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# REPORT

## MERGER CONTROL PROCEEDINGS

### IN POLAND IN 2018

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2018 represents another year with a significant number of concentrations notified to the President of the Polish Competition Authority (the "UOKiK"), as well as number of decisions issued in those cases. In the last 12 months, UOKiK initiated 247 proceedings and issued 233 merger decisions<sup>1</sup>.

233 DECISIONS

In the previous year, UOKiK did not issue any conditional or prohibition decisions. In this context, it is worth mentioning that in 3 cases the proceedings were terminated due to a withdrawal of the notification by the parties following receipt of UOKiK's statement of objections<sup>2</sup>. We assume that the withdrawals allowed to avoid a formal prohibition of implementing a concentration related to impossibility of working out remedies which would be acceptable to UOKiK.

The average time of proceedings ended by issuance of phase I clearance amounted to more than 36 calendar days<sup>3</sup> (with the shortest proceedings lasting 6 days and the longest 157 days). In turn, the average time of proceedings which ended with a formal decision after phase II proceedings amounted to nearly 215 calendar days<sup>4</sup> (with the shortest proceedings lasting 127 days and the longest 350 days). At the same time, only 8 UOKiK's decisions were issued after conducting phase II proceedings, and in 5 cases phase II proceedings were not closed before the end of 2018.

Enjoy your reading!

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<sup>1</sup> Data presented in this part of the report are based on the list of cases available on UOKiK's website:

<https://www.uokik.gov.pl/koncentracje.php>. UOKiK's official statistics which will be published in 2019, might be slightly different.

<sup>2</sup> Cases: Benefit Systems/Calypso Fitness, UPC/Multimedia and PKPE Holding/Elester-PKP.

<sup>3</sup> Based on the actual duration of case assessment, including proceedings initiated before 2018.

<sup>4</sup> Based on the actual duration of case assessment, including proceedings initiated before 2018.

## 2018 IN NUMBERS

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### Merger proceedings in 2018 – statistics

- **247** proceedings initiated (an increase by 8% as compared to 2017)<sup>5</sup>, out of which **246** were commenced upon the undertaking's requested and **1** was initiated ex officio on suspicion of a concentration being implemented without UOKiK's clearance<sup>6</sup>;
- **233** decisions issued (an increase by 13% as compared to 2017), out of which all were unconditional; (in 2017 one conditional clearance decision was issued);
- **10** cases were referred to phase II (a decline by almost 10% as compared to 2017);
- **5** proceedings were terminated due to a withdrawal of the notification (an increase by 150% as compared to 2017);
- The average time of proceedings ended by phase I clearance amounted to **36 calendar days** (almost 3 days longer than in 2017), while the median amounted to **32 days**;
- The average time of proceedings ended by phase II clearance amounted to **215 calendar days** (19 days longer than in 2017), while the median was **202 days**;
- No decision imposing a fine for failure to notify (in 2017, 3 such decisions were issued).

## STATUTORY DEADLINES IN MERGER CONTROL PROCEEDINGS

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- The deadline for issuing a decision by UOKiK in phase I proceedings is **1 month**;
- In particularly complex cases which indicate a reasonable likelihood of a significant restriction of competition, or which require a market study, UOKiK initiates the so-called phase II proceedings, and the deadline for issuing a decision is extended by **4 months** (this gives in total 5 months from the date of commencement of the proceedings);
- Every UOKiK's request to the undertaking concerned to submit additional data or information suspends the lapse of the statutory deadline (1 month and a possible additional 4 months) for issuing a decision. The deadline continues from the moment of delivery of additional data and information by the undertaking;
- The deadline for issuing a decision is suspended as of the date of statement of objections raised by UOKiK until the undertaking responds to the statement of objections. The deadline is also suspended in the waiting period before the undertaking responds to UOKiK's proposal of conditions;
- In the case that the undertaking submits a proposal of conditions, the deadline for issuing a decision in phase II is extended by **14 calendar days**.

<sup>5</sup> Data for 2017 presented in the table above are based on the UOKiK's annual report for 2017.

<sup>6</sup> Nord Stream 2 case.

## RECENT TRENDS IN MERGER CONTROL PROCEEDINGS IN 2018

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### NON-PARALLEL ANALYSIS OF CASES BY TWO DEPARTMENTS OF UOKiK

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UOKiK's unit responsible for conducting proceedings in merger cases is the Merger Control Department (DKK) which analyses notifications, maintains contact with the parties, as well as prepare recommendations regarding the content of the decisions. The second UOKiK's unit involved in merger proceedings is the Market Analysis Department (DAR) which carries out economic analyses of the effects of concentrations. UOKiK's merger decisions are issued after an analysis by both departments of the impact of the transaction.

