

Joint venture - what it is and what it's not. Comments on the "Nord Stream 2 saga".

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The Polish Competition Authority - the President of the Office for Competition and Consumer Protection (the "PCA" or the "President of the OCCP")-initiated the precedent antimonopoly proceedings against Gazprom and its international partners (Engie from Switzerland, as well as four other companies from the Netherlands: Uniper, OMV, Shell and Wintershall) related to an alleged violation of the Polish merger control rules. The PCA wants to check if the foregoing companies engaged in the activities that - according to the authority's press release - *"could be an obvious attempt to circumvent the lack of consent to establish a company financing the construction of the gas pipeline"*.

The case will offer some very interesting insights on how the PCA interprets both the concept of "joint venture" as well as the provisions of the Polish competition law that relate to a world-wide ban on closing the transaction that had not been cleared.

What happened back in 2015?

On 8 December 2015, the PCA received an application to approve the creation of joint-venture *Nord Stream 2 AG*, based in Switzerland. The joint-venture was supposed to be responsible for the design, financing, construction and operation of two submarine gas pipelines with a throughput capacity of 27.5 billion cubic

meters per year, connecting the Russian part of the Baltic coast with the German coast near Greifswald.

The notification was filed in Poland, as the Polish merger control regime extends to formations of non-full-function joint ventures (otherwise than, for example, EU Merger Regulation where it is required from the joint undertaking to perform the functions of an autonomous economic entity on a permanent basis). What is more, even if the word *joint venture* suggest the requirement of joint control, such concentrations should be notified even if one of the founders holds shares/stocks in a quantity giving it the right of control over the joint undertaking and the other founders hold minority shares. Finally, the law applies also to foreign (extraterritorial) JVs, provided that their formation causes some effects on the Polish territory. In consequence, if only the formal, turnover related thresholds are met (which is not difficult to be done considering Gazprom or Shell), the formation of a new non-full-function undertaking requires approval of the PCA.

In their statement, the notifying parties claimed that the new entity would not cause any significant impediment to competition. The details of this argumentation are not known, one could however assume that the main line of argument was related to the character of the new company (its non-full-function nature).

The President of the OCCP did not share this view. In the press release the authority stated that: *"In the concentration application, Gazprom presented data showing it already commands a dominant position on Poland's natural gas supply market. The proposed joint venture would significantly strengthen Gazprom's transmission capacity in Europe, and thus also its market and negotiating position in relation to Polish customers."* That is why, in February 2016, the authority decided to open an in-depth, phase II investigation, involving a market study and consultations with key players on the Polish gas market.

Following the market studies, in July 2016, the President of the OCCP issued its objections to the planned concentration. According to another press release: *"The Office found that the concentration might lead to restriction of competition. At the moment Gazprom has a dominant position with respect to transmission of gas to Poland, and the planned transaction could further strengthen the company's negotiating position with regard to users in Poland."*

Shortly after that, early in August 2016, the applicants decided to withdraw the

application and the authority discontinued the proceedings.

From a formal perspective, this did not mean that the concentration was blocked or vetoed by the President of the OCCP (as no decision was issued to this effect). At the same time, the parties to the JV could not proceed with its formation as this would amount to gun jumping (should the JV be formed without approval). In consequence, *Nord Stream 2 AG* was established, but as a subsidiary owned entirely by Gazprom.

What is happening in 2018?

In April 2017, the PCA re-examined the case and initiated the preliminary proceedings (which by now have been transferred into official antimonopoly proceedings against the six companies which filed the notification back in 2015).

The reason for this is that Gazprom and its international partners signed a contract for financing the construction of the gas pipeline, under which the five European energy companies agreed to provide long-term financing for 50 per cent of the total cost of the project.

The authority explained its move in another press release: *“the activities of the would-be consortium members could be an obvious attempt to circumvent the lack of consent to establish a company financing the construction of the gas pipeline. In fact, the purpose of both activities was the same. Both the creation of a joint venture and the conclusion of subsequent agreements were mainly aimed at financing the construction of Nord Stream 2”*.

This short – and rather ambiguous – statement allows for some initial conclusions as to the main grounds for the legal battle between Gazprom and the PCA. It seems that the PCA will not try to qualify the actions of Gazprom and its partners as having created an alternative form of *joint venture* (resulting from their ongoing, but far more subtle, cooperation). It will rather claim that the entire new business structure of cooperation between the parties circumvents the law, as its sole purpose is to proceed with the transaction that was “blocked”. That means that the authority (and the courts, if there is ever a decision that would be appealed by Gazprom) would have to answer some interesting questions. First, whether the withdrawal of the application for a JV formation by the notifying entities really amounts to a veto? And second, whether – in the set up altered business, where the company is formed not as a JV but as a 100% Gazprom’s

subsidiary – a simple signing of agreements that allow for construction of certain infrastructure can be seen as “circumvention” of such (non-existing) ban? In other words, is it really possible to extend the (alleged) ban so that it covers virtually any other action that leads to the same market result?

Should this be the final interpretation provided by the authority, the case would obviously be a very dangerous precedent. Its danger would only be mitigated by the fact that the courts in Poland do not follow the “circumvention of law” argument easily and that means that the PCA will be facing a challenging case in the appeal.

Possible consequences

Regardless of the final outcome of the proceedings (or the outcome of the potential court appeals), this rather unexpected move of the PCA certainly makes the life of the consortium members (at least a bit) more difficult. It is so, as the President of the OCCP may impose a maximum fine of 10% of the turnover generated in the financial year preceding the year in which the fine is imposed if an undertaking performed a concentration without obtaining its consent. In addition – and this is potentially very harmful – if the concentration has already been implemented and restoration of competition in the market is otherwise impossible, the PCA may order measures that would bring back the competitive *status quo* (this, of course, requires separate proceedings and a new decision that can also be appealed).

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