

## NORD STREAM 2 - MAXIMUM PENALTIES IMPOSED BY UOKiK PRESIDENT

- Tomasz Chróstny, President of UOKiK, has imposed a penalty of over PLN 29 bn on Gazprom, and of over PLN 234 mln on 5 remaining companies participating in the construction of the gas pipeline - as a result of the lack of approval for the Nord Stream 2 transaction.
- Pursuant to the decision of the President of UOKiK, the entities concerned are obliged to terminate the agreements for financing Nord Stream 2.

[Warsaw, 7 October 2020] The unprecedented decision and the imposition of the maximum penalty are the [outcome of the proceedings UOKiK](#) has concluded with regard to a company that is responsible for constructing and operating Nord Stream 2 gas pipeline without the required consent of the President of UOKiK. Charges against six economic operators were pressed in this particular case two years ago. The entities concerned included: Gazprom from the Russian Federation, the French Engie Energy (country of registration: Switzerland), the German Uniper, the Austrian OMV, the Dutch-British Shell and the German Wintershall (the last for companies are registered in the Netherlands).

The investigation conducted by the Polish anti-monopoly authority has shown that 6 companies (participants of the Nord Stream 1 consortium) concluded, without having received the approval to establish a joint venture, a number of agreements concerned with the financing of NS2, which effectively confirmed their significant and indispensable role in the entire project. The agreements concluded between the participants were concerned both with financing and with a number of other authorizations, such as, for instance, the ability to interfere with the operation of NS2. Furthermore, by establishing a pledge on the stocks of Nord Stream 2, the financing parties became “quasi” stockholders of that company - in the event of its default under the loan agreement, they would be entitled to take over the stocks of the company constructing the gas pipeline. The advantages and obligations stemming from participation in the undertaking were clearly defined for all parties involved.

*“In December 2015, when the establishment of the joint venture was first reported, the participants specified their “intention to concentrate” that has remained a part of their plans ever since. Each subsequent move was only an attempt to alter the form of their participation in the scheme. All entities were aware of the activities undertaken, as exactly*

*the same economic operators had previously financed the establishment of NS1 gas pipeline, enjoying the same shareholdings. Less than a year later, after the President of UOKiK voiced his serious concerns regarding the concentration, Gazprom signed agreements concerning NS2 gas pipeline with 5 Western European energy companies. According to those agreements, half of the costs of constructing the gas pipeline (with the total value of the project estimated at EUR 9,5 bn), was to be financed by those 5 corporations, contributing EUR 950 mln each. The other half was to be covered by Gazprom. The same entities which had previously applied for the approval based on the competition protection regulations in effect in Poland and failed to receive it, became parties to the financing agreements. The level of their financial involvement remained similar, and the terms and conditions of financing were determined in a manner enabling them to take over the shares of at a later stage of the project. All participants of the concentration scheme share also the same interest in implementing the project,”* explains Tomasz Chróstny, President of UOKiK.

According to the President of UOKiK, such activities constitute an attempt of the would-be shareholders of Nord Stream 2 to work around the requirement to obtain the approval of the President of UOKiK to establish a company financing the construction of the gas pipeline. The goal of all efforts undertaken was the same. Both the establishment of the joint venture and the conclusion of later agreements aimed at financing the construction process.

*“If the project were solely of a financial nature, then Gazprom could easily obtain financing from the Government of the Russian Federation or from commercial banks. Perhaps they would be able to pull it off on their own. It needs to be stressed that operating as a financial institution is not the core activity of any of the remaining concentration participants. First and foremost, Uniper, Engie, OMV, Shell and Wintershall are customers, and sometimes also competitors of Gazprom on the gas market. The fact that a joint venture is financed by participants of the gas market and not by financial institution proves that all the entities involved share the same economic interests. Without the participation of those entities, Nord Stream 2 would not be able to operate and to pursue the gas pipeline construction project in the European Union, meaning that most probably it would not be established at all,”* explains Tomasz Chróstny, President of UOKiK.

When evaluating the seriousness of the regulatory breach, the President of UOKiK concluded that the companies had never given up their intention to continue with the concentration scheme, but completed the project in a different form. None of the entrepreneurs informed by the Polish anti-monopoly authority of the activities undertaken, therefore failing to

observe the laws in effect to Poland, which are equivalent to those in force in the European Union. Therefore, completion of the project constitutes a breach of legal provisions and fair competition rules, resulting in increasing the degree of dependence of gas recipients, on the internal market, from a single supplier - Gazprom.

