



EUROPEAN COMMISSION
DG Competition

Case M.9561 - PKN ORLEN / RUCH

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 4(4)
Date: 12/02/2020



EUROPEAN COMMISSION

Brussels, 12.02.2020
C(2020) 888 final

PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying party

**To the Urzędu Ochrony
Konkurencji i Konsumentów
(UOKiK)**

**Subject: Case M.9561 – PKN ORLEN / RUCH
Commission decision following a reasoned submission pursuant to
Article 4(4) of Regulation No 139/2004¹ for referral of the case to
Poland and Article 57 of the Agreement on the European Economic
Area².**

Date of filing: 10 January 2020

Legal deadline for response of Member States: 31 January 2020

Legal deadline for the Commission decision under Article 4(4): 14 February 2020

Dear Sir or Madam,

1. INTRODUCTION

- (1) On 10 January 2020, the Commission received by means of a Reasoned Submission a referral request pursuant to Article 4(4) of the Merger Regulation with respect to the transaction cited above. The parties request the operation to be examined in its entirety by the competent authorities of Poland.

¹ OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

- (2) According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the parties to the transaction may request that their transaction be referred in whole or in part from the Commission to the Member State where the concentration may significantly affect competition and which present all the characteristics of a distinct market.
- (3) A copy of this Reasoned Submission was transmitted to all Member States on 10 January 2020.
- (4) By letter dated 15 January 2020, the Urzędu Ochrony Konkurencji i Konsumentów (“UOKiK”), as the competent authority of Poland, informed the Commission that Poland agrees with the proposed referral.

2. THE PARTIES

- (5) PKN ORLEN is a publicly traded company incorporated under Polish law, mainly active in crude oil processing and the manufacture of petroleum and petrochemical products. PKN ORLEN also operates a chain of fuel stations located in Poland, among other countries, where also newspapers and daily consumer goods – in particular, fast-moving consumer goods (“FMCG”) - are traded.
- (6) RUCH is a company incorporated under Polish law. It operates kiosks and newsagent stores located in Poland, where FMCG are sold. RUCH is also active in the field of newspapers and books distribution (it is the country’s second largest wholesale distributor of printed press).
- (7) The proposed concentration relates to the acquisition by PKN ORLEN of sole control over RUCH and its subsidiaries (together, “Parties”), by way of acquisition of 100% of the share capital in RUCH (“Transaction”).
- (8) The Transaction takes place in the context and as a result of the restructuring of RUCH’s debt as the company faces financial difficulties. In particular, the restructuring follows the timeline below:
 - On 27 December 2018, Alior Bank, the largest holder of RUCH’s debt, signed a Letter of Intent for the purchase of 100% of the share capital of RUCH. The acquisition, not yet closed to this day, was cleared by the Polish competition authority on 25 January 2019.³
 - On 10 April 2019, PKN ORLEN, Alior Bank and Powszechny Zakład Ubezpieczeń S.A. (“PZU”) signed a share purchase agreement whereby, subject to the fulfilment of a number of condition precedents, Alior Bank will acquire 100% of shareholding in RUCH, which will be ultimately transferred to PKN ORLEN.
- (9) The Transaction, therefore, constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation.

³ UOKiK decision No DKK-19/2019 of 25 January 2019.

3. EU DIMENSION

- (10) The undertakings concerned have a combined aggregated world-wide turnover of more than EUR 5 billion (PKN ORLEN EUR 25 743.4 million, RUCH EUR 290.4 million). They have a Community-wide turnover in excess of EUR 250 million (PKN ORLEN EUR 22 858.5 million, RUCH EUR 290.3 million). The undertakings do not achieve more than two-thirds of their Community-wide turnover within one and the same Member State.
- (11) The notified operation therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

4. ASSESSMENT

4.1. Relevant product markets

4.1.1. *The market for the retail of FMCG*

- (12) Both PKN ORLEN and RUCH distribute FMCG at retail level, the former through convenience stores located at fuel stations and the latter through kiosks and newsagent stores.
- (13) In the Reasoned Submission, the Notifying Party submits that the substitutability between PKN ORLEN's (and Grupa Lotos's, another entity PKN ORLEN is planning to acquire in a separate potential transaction⁴) fuel stations and RUCH's kiosks/newsagent stores is very limited and both concepts should be treated as separate relevant product markets, due to differences in (i) the shopping mission of the customers, (ii) the regulatory barriers to entry, and (iii) the financial costs associated to the two business models.
- (14) The identification of a separate market for small retailers (distinct from a market including HSD - hypermarkets, supermarkets and discounts) has taken place gradually at both Union and national level. In the *Żabka Polska/Spółem Zabrze* decision, the Polish competition authority indicated the benchmark of 350 m² net sales area as a borderline between large shops and traditional retailers.⁵ In *Kesko/Tuko*, the Commission identified a distinction between traditional supermarkets and small retail outlets, including convenience stores located at fuel stations and kiosks.⁶ The Polish competition authority has never closely assessed the competitive relationship between outlets located at fuel stations and kiosks/newsagent stores. Nonetheless, in the *Eurocash/Inmedio* merger case,⁷ the Polish competition authority commented on the issue.

