State-Controlled Entities in the EU Merger Control: the Case of PKN Orlen and Lotos Group

by

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CONTENTS

I. Introduction: state owned enterprises in EU merger control before COVID-19
II. PKN Orlen and Lotos Group: state owned or state controlled?
III. Polish state owned enterprises under EU merger control
IV. Polish state owned enterprises under national competition law
V. PKN Orlen/Lotos merger: quo vadis EU Commission?
VI. Conclusion

Abstract

The economic downturn caused by the coronavirus pandemics is expected to result in the increased participation of the state in the functioning of markets. One of the forms of this participation is the recapitalization and state shareholding in commercial enterprises, which could lead to anti-competitive effects to the detriment of competitors and consumers. In this regard, the effective enforcement of merger control rules at the EU and national levels gains in importance. The present paper questions the adequacy of the available merger control standards and assessment tools for taking into account potential anti-competitive effects stemming from ownership and non-ownership forms of state control over undertakings. The

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analysis is focused on the experiences of Polish state owned enterprises under the EU and national merger control assessment. It was prompted by the notification of the *PKN Orlen/Lotos* merger that received conditional clearance from the EU Commission.

Résumé

Le ralentissement économique provoqué par la pandémie de coronavirus est supposé se traduire par une participation accrue de l'État au fonctionnement des marchés. L'une des formes de cette participation est la recapitalisation et la participation de l'État dans les entreprises commerciales, ce qui pourrait produire des effets anticoncurrentiels au détriment des concurrents et des consommateurs. À cet égard, l'application effective des règles de contrôle des concentrations au niveau de l'UE et national gagne en importance. Le présent article s'interroge sur l'adéquation des normes de contrôle des concentrations et des moyens d'évaluation disponibles pour tenir en compte les effets anticoncurrentiels potentiels découlant des formes de contrôle public sur les entreprises. L'analyse se concentre sur les expériences des entreprises publiques polonaises dans le cadre de l'évaluation du contrôle des concentrations au niveau de l'UE et national. Cette analyse est le résultat de la notification de la fusion PKN Orlen/Lotos qui a reçu l'autorisation conditionnelle de la Commission européenne.

Key words: state owned enterprise; merger control; single economic unit; competitive neutrality; Poland; national competition authority.

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I. Introduction: state owned enterprises in EU merger control before COVID-19

Following the principle of non-discrimination between private and public forms of property ownership, embedded in Article 345 TFEU, the EU Merger Regulation (hereinafter: EUMR) also adheres to the principle of competitive neutrality and stipulates that the "arrangements to be introduced for the control of concentrations should…respect the principle of non-discrimination between the public and the private sectors".[1] According to the EU Commission's explanation, "if it was allowed to treat state-owned undertakings more favourably than other enterprises, removing the level playing field that

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 024, 29 January 2004, recital 22.

should be the characteristic of free competition, the competitive process and the long-term goal of one European integrated market could be considerably damaged" (OECD, 2009, p. 243). The Court of Justice of the European Union (hereinafter: CJEU) developed a functional approach to the concept of undertaking, which "encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed".[2] As a result, state owned enterprises (hereinafter: SOEs) are regarded as 'undertakings' and have to pass through the same procedural steps and substantive assessments of the EU merger control regime along with other types of companies.

At the same time, the determination of the 'undertakings concerned' or 'persons concerned' in merger cases has encountered several application challenges in relation to the economic concentrations involving SOEs. These challenges can be presented as two broader groups of questions: (1) procedural questions related to the qualification of a transaction as a concentration under the EUMR and determination whether a given transaction reaches the threshold of the 'Community dimension', and has to be notified to the EU Commission under the EUMR; and (2) substantive questions related to the competitive assessment of SOE-related mergers and acquisitions such as whether one SOE will be subject to coordination of its conduct on the market with other SOEs controlled by the same state.

A 'concentration' under the EUMR can result from a merger of two or more previously independent undertakings or parts of undertakings or from an acquisition, by one or more persons, of direct or indirect control of the whole or parts of one or more other undertakings.[3] A 'concentration' should be distinguished from an 'internal restructuring' within a group of companies, which may take the form of increases in shareholdings not accompanied by changes of control or restructuring operations, such as "a merger of a dual listed company into a single legal entity or a merger of subsidiaries".[4] Will a merger of two SOEs owned by the same state qualify as a concentration under the EUMR? According to the Commission's Jurisdictional Notice, if two SOEs "were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring".[5] For example, "several SOEs will be considered to be the same independent centre of commercial

[2] Case C-41/90 *Höfner and Elser v Macrotron GmbH*, judgment of 23 April 1991, para 21.

[3] EUMR, Article 3(1). Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16 April 2008, para 7.

[4] Jurisdictional Notice, para 51.

[5] Jurisdictional Notice, para 52.

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decision-making where they are part of the same holding company owned by the State" (Fountoukakos and Puech-Baron, 2012, p. 48).