The economic analysis of effects of the concentration is carried out at the end of proceedings

However, as a general rule, DAR's analyses are not carried out in parallel with DKK's analyses, but rather after DKK completes its work on a particular case. In many instances this prolongs the assessment on merits. Moreover, in practice we have encountered situations in which even the most straightforward concentrations, with a marginal impact on markets covering Poland, were diligently analysed by DAR from the point of view of overlapping horizontal and vertically linked markets.

While we do not undermine the importance of economic analyses of concentrations, including DAR's role, we believe that such analyses should be carried out from the beginning of the examination of the case by UOKiK, and that DAR should cooperate with DKK more closely throughout the entire proceedings. Due to the currently applied model of handling the cases the companies submitting filings in Poland should be ready to answer formal requests of UOKiK even on, as it might seem, the very end of proceedings.

## INCREASED REFERRAL ACTIVITY OF UOKiK

For years, UOKiK has practically not used its power to request the referral of a case from the European Commission based on the referral procedure (Article 9 sec. 2 a and b of Regulation 139/2004). Over a period of nearly 13 years UOKiK has only twice requested a referral. This trend changed at the turn of 2017 and 2018, when within only one month, UOKiK decided twice to request the referral of a case from the European Commission.

The first of the cases was the acquisition of Pini Polonia by Smithfield Foods. The transaction had a close connection with the Polish market as it de facto amounted to the acquisition of slaughterhouses located in Poland, therefore its assessment was referred to UOKiK. The second concentration concerned the acquisition of the American media company Scripps Network Interactive by Discovery Communications Inc. The Polish element in this global transaction was only one of the issues requiring a detailed competition law analysis. The lack of significant impediments to competition on the markets covering the territory of Poland and the better position of the Commission to analyse the transaction as a whole were decisive factors in the failure to refer the case for an assessment by UOKiK.

Within one month  
UOKiK twice  
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Commission

UOKiK's two requests to refer a case by the European Commission submitted within only one month should undoubtedly be noted. The upcoming year should provide an answer to the question of whether if UOKiK's actions described above were an indication of a new policy of the regulator, which proactively follows international transactions with Polish elements, or whether they were merely a consequence of the fact that two proceedings concerning important sectors from the point of view of the Polish government were being conducted by the European Commission at the same time.

## OBLIGATORY TRANSLATION OF THE AGREEMENT

One of the formal requirements of the notification form is that of proving the actual intention of implementing a concentration. This requirement is met by attaching to the form a document identifying the activities leading to the concentration. Most often it is a preliminary agreement, conditional agreement, or a letter of intent. If the documents were drafted in a foreign language, the applicant is obligated to submit a sworn translation of such documents.

Previous UOKiK's practice allowed one to limit the scope of the translation to just the key provisions, such as the names of the parties, subject of the agreement, or conditions precedent. This approach allowed to limit the expenses and time necessary to prepare the translation and at the same time guaranteed UOKiK access to the Polish version of information which was crucial from the point of view of the proceedings.

UOKiK requires  
a translation  
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document  
governing the  
concentration

In 2018 we have identified a change of UOKiK's practice: in many proceedings, UOKiK requested the notifying parties to submit a sworn translation of the **entire document** governing the concentration. In numerous instances, the new practice of the UOKiK prolonged the time needed to prepare the notifications or the duration of proceedings. While preparing a translation of the whole letter of intent is not problematic, arranging a translation of dozens of pages of a long preliminary agreement is a lengthy process.

We believe that submitting to UOKiK a translation of provisions such as the seller's reps and warranties, force majeure or dispute resolution is not essential for a substantive analysis of the concentration. Parties to transactions reportable in Poland should, however, bear in mind this new practice of the UOKiK and include in the road map of the transaction additional time to prepare translations of sizable transactional documentation.