⁴ PKN ORLEN is involved in another transaction, within the Commission jurisdiction, that is the acquisition of the refinery business of Grupa Lotos, which operates a network of fuel stations.

⁵ UOKiK decision of 29 April 2014, Case No DKK-54/2014 – *Żabka Polska/Spółem Zabrze*.

⁶ European Commission decision of 20 November 1996, Case No IV/M.784 - *Kesko/Tuko*, paragraph 20. In particular, the Commission concluded that “*the relevant market consists of the provision of a basket of fresh and dry food-stuffs, and non-food household consumables sold in a supermarket environment. The market does not include sales at specialised stores, kiosks and petrol stations. Instead these outlets provide a service that is complementary to those of supermarkets*”.

⁷ UOKiK decision of 1 October 2014, Case No DKK-128/2014 *Eurocash/Inmedio*, where the authority stated that, besides other kiosks and newsagent stores, “*the competitive pressure [on Inmedio business] is exerted by entities offering partially similar assortment, i.e. petrol stations, tobacco shops or*

4.1.2. *The market for the wholesale printed press distribution*

- (15) The Notifying Party explains that, so far, the Polish press distribution market has been analysed by the Polish national competition authority in two antitrust cases, namely *RUCH/Franspress* and *RUCH/Rolkon*. These decisions delineate two levels of trade, wholesale and retail, which may constitute separate product markets.
- (16) With respect to the referral of the case at hand, the Notifying Party indicates that the relevant product market should be defined as the market for wholesale printed press distribution.

4.2. **Relevant geographic market**

- (17) With respect to the market for the retail of FMCG, drawing upon the precedent of *Eurocash/Inmedio*⁸ and on other cases decided by the UOKiK in the field of traditional retail stores (that is, stores with sales area below 350 m²), the Notifying Party indicates that the relevant market is local in scope and extends to a 1-kilometre radius around each store.
- (18) As to the geographic scope of the market for the wholesale printed press distribution, the Notifying Party indicates that wholesale distributors of printed press are supplying press on the national-wide basis. In addition, since Polish-language titles constitute almost the entire portfolio of distributors, cross-border sales are very limited. In fact, the foreign revenue of the distributors is generated from subscriptions (retail sales to Polish-language customers leaving abroad). For these reasons, the Notifying Party argues that the relevant geographic market should be defined as national in scope.

4.3. **Assessment of the referral request**

4.3.1. *Legal requirements*

- (19) According to the Commission Notice on case referral, in order for a referral to be made by the Commission to one or more Member States pursuant to Article 4(4), the following two legal requirements must be fulfilled:
- a) there must be indications that the concentration may significantly affect competition in a market or markets,⁹ and
 - b) the market(s) in question must be within a Member State and present all the characteristics of a distinct market.¹⁰

4.3.2. *The concentration may significantly affect competition in a market or markets*

- (20) In order to meet the first requirement, the requesting parties are in essence required to demonstrate that the Transaction is liable to have a potential impact on competition on a distinct market in a Member State, which may prove to be significant, thus deserving close scrutiny.

traditional retailers offering daily consumer goods. This market is characterised by minimum entry barriers either financial or regulatory”.

⁸ UOKiK decision of 1 October 2014, Case No DKK-128/2014 *Eurocash/Inmedio*.

⁹ Further developed in point 17 of the Commission Notice on Case Referrals.

¹⁰ Further developed in point 18 of the Commission Notice on Case Referrals.

4.3.2.1. Horizontally affected markets: the retail market for the supply of FMCG

- (21) In case of a potential relevant product market for small retailers including both fuel stations and kiosks/newsagent's stores, the Transaction would lead to horizontally affected markets.
- (22) In this respect, in fact, the Reasoned Submission indicates that PKN ORLEN's acquisition of RUCH leads to horizontally affected markets in Poland in the retail of FMCG, an activity that PKN ORLEN carries out through its network of fuel stations and RUCH through its kiosks/newsagents stores.
- (23) Based on the above market definition, the Notifying Party has assessed the Parties' position in over 2 000 geographic markets where their activities take place. The analysis has revealed that the Transaction leads to 841 overlaps and to 32 affected markets at local level.

