thank you for your attention!

www.uokik.gov.pl

mateusz.blachucki@uokik.gov.pl

+ 48 22 55 60 308