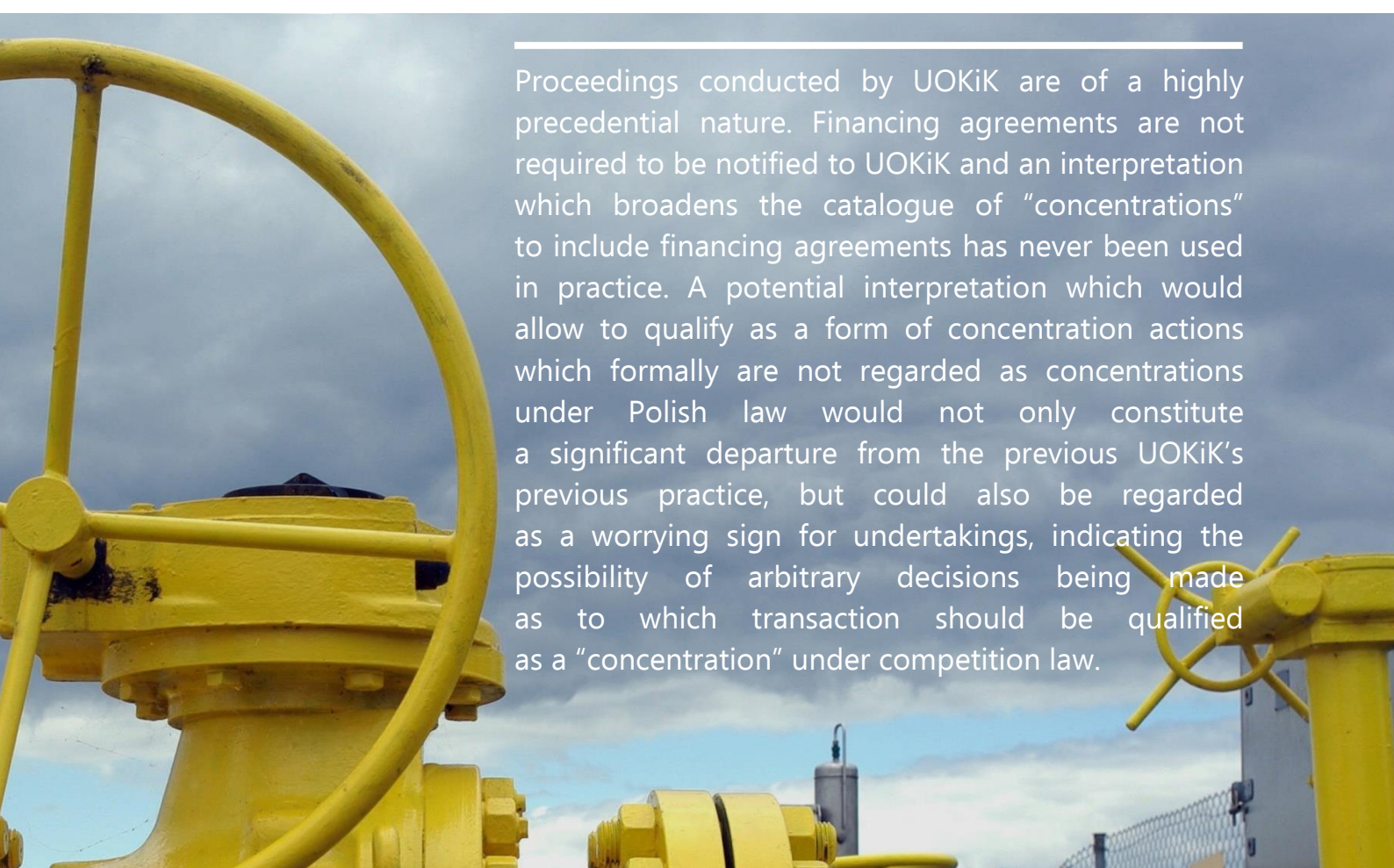
## MOST IMPORTANT MERGER CASES IN 2018

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### NORD STREAM 2 (GAS TRANSMISSION)

In 2015 Gazprom and 5 undertakings belonging to Shell, E.ON, OMV, Engie and BASF capital groups notified UOKiK their intention to create a joint venture, which activity would encompass designing, financing, constructing and operating the Nord Stream 2 gas pipeline. After carrying out a market study, UOKiK issued a statement of objections to the concentration, arguing that it would lead to a strengthening Gazprom's dominant position in the supply of gas to Poland. Ultimately, the parties decided to withdraw their notification of concentration, which led to termination of the proceedings without a formal decision.

In April 2018, UOKiK once again looked into the Nord Stream 2 case, accusing Gazprom and other companies from Shell, Uniper, OMV, Engie and BASF groups of creating a joint venture without securing UOKiK's prior consent. Proceedings were initiated in connection with entering into financing agreements, based on which five Gazprom's partners were supposed to guarantee long-term financing of the Nord Stream 2 project. Despite the fact that no actual joint venture was created, UOKiK considered that actions of would-be consortium members might constitute a circumvention of the lack of consent to the creation of a company financing the construction of the gas pipeline.



Proceedings conducted by UOKiK are of a highly precedential nature. Financing agreements are not required to be notified to UOKiK and an interpretation which broadens the catalogue of "concentrations" to include financing agreements has never been used in practice. A potential interpretation which would allow to qualify as a form of concentration actions which formally are not regarded as concentrations under Polish law would not only constitute a significant departure from the previous UOKiK's previous practice, but could also be regarded as a worrying sign for undertakings, indicating the possibility of arbitrary decisions being made as to which transaction should be qualified as a "concentration" under competition law.