4.3.2.2. Vertically affected markets: the upstream market for the wholesale printed press distribution and the downstream market for the sale of FMCG, including printed press

- (24) The Notifying Party also refers to the vertical relationship between RUCH, which is the second largest press distributor in Poland in the upstream market for wholesale printed press distribution, and PKN ORLEN, which is active on the downstream market for the sale of FMCG, including printed press.
- (25) With respect to the upstream market for wholesale press distribution, the Notifying Party explains that there are two possible methods for calculating the market shares of wholesale distributors. The first one relies on actual sales (in value or in volume) made by distributors (RUCH, Kolporter and Garmond, in this case) to press retailers. The second method relies on press run (or circulation), representing volume of printed press ordered by wholesalers from editors for purposes of resale to retailers. On the basis of such calculation methods, RUCH has a market share of approximately [20-30]% based on press sales and of [20-30]% based on press run.
- (26) The Notifying Party submits that, although, such vertical relationship does not lead to competition concerns, the markets in question are vertically affected, by virtue of the proximity of RUCH's market share to the threshold of 30% and of the fact that PKN ORLEN exceeds the threshold of 30% in 14 local markets where it is active in the sale of FMCG (including printed press).
- (27) Therefore, as the Transaction is liable to have a potential significant impact on competition in the markets mentioned above, the first legal requirement set forth in Article 4(4) of the Merger Regulation appears to be met.

4.3.3. *The markets in question must be within a Member State and present all the characteristics of distinct markets.*

- (28) As indicated above, the horizontally affected markets are all local markets located in the territory of Poland and extending to 1-kilometre radius around each store.
- (29) As to the vertically affected markets, the Commission considers that the upstream market for the wholesale printed press distribution is national in scope and consists of the territory of Poland.

- (30) The preliminary assessment of the Transaction thus suggests that the principal effects of the Transaction would be restricted to Poland. Further, the markets in question present all the characteristics of distinct markets.
- (31) Therefore, the Commission considers that the second legal requirement set forth by article 4(4) of the Merger Regulation also appears to be met.

4.3.4. *Additional factors*

- (32) In addition to the verification of the legal requirements, point 19 of the Notice provides that it should also be considered whether referral of the case is appropriate, and in particular “*whether the competition authority or authorities to which they are contemplating requesting the referral of the case is the most appropriate authority for dealing with the case*”.
- (33) In addition, point 23 of the Notice states that “*Consideration should also, to the extent possible, be given to whether the NCA(s) to which referral of the case is contemplated may possess specific expertise concerning local markets, or be examining, or about to examine, another transaction in the sector concerned*”.
- (34) In relation to the market for the retail distribution of FMCG, if the competent authority concludes that PKN ORLEN and RUCH are active in the same relevant product market, the competitive assessment would require detailed examination of the 32 affected local markets. The Commission observes that the Polish competition authority has conducted several merger control proceedings involving the investigation of local daily consumer markets in recent years, the last one being the *Kaufland/Tesco* merger case which it closed in November 2019.
- (35) Also, as mentioned above, the competitive relation between fuel stations and kiosks/newsagent stores in Poland has been first examined by the Polish competition authority in the *Eurocash/Inmedio* case. The Polish competition authority, therefore, appears to be ideally placed and have the relevant experience to carry out the market investigation in relation to the Transaction. In relation to the vertically affected market for the wholesale printed press distribution, the Commission considers that the Polish competition authority has already experience in examining these markets (e.g. in the mentioned antitrust cases involving RUCH).
- (36) Finally, the Commission also notes that the requested referral would preserve the principle of “one-stop-shop” to the extent that the case will be referred to a single competition authority, which is an important factor of administrative efficiency.

4.3.5. *Conclusion on referral*

- (37) On the basis of the information provided by the Notifying Party in the Reasoned Submission, the Transaction meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the concentration may significantly affect competition in a market(s) within a Member State which presents all the characteristics of a distinct market.
- (38) Moreover, the Commission considers that the strictly local nature of the horizontally affected markets and the possibility that competitive conditions differ from one market to the other seem to support the conclusion that the Polish competition authority is the best placed authority to carry out the investigation.

- (39) Also, the Commission considers that, in the light of its case practice in the field of retail distribution of FMCG and of wholesale printed press distribution, the Polish competition authority has the relevant experience in order to carry out the investigation and assess the Transaction.

5. CONCLUSION

- (40) For the above reasons, and given that Poland has expressed its agreement, the Commission has decided to refer the Transaction in its entirety to be examined by Poland. This decision is adopted in application of Article 4(4) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(signed)
Olivier GUERSENT
Director-General