The early merger control practice of the EU Commission has evolved around cases involving SOEs from EU Member States, or those controlled by the countries within the European Economic Area. As a result, the 'European inquisitor' (Bernatt, Botta and Svetlicinii, 2018a; Bernatt, Botta and Svetlicinii, 2018b) was dealing with the companies that were largely subjected to EU competition law and placed within the regulatory framework of competitive neutrality. The Commission has developed the concept of a 'single economic unit', which encompassed all undertakings under the control of the same decision-making center. Hence, if two SOEs are owned by the same state but controlled by different entities or persons, they would belong to distinct 'single economic units' and the merger of such SOEs would qualify as economic concentration under the EUMR.[6] Similarly, for determining whether the concentration achieves 'Community dimension', the Commission calculated the aggregate turnover of all SOEs included into such 'single economic unit'.[7] The competitive assessment of the possible coordination of the market behavior of SOEs owned by the same state was carried out on the basis of: previous evidence of such coordination, presence of interlocking directorships, exchange of sensitive information between the undertakings concerned, and other factors considered by the Commission on case-by-case basis.[8] The universal applicability of these concepts has been put to the test in 2011, when the Commission has conducted its first substantive assessment of an acquisition notified by a Chinese SOE (Depoortere, 2011).[9] The subsequent string of acquisitions of Chinese SOEs in Europe challenged the application of the traditional competition law concepts such as 'concentration', 'single economic unit', 'control' and 'decisive influence' to the Chinese 'national champions', which operate within a system of state capitalism that does not embrace the principle of competitive neutrality (Svetlicinii, 2017; Svetlicinii, 2020).

The clearance of Chinese SOEs' acquisitions and the Commission's blocking of the *Siemens/Alstom* merger[10] prompted various calls for reform of the EU merger control regime coming from individual Member States and other stakeholders (Heim, 2019). For example, France, Germany and Poland

[6] See e.g. Case No. IV/M.511 *Texaco/Norsk Hydro*, decision of 9 January 1995; Case No. IV/M.1573 *Norsk Hydro/Saga*, decision of 5 July 1999; Case No IV/M.931 *Neste/IVO*, decision of 2 June 1998.

[7] See e.g. Case No. COMP/M.4934 *Kazmunaigaz/Rompetrol*, decision of 19 November 2007; Case No. COMP/M.8319 *CEFCI/JSC KazMunaiGaz/Rompetrol France*, decision of 23 December 2016; Case No. COMP/M.8361 *Qatar Airways/Alisarda/Meridiana*, decision of 22 March 2017.

[8] See e.g. Case No. COMP/M.5549 *EDF/Segebel*, decision of 12 November 2009.

[9] Case No. COMP/M.6082 *China National Bluestar/Elkem*, decision of 31 March 2011.

[10] Case No. COMP/M.8677 *Siemens/Alstom*, decision of 6 February 2019.

in their position paper entitled 'Modernising EU Competition Policy' urged the EU Commission to 'stringently take into account' state control and state support of undertakings coming from third countries in calculating turnover and conducting the competitive assessment of the notified concentrations.[11] In relation to mergers of those European companies that should be able to compete on the global markets, the three Member States suggested to take into account the competitiveness of the EU industry and the European value chains by using more flexibility in adopting merger remedies that should take the form of behavioral conditions rather than structural divestitures.[12] Their concerns were heard by Ursula von der Leyen, the newly elected President of the EU Commission, who called upon Margrethe Vestager, now 'the Executive Vice-President for a Europe fit for the Digital Age' to "develop tools and policies to better tackle the distortive effects of foreign state ownership and subsidies in the internal market" (von der Leyen, 2019, p. 6). The Commission's response to the competition challenges posed by SOEs and other state-initiated market distortions was subsequently formulated in the White Paper on levelling the playing field as regards foreign subsidies.[13]

The COVID-19 pandemic, which caused large scale economic disruptions in the EU starting from March 2020, has diverted the Commission's attention towards emergency economic support measures and the planning of economic recovery policies. In order to allow Member States to grant state aid to its struggling enterprises, the Commission has adopted the Temporary Framework for state aid measures during the COVID-19 outbreak, which identified temporary state aid measures that the Commission considers compatible under Article 107 TFEU.[14] Among the woes brought about by the COVID-19 was the volatility of the stock markets and fear of foreign acquisitions. Commissioner Vestager pointed out that one of the ways to prevent a takeover by a foreign state is to replace it by the takeover by the EU Member State: "We don't have any issues of states acting as market participants if need be – if they provide shares in a company, if they want to prevent a takeover of this kind" (McCaffrey, 2020). The German Economy Minister Peter Altmaier concurred: "We will avoid a sell-out of German economic and industrial concerns. There cannot be

[11] Modernising EU Competition Policy (4 July 2019), https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.html.

[12] *Ibid.*, p. 3.

[13] European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020.

[14] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01; Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 112 I/01.

any taboos. Temporary and limited state support as well as participations and takeovers need to be possible" (Escritt and Steitz, 2020).