Such a situation may bring about serious consequences for the economy of Poland and of the European Union, in particular by introducing territorial restrictions affecting the deliveries of natural gas, and by increasing the prices of gas to end customers, in particular to Polish consumers. The high cost of implementing the undertaking may be set off by higher bills paid by Polish recipients of natural gas, and the negotiating position of the consortium leader, i.e. Gazprom, will be strengthened considerably both in relations with Poland and with other European Union Member States. Consequently, completion of the undertaking would harm not only competition on the market, but the consumers alike.

The companies financing the gas pipeline were acting knowingly. Therefore, they have been penalized with the highest financial sanctions available, equaling, in each case, 10 per cent of their annual turnover:

- Gazprom - PLN 29 075 726 808
- Engie Energy - PLN 55 513 793
- Uniper - PLN 29 913 407
- OMV - PLN 87 748 906
- Shell - PLN 30 220 135
- Wintershall - PLN 30 785 804

Additionally, the President of UOKiK ordered the parties involved to terminate the agreements concluded in order to finance NS2. This will reinstate the state of competition from prior to the concentration. The companies have thirty days, from receiving the decision, to terminate their contracts. If the decision is appealed against, the deadline expires 30 days from it becoming legally valid.

*“I have not identified any attenuating circumstances. The activities of the six companies negatively impacted competition on the natural gas market in Poland - a market that is of great importance for the entire economy and for the situation of individual households. The launch of NS2 will threaten the continuity of natural gas supplies to Poland. An increase in the price of the product is also highly likely, with the said increase being borne by Polish consumers. Completion of this investment project increases the economic dependence on*

*the Russian gas - not only in the case of Poland, but also of other European states. As far as energy security is concerned, the undertaking splits Europe into two parts, with the border located on the Odra river. It is astounding that Western corporations fail to understand that and participate in an undertaking that not only disturbs competition on the market, but also poses a threat to Europe's energy security. With all that taken into account, the financial penalties imposed are intended not only to convince the parties involved to observe the law, but also to discourage other players from attempting similar behaviors that violate anti-monopoly regulations in the future. In this particular case, it was also necessary to adopt other legal measures to reinstate the circumstances from prior to the concentration. We have taken advantage of all tools at our disposal,"* explains Tomasz Chróstny, President of UOKiK.

### **The case of Nord Stream 2 at UOKiK - history of the anti-trust investigation**

In 2015, UOKiK received an application filed by six companies for approval to create a joint venture responsible for the construction and operation of Nord Stream 2 gas pipeline. In 2016, the President of UOKiK voiced its concerns regarding the concentration scheme, noting that the planned transaction [could lead to the restriction of competition and presented its reservations](#). The companies withdrew their application, which in practice meant that they were [prohibited from performing the merger](#). Meanwhile, shortly thereafter, information surfaced that the would-be parties to the transaction had signed an agreement for the financing of the gas pipeline. Therefore, proceedings against Gazprom and its five trading partners regarding the execution of the transaction without obtaining approval from the Authority were initiated.

In the course of the proceedings, the President of UOKiK requested all six entities involved, on several occasions, to provide documents of significant character for the case. Two of those entities, namely [Gazprom](#) and [Engie Energy](#), refused to provide information of crucial nature for the investigation, which led to the combined penalty of PLN 385 mln being imposed upon them.

The obligation of foreign companies to obtain a consent of the President of UOKiK to proceed with concentration, as well as their obligation to cooperate with the Authority and to provide information and documents requested, stems from Polish anti-monopoly legislation. Similar concentration-related regulations aiming to ensure fair competition on the market are in effect of all European Union Member States.



Urząd Ochrony Konkurencji i Konsumentów

A penalty of up to 10% of annual turnover may be imposed for violating the ban to proceed with concentration schemes without obtaining approval of the President of UOKiK. In addition to financial sanctions, the President of UOKiK may also order that the state of affairs be reverted to the condition from prior to the concentration. The President of UOKiK would also like to remind the public that **anyone who has suffered a loss as a result of a breach of the competition law may file a civil lawsuit against any of the entities that have broken the law.**