The Commission responded by amending the Temporary Framework on 8 May 2020 to allow "well-targeted public interventions providing equity and/or hybrid capital instruments to undertakings could reduce the risk for the EU economy of a significant number of insolvencies".[15] At the same time, since such state interventions are especially distortive for competition, the Commission specified that these measures should "be subject to clear conditions as regards the State's entry, remuneration and exit from the undertakings concerned, governance provisions and appropriate measures to limit distortions of competition".[16] The Commission acknowledged that some Member States are considering the acquisition of strategic companies. If such acquisition is done to avoid a foreign takeover, the Commission urged Member States to consider other means such as strengthening the FDI screening mechanism (Svetlicinii, 2019).[17] The Temporary Framework provided for incentive schemes that would ensure the eventual exit of the state from those undertakings that have been assisted by recapitalization. At the same time, if the beneficiary has significant market power and receives a recapitalization measure above EUR 250 million, then the Member State concerned must propose additional measures to preserve effective competition in the affected markets.[18] Such measures may include structural or behavioral commitments.

The Temporary Framework has laid down the ground rules for recapitalization of the European companies and, if pursued by the national government, it will lead to the increase of the number of companies (albeit temporary) with state shareholdings as well as those where the state will be able to exercise control over them. Is the EU merger control regime well equipped to address the potential anti-competitive effects of state-supported acquisitions and mergers? Are the previously developed concepts and assessment tools effective in assessing the potential anti-competitive effects of state control over SOEs and other state-invested entities? While the preceding research of the author has been focused primarily on cases involving Chinese SOEs, the growth of economic nationalism

[15] Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak C(2020) 3156 final (8 May 2020), para 5. The consolidated version of the Temporary Framework after the two amendments is available at https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_as_amended_3_april_and_8_may_2020_en.pdf.

[16] *Ibid.*, para 7.

[17] European Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452, C(2020) 1981 final (25 March 2020).

[18] Temporary Framework, para 72.

and protectionism within the EU itself calls for the reversal of attention towards SOEs controlled by the Member States. The present paper attempts to provide the answers to these questions by addressing the recent notification of the acquisition of the Lotos Group (controlled by the Polish State)[19] by PKN Orlen[20] (significant shareholding owned by the Polish State).[21]

II. PKN Orlen and Lotos Group: state owned or state controlled?

The establishment of PKN Orlen and the Lotos Group dates back to the early 2000s, which saw a privatization of the Polish petroleum industry. The two largest state owned oil refineries, the one in Płock (around 60% of domestic production) and the one in Gdańsk (around 20% of domestic production), were up for sale. The Polish government was hesitant to consolidate the refining capacities under one single corporate group due to fears of geopolitical Russian takeovers in the strategic energy sector (Orban, 2008, pp. 85–87). However, the attempts to privatize the Gdańsk refinery attracted consortia of bidders including Russian oil giants Yukos and Lukoil. As a result, the public tenders were called off and after the revision of the petroleum industry strategy in 2003, the Gdańsk refinery and three refineries in the south of Poland were consolidated into the Lotos Group under state control.

In 2005, in order to keep the strategic industry under state control, Poland adopted its ‘golden share’ legislation allowing the government to block key decisions in companies of special importance for the public order or public security.[22] In 2008, the Council of Ministers has included PKN Orlen, along with the Lotos Group, Polish Oil and Gas Extraction (PGNiG),[23] the energy holding Tauron Group,[24] electricity transmission system PSE,[25] and others, on the list of companies of special importance for public order and security.[26] However, after the EU Commission’s infringement proceedings against

[19] *Grupa Lotos*, http://www.lotos.pl/; traded on Warsaw Stock Exchange as LTS.

[20] *Polski Koncern Naftowy Orlen*, https://www.orlen.pl/; traded on Warsaw Stock Exchange as PKN.

[21] Case No. COMP/M.9014 *PKN Orlen/Grupa Lotos*, decision of 14 July 2020.

[22] Act of 19 July 2005 on Special Powers of the Treasury and Their Exercise in Companies of Special Importance for Public Order or Public Security, Official Gazette No. 132, item 1108.

[23] *Polskie Górnictwo Naftowe i Gazownictwo*, http://pgnig.pl/; traded on Warsaw Stock Exchange as PGN.

[24] *Tauron Polska Energia*, https://en.tauron.pl/; traded on Warsaw Stock Exchange as TPE.

[25] *Polskie Sieci Elektroenergetyczne*, https://www.pse.pl/

[26] Council of Ministers, Regulation of 30 September 2008 concerning the list of companies of special importance for public order or public security, Official Gazette No. 192, item 1184.

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Member States applying 'golden share' regimes, the Polish government had to withdraw the above-mentioned legislation (Adamczyk and Barański, 2010).

The unwillingness of the Polish State to part with the previously fully state-owned companies, labeled 'reluctant privatization', led to the current situation of "the preservation of numerous enterprises that are still controlled by the state, although formally the state does not possess any shares in them or has only small packages, which carry insignificant voting rights" (Bałtowski and Kozarzewski, 2016, p. 409). As a result, one would observe the emergence of the two broader groups of companies: (1) SOEs where the state holds a dominant shareholder position (PGNiG, PGE,[27] Lotos Group, Enea,[28] Energa,[29] etc.); and (2) companies where the state maintains a certain degree of control through statute provisions of voting caps strengthening the position of the state shareholder (PKN Orlen, Tauron Group, CIEH,[30] etc.). The second group of companies has been labeled as 'state-controlled enterprises' or SCEs encompassing those companies that are controlled by the state using non-ownership instruments (Bałtowski and Kozarzewski, 2016, p. 406).

At the time of writing, the state shareholding in PKN Orlen was 27.52%[31] held by the Ministry of State Assets (hereinafter: State Treasury).[32] At the same time, the articles of association provide that no shareholder can exercise more than 10% of the total voting rights at the General Meeting.[33] This restriction, however, does not apply to the State Treasury. This results in a situation where the State Treasury appears as the largest voting rights holder while the voting powers of all other shareholders is curbed at the 10% cap. For example, at the General Meeting held on 5 March 2020, the State Treasury exercised 43.01% of voting rights, while the total voting rights of all other participating shareholders that had at least 5% of voting rights amounted to 34.97%.[34] Furthermore, the position of the state shareholder is also strengthened by the special right of the State Treasury to appoint one member of the

[27] *Polska Grupa Energetyczna*, https://www.gkpge.pl/; traded on Warsaw Stock Exchange as PGE.

[28] *Enea SA*, https://www.enea.pl/; traded on Warsaw Stock Exchange as ENA.

[29] *Energa SA*, https://www.energa.pl/; traded on Warsaw Stock Exchange as ENG.

[30] *CIEH SA*, https://ciechgroup.com/; traded on Warsaw Stock Exchange as CIE.

[31] See PKN Orlen, Shareholders structure, https://www.orlen.pl/EN/InvestorRelations/ShareholderServicesTools/ShareholdersStructure/Pages/default.aspx.

[32] The Ministry of State Treasury (*Ministerstwo Skarbu Państwa*) was liquidated in 2017, while the current Ministry of State Assets (*Ministerstwo Aktywów Państwowych*) was established at the end of 2019.

[33] PKN Orlen, Articles of Association, Article 7(11).

[34] See PKN Orlen, Shareholders with at least 5% of votes at EGM of PKN ORLEN, Regulatory announcement No. 12 of 5 March 2020, https://www.orlen.pl/EN/InvestorRelations/RegulatoryAnnouncements/Pages/Regulatory-announcement-no-12-2020.aspx.

Supervisory Board directly, in addition to the members it can vote in through the General Meeting.[35] These corporate arrangements led the commentators to conclude that the "Polish state currently controls PKN Orlen via a 27.5% stake" (IntelliNews, 2018a) and that the "Polish state is able to control listed companies even without a majority stake" (Bretan, 2018). The control over the SOEs and other enterprises made the Ministry of State Treasury so powerful that the "political weight of this body apparently was one of the main reasons of its liquidation after the Law and Justice coalition came to power in 2015 and started to concentrate economic power in the hands of the Prime Minister and branch ministries" (Kozarzewski and Bałtowski, 2019a, p. 20).

The observation of the functioning of Polish SCEs such as PKN Orlen revealed their similarities with the SOEs: "the boards of these companies are subject to politically motivated personnel decisions; the state de facto determines their development strategies, it is also the state that decides every year on the amount of the dividend these companies will pay out" (Kozarzewski and Bałtowski, 2019b, p. 26). For example, Wojciech Jasiński assumed his duties as the President of the Board of Directors in PKN Orlen at the end of 2015 (and served until 2018) while maintaing his appointment in the supervisory board of the state owned PKO Bank Polski (commercial bank), which he held from February 2016. On 5 February 2017, Mr Jasiński was dismissed as PKN Orlen's CEO and replaced with Daniel Obajtek, who previously headed Energa SA, another Polish SOE. It was reported that "his refusal to fire colleagues associated with Civic Platform had played a role, as had his reluctance to join a project to build a nuclear power plant" (Koper, 2019). PKN Orlen's Vice-President, Mirosław Kochalski, held various political appointments with the Law and Justice party and the presidency of CIEH Group (chemical industry). Mateusz Bochacik served on the supervisory boards of PKN Orlen and one of the companies within the Polish Armaments Group (PGZ).[36] Arkadiusz Siwko, who served on the supervisory board of PKN Orlen, also held the position of the President of PGZ. Robert Pietryszyn occupied board positions in PZU and the Lotos Group. Remigiusz Nowakowski held board positions in PKN Orlen and the state owned Tauron Group (Mikołajewska, 2017; Mikołajewska, 2019).

Centralized government control and participation in a number of SOEs and SCEs, which until recently was concentrated in the hands of the State Treasury, the rotation of the same individuals through the corporate boards of these undertakings, the steering of the strategic decisions of the SOEs and SCEs in line with the government's economic development strategies and policies (for example, in the energy and petroleum sectors) serve as evidence of both the capacity and the actual exercise of state control over major commercial

[35] PKN Orlen, Articles of Association, Article 8(2).
[36] *Polska Grupa Zbrojeniowa*, https://grupapgz.pl/.

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decisions of those companies through ownership and non-ownership means. The ensuing section will discuss whether and how these factors have been considered in the assessment of mergers involving Polish SOEs at the EU and national levels.

III. Polish state owned enterprises under EU merger control

After its ‘partial privatization’, PKN Orlen was involved in a number of concentrations, which due to the size of its economic group and its presence in several Member States, have reached ‘Community dimension’ and were notified to the EU Commission under the EUMR. In 2005, PKN Orlen set to acquire 62.99% in Unipetrol a.s., a Czech SOE in the process of privatization, controlled by the National Property Fund of the Czech Republic.[37] In its clearance decision, the Commission did not label the acquiring undertaking as a SOE: “PKN Orlen used to be a state-owned company, which prior to Poland’s opening up to an open market economy, was the only company able to produce and sell petroleum products and its derivates”.[38] Since the transaction had no significant effect on the non-retail sales markets of fuel oil and liquefied petroleum gas, the Commission focused its assessment on the non-retail sales markets of gasoline and diesel. The analysis concluded that the geographic scope for non-retail markets was national (Czech Republic and Poland) and neither of the merging parties was particularly strong in the border region between the two countries.[39] Furthermore, it was noted that PKN Orlen faced strong competition from the Lotos Group on the Polish market for gasoline, diesel, and bitumen.[40] In 2003, the Lotos Group owned 349 gas stations and three petroleum refineries in Southern Poland.[41] PKN Orlen, on the other hand, controlled the refinery in Płock and two smaller refineries in the south of the country.[42] Thus, the Commission considered PKN Orlen and the Lotos Group as competitors without demonstrating whether and how it considered the effects of state participation in both undertakings.

In 2006, PKN Orlen expanded its presence in Lithuania by acquiring control over AB Mažeikiu Nafta, a company active in the refining of crude oil and the

[37] Case No. COMP/M.3543 *PKN Orlen/Unipetrol*, decision of 20 April 2005.
[38] *Ibid.*, para 7.
[39] *Ibid.*, para 19.
[40] *Ibid.*, paras 34, 50.
[41] *Ibid.*, para 35.
[42] *Ibid.*, paras 43–44.

wholesale and retail of petroleum products in the Baltic States and Poland.[43] The competitive assessment was focused on ex-refinery/cargo sales, non-retail sales, and retails sales of refined oil products[44] in North Eastern Poland where both parties were present, but since none of them were exclusive suppliers, the concentration did not raise anti-competitive concerns.[45] Here again, the Lotos Group was considered as a main competitor of PKN Orlen on the market for non-retail sales of diesel and gasoline in Poland.[46] The Commission cleared the merger by concluding that the "additional market shares are relatively small, customers are able to source supplies from neighboring EU countries, supplies from CIS are likely to increase their sales as refineries in these countries are being upgraded, storage facilities are available and there is considerable buyer power".[47]

In 2012, the EU Commission has received PKN Orlen's merger notification concerning the acquisition of the fuel supplier Petrolot (from 2017 – Orlen Aviation), which was previously under the joint control of PKN Orlen and the state owned LOT Polish Airlines.[48] The merging parties have requested the Commission under Article 4(4) EUMR to refer the case for investigation to the Polish NCA – the Office of Competition and Consumer Protection (hereinafter: UOKiK).[49] After considering that the affected geographic markets (individual airports) were all in Poland, the Commission referred the case to UOKiK. According to the submission from the Lotos Group, the supply of jet fuel required the possession of adequate storage facilities at each airport. In this respect, Petrolot had such facilities at 12 airports, while the presence of its competitors was very low. This raised vertical anti-competitive concerns as PKN Orlen was active on the market for the supply of jet fuel, while Petrolot was acting as a downstream distributor delivering the fuel to airplanes. The Polish NCA confirmed the existing dominance of Petrolot on the jet fuel markets in several airports in Poland but concluded that the concentration will not lead to a strengthening of this dominant position.[50] Furthermore, according to UOKiK, the departure of LOT, as a shareholder of Petrolot, ensures that there will be no discrimination in fuel supply between LOT and other airlines refueling their jets in Polish airports.

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[43] Case No. COMP/M.4348 *PKN/Mazeikiu*, decision of 7 November 2006.

[44] *Ibid.*, para 8.

[45] *Ibid.*, para 27.

[46] *Ibid.*, paras 42–43.

[47] *Ibid.*, para 50.

[48] Case No. COMP/M.6683 *PKN Orlen/Petrolot*, decision of 5 September 2012.

[49] *Urząd Ochrony Konkurencji i Konsumentów*, https://www.uokik.gov.pl/

[50] UOKiK, Decision No. DKK-131/2012 of 5 December 2012.

In terms of referrals of merger cases from the Commission to the NCA, UOKiK's experience is mixed. In 2018, the Commission rejected UOKiK's request under Article 9 EUMR to refer to the Polish NCA an acquisition in the media sector. The Commission reasoned that "given its extensive experience in assessing cases in the media sector, and the need to ensure consistency in the application of merger control rules in this sector across the EEA, it was better placed to deal with this case" (European Commission, 2018).[51] In another case, which concerned two companies active on the pork meat market, the Commission approved UOKiK's request for referral under Article 9 EUMR (European Commission, 2017).[52] As a result, until recently,[53] *PKN Orlen/Petrolot* was the only merger case concerning a Polish SCE that was referred to the UOKiK under the EUMR.[54]

Most recently, the Commission cleared PKN Orlen's acquisition of Energa, a Polish renewable energy operator.[55] Prior to the acquisition, Energa was a SOE with 52% of the shares (as of 29 November 2019), which provided the Polish State with a 64% share of the voting power at the General Meeting. In its press release, the EU Commission referred to Energa as "an energy company active in the generation and wholesale supply, distribution, and retail supply of electricity and other energy-related activities in Poland" (European Commission, 2020a). While the merger clearance decision has not been yet released at the time of writing, the Commission's press release does not contain any mentioning of the state participation in PKN Orlen. As a result, the Commission's merger assessment of the concentrations involving PKN Orlen do not consider this undertaking to be part of the same 'single economic unit' with other Polish SOEs.

[51] Case No. COMP/M.8665 *Discovery/Scripps*, decision of 6 February 2018.

[52] Case No. COMP/M.8611 *Smithfield/Pini Polonia*, decision of 23 January 2018.

[53] See Case No. COMP/M.9561 *PKN Orlen/Ruch*, decision of 12 February 2020. The Commission under Article 4(4) EUMR has referred to the UOKiK an acquisition of Ruch (a Polish operator of kiosks and newsagent stores) by PKN Orlen.

[54] Under Article 4 EUMR, the Commission has referred to UOKiK the following cases: Case No. COMP/M.6476 *Canal+/ITI/TVN/FTA/ITI Neovision*, decision of 16 March 2012; Case No. COMP/M.6822 *Groupe Auchan/Real/Real Hypermarket Romania*, decision of 7 March 2013. Under Article 9(3) EUMR, the Commission has referred to UOKiK the Case No. COMP/M.4522 *Carrefour/Ahold Polska*, decision of 10 April 2007.

[55] Case No. COMP/M.9626 *PKN Orlen/Energa*, decision of 31 March 2020.

IV. Polish state owned enterprises under national competition law

While the EU Commission may have had limited experience in assessing the effects of corporate governance in Polish SOEs and SCEs on the commercial conduct of such companies, the Polish NCA has accumulated a more varied practice in this domain. Polish competition law authorizes the President of UOKiK to exceptionally clear anti-competitive mergers on the basis of public interest provided that "(1) the concentration will contribute to economic development or technical progress; (2) it may have a positive effect on the national economy."[56] UOKiK's merger review practice contains examples where public interest was taken into account in merger cases involving SOEs: *Dalkia International/Zespól Elektrocieplowni Poznanskich* (2004), *PGE* (2006), *Tauron* (2007), *Enea* (2007), *PGE/Energa* (2011) (Błachucki, 2014; Bernatt and Mleczko, 2018).

In 2011, UOKiK prohibited the acquisition of Energa by PGE, the two SOEs active in the generation, trading and distribution of electricity.[57] One of the anti-competitive concerns noted by the Polish NCA was the elimination of PGE's biggest competitor on the retail market, where PGE's market share was 25% and Energa's 15% (Gago and Tabor, 2011). The President of UOKiK also refused to clear the merger on the basis of public interest. Although several prior merger clearances in the energy sector were issued on the basis of energy security,[58] in the present case the Polish NCA feared that the merger would cause an increase in electricity prices as PGE will attempt to recoup its costs of acquiring Energa. The bulk of the energy sector was already controlled by SOEs (PGE, Tauron, Energa and Enea) with little incentive to engage in price competition. On appeal, PGE has offered a commitment to sell 15% of the electricity on the regulated market of the energy exchange platforms until the end of 2020. The court has rejected this proposal, stating that it does not go beyond the existing obligations under energy regulations. The court also did not accept PGE's public interest arguments, stating that the reliance on the government's energy policy cannot qualify as proof of the public interest (Sroczynski, 2012). This decision has allegedly caused the dismissal of the UOKiK President Krasnodębska-Tomkiel, who was appointed by the Prime Minister Donald Tusk in 2014, as it was expected that UOKiK may create further obstacles for the consolidation of the state-owned energy sector (Martyniszyn and Bernatt, 2020, pp. 176–177). This dismissal also suggested that "the government has attempted to influence

[56] Act of 27 February 2007 on competition and consumer protection, *Journal of Laws*, No. 2015, item 1634, Article 20.2.

[57] UOKiK, Decision DKK 1/2011 of 13 January 2011.

[58] UOKiK, Decision DOK-163/2006 of 22 December 2006; UOKiK, Decision DOK-29/2007 of 8 March 2007.

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the work of the agency, especially, but not only, when it comes to mergers involving state-owned firms" (Martyniszyn and Bernatt, 2020, pp. 177–178).

In 2017, the UOKiK investigated a 'reverse privatization' whereby the state owned PGE would acquire control over the electricity generation capacities of EDF Polska, which included a number of coal and gas fired generation plants and heat distribution networks.[59] The Polish NCA opened an in-depth investigation due to anti-competitive concerns affecting the electricity production market and the electricity wholesale supply market. PGE was expected to gain a dominant position on the electricity generation market and leverage it into the electricity wholesale supply market. UOKiK was concerned about customer foreclosure as the electric energy produced by EDF Polska could become unavailable for firms outside the PGE Group. In the end, the NCA accepted commitments in the form of a 3-year-long obligation to sell electricity generated by EDF Polska outside the PGE group. While UOKiK's decision was hailed as a significant breakthrough in terms of acceptance of behavioral remedies (Gołębiowski, 2019; Svetlicinii and Lugenberg, 2013), it was also argued that this clearance exhibited the signs of favoritism in its treatment of SOEs: (1) the proposed commitments were examined and accepted without modification within a short period of time (one week); (2) the proposed commitments did not address the anti-competitive concerns of the energy regulator related to the electricity production market, which is now dominated by SOEs; (3) the merger eliminated EDF Polska, the fourth-largest and the only competitor, which is not owned by the Polish State (Bernatt, 2019, pp. 42–46).

The above review of UOKiK's merger control practice reveals the absence of the 'single economic unit' even in relation to mergers between two SOEs controlled by the Ministry of State Treasury. This approach allows the Polish NCA to block SOE consolidations as demonstrated by the *PGE/Energa* case. At the same time, the President of UOKiK retains discretion of clearing mergers on the basis of public interest, which has been considered in a number of SOE-related mergers. The balancing between competition concerns and public interest, in the light of the independence concerns about the Polish NCA, could lead to further consolidation of the market power by SOEs and SCEs.

At the same, the treatment of SOEs and SCEs as autonomous undertakings has made them the target of antitrust enforcement. For example, in 2005, UOKiK initiated an investigation into an alleged anti-competitive agreement between the largest petroleum producers, PKN Orlen and the Lotos Group, concerning the joint termination of the production of U-95 gasoline, which was used in the older generation of automobiles. The two companies colluded to withdraw from the market simultaneously in order to eliminate the possibility

[59] UOKiK, Decision DKK-156/2017 of 4 October 2017.

that one of them would remain on the market and acquire dominance after the exit of the competitor (Gago and Borowiec, 2007; Paliszewski, 2007). The case ended in 2007 with an infringement decision and a fine of PLN 5.5 million (PKN Orlen – 4.5 million; Lotos – 1 million) (UOKiK, 2008).

PKN Orlen was also prosecuted for various abuses of its dominant position. In 2006, it was sanctioned by UOKiK for charging excessively low prices for radiator liquids, which were close to the costs of their production.[60] In the long run, this pricing strategy led to the elimination of PKN Orlen's competitors, who were often dependent on PKN Orlen for the supply of monoethylene glycol (hereinafter: MEG), a key component of radiator liquids. By raising the prices for MEG faster than its own prices for the radiator liquids, PKN Orlen created a margin squeeze situation for its competitors (Najbauer, 2006). UOKiK ordered PKN Orlen to pay a fine of PLN 14 million (Dec, 2006). In 2012, PKN Orlen's subsidiary Orlen Oil was prosecuted for resale price maintenance agreements concluded with the distributors of automotive lubricants.[61] Notably, PKN Orlen was maintaining these RPM arrangements since 2003, although the respective contract clauses were not enforced when breached by the distributors (Igras, 2012).

UOKiK's antitrust enforcement, especially in the field of abuse of dominance, has resulted in Poland's top antitrust fines being imposed on major SOEs: Telekomunikacija Polska (telecommunications), PKP Cargo (logistics), PGNiG (oil and gas), PZU (insurance) (Martyniszyn and Bernatt, 2020, p. 195). The enforcement preference for abuse of dominance cases by the Polish NCA, follows the general trend of antitrust enforcement in Central and Eastern European jurisdictions, where the competition authorities, especially in the early years of their establishment, have found such cases easy to investigate and prosecute (Svetlicinii and Botta, 2012). As a result, the abuse of dominance investigations against individual SOEs or SCEs could be also employed for addressing potential anti-competitive conduct of these undertakings.

V. *PKN Orlen/Lotos* merger: quo vadis EU merger control?

The government of the Law and Justice (*Prawo i Sprawiedliwość*) party (ruling after the 2015 parliamentary elections), has contemplated the merger between the two state-controlled petroleum companies PKN Orlen and the Lotos Group already in 2007. At that time, the government's plan provided that the Lotos Group will acquire a much larger PKN Orlen, which would result in

[60] UOKiK, Decision No. RWA-48/2006 of 29 December 2006.
[61] UOKiK, Decision DOK-410/1/12/PW of 31 December 2012.

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the state's holding of 75% in the new company (Petroleum Economist, 2007). However, "all proposals have been rejected until now, partly from anxiety that it would have effects on market competition that would be detrimental to the Polish consumer" (Conroy, 2018). In 2018, the Polish government decided to consolidate the two biggest petroleum refiners by selling to PKN Orlen a 53% stake in the Lotos Group (Shotter, 2018). The high political stakes of this decision were reflected in the media reports claiming that the state supervision over PKN Orlen and the Lotos Group has been assumed by the Prime Minister Mateusz Morawiecki from the energy minister Krzysztof Tchorzewski, which reflected an internal disagreement over the planned *PKN Orlen/Lotos* takeover and PKN Orlen's role in the nuclear power plant project (IntelliNews, 2018b). In 2014, the Polish government has already engaged its energy sector's SOEs (PGE, Tauron, and Enea) in the construction of the first domestic nuclear power plant (Polish Competition Authority, 2014).

The *PKN Orlen/Lotos* merger was notified to the EU Commission,[62] which decided to open an in-depth investigation. Commissioner Vestager explained that the "Commission will investigate whether the proposed acquisition would reduce competition and lead to higher prices for or less choice of fuels and related products for business customers and end consumers in Poland and other Member States" (European Commission, 2019). In May 2020, the parties have offered commitments, which included the divestiture of a certain number of petrol stations operated by the Lotos Group in Poland. Avia International has already indicated its willingness to purchase petrol stations from *PKN Orlen/Lotos* (Cleaner Energy, 2019b) while the UOKiK President Marek Niechciał announced the readiness of the Polish NCA to supervise the implementation of the commitments (Cleaner Energy, 2019a). As a result, on 14 July 2020, the Commission announced the conditional clearance of the proposed merger subject to certain divestitures to ensure the preservation of competition on wholesale and retail markets for petroleum products (European Commission, 2020b). According to the media reports, senior Commission officials admitted that "the acquisition was set to be blocked, after initial antitrust assessments suggested it would harm competition in Polish fuel services like gas stations and the refueling of airliners" but Commissioner Vestager subjected to "political pressure from Poland" has "made a top-level intervention to ensure the deal was approved, just as Warsaw wanted" (Larger, 2020). Encouraged by the Commission's conditional clearance, PKN Orlen has announced its intention to acquire another Polish energy SOE – PGNiG, which would keep PKN Orlen "at the helm of the process aimed at creating a single, all-Polish group with well diversified revenue sources and significant market standing in Europe" (PKN Orlen, 2020).

[62] Case No. COMP/M.9014 PKN *Orlen/Grupa Lotos*.

VI. Conclusion

As the Member States contemplate their long term national policies for a rebound from the economic downturn caused by the COVID-19 outbreak, the recapitalization of enterprises will remain in the arsenal of the available tools to inject much needed liquidity into companies of strategic importance. This could lead, even temporarily, to the increase of the state shareholding in companies looking for strategic opportunities to succeed over their competitors, and implement an exit strategy for the state participations as mandated by the Temporary Framework. Another catalyst that could encourage state-sponsored acquisitions is the fear of foreign takeovers in strategic industries. In times like this, the ability of merger control systems both at the EU and at the national level to address the anti-competitive effects of concentrations involving SOEs and SCEs grows in importance.

The review of the EU merger control practice in relation to Polish SOEs and SCEs demonstrates that the exercise of state control, especially through non-ownership means, has not been adequately addressed in merger clearance decisions. The enforcement practice of the Polish NCA, an authority that is more familiar with the specifics of Polish SOEs' corporate governance, also did not ascertain the potential anti-competitive effects stemming from state control over numerous SOEs and SCEs in highly concentrated industries, and the possibility to influence strategic decisions by these enterprises when it comes to the implementation of sectorial development policies. Without clarifying the existence of 'single economic units' comprising SOEs and SCEs in particular sectors, the Polish NCA has treated them as independent undertakings for the purposes of enforcing competition law provisions prohibiting anti-competitive agreements and abuses of a dominant position. However, antitrust enforcement cannot be viewed as an alternative to effective merger control, especially in the light of the recurrent concerns over the independence of the NCA.

Following the recent clearance of a Chinese SOE's acquisition of a German company in the railway sector, the German NCA was praised by antitrust observers for its solid grounding on competitive assessment as opposed to industrial policy considerations because "even where state ownership translates into significant economic power, this does not necessarily pose a threat to effective competition when a non-EU player enters a European market" (Siragusa and Rizza, 2020, para. 9). This case is another reminder for the EU Commission and the NCAs to develop a more detailed and consistent assessment methodology for determining the existence of a 'single economic unit' in SOE-related concentrations, and conducting a substantive assessment of the potential anti-competitive effects stemming from the exercise of state

control and coordination of the commercial conduct of SOEs and SCEs (Svetlicinii, 2018). Without such methodology, the application of EU and national merger control rules following the principle of competitive neutrality can hardly be achieved.

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