## SMITHFIELD/PINI POLONIA (MEAT SECTOR)

As indicated above, proceedings in the case of a concentration between Smithfield/Pini Polonia were referred to UOKiK by the European Commission based on a request of UOKiK. According to UOKiK, the concentration might have led to significant impediment to effective competition on the market of purchase of pig livestock, which was indicated by the high market shares of the parties to the concentration and the significantly lower market shares of all their competitors.

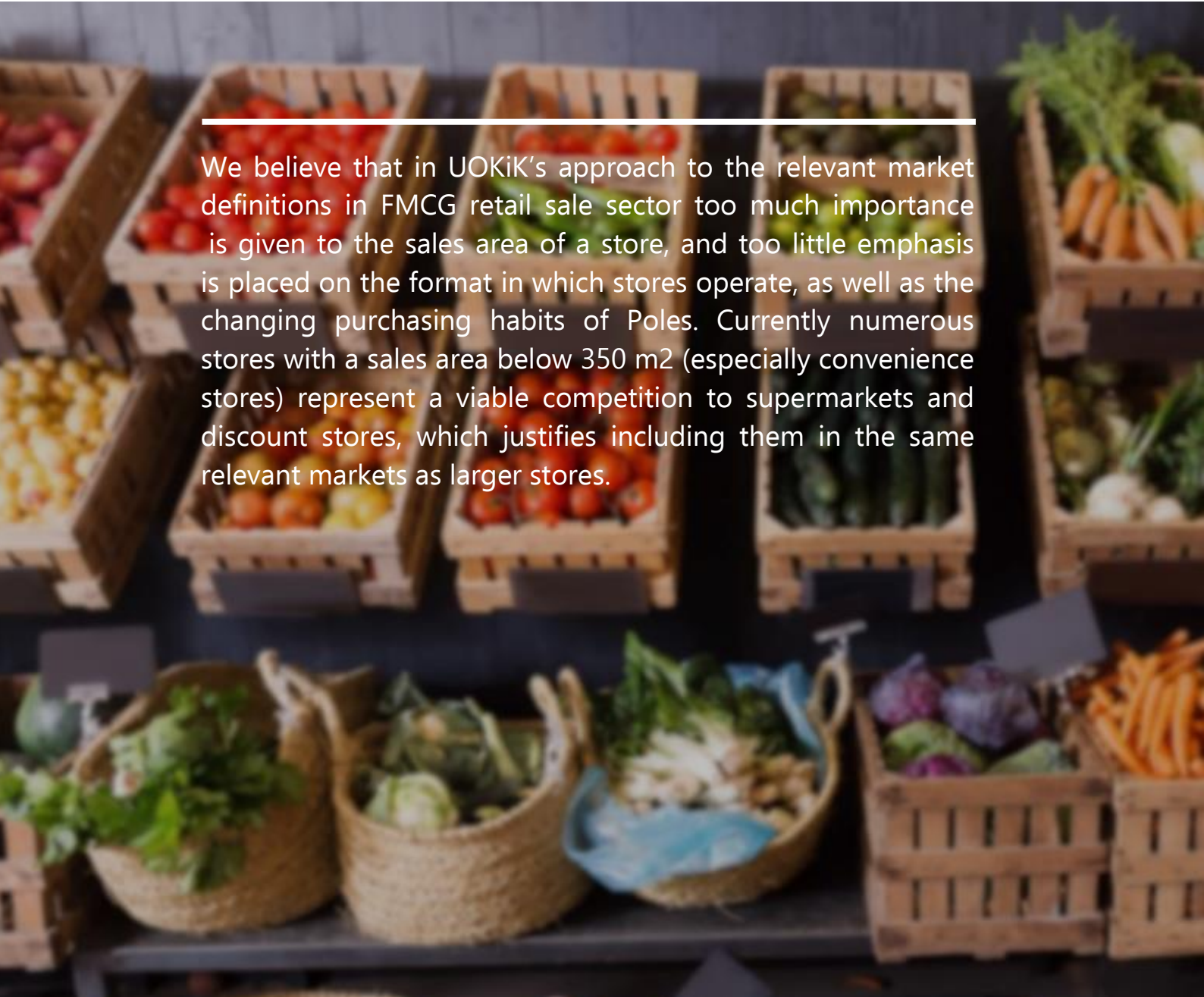
The 9-month long proceedings (or even 12-month, if one were to add the duration of proceedings before the European Commission) did not confirm UOKiK's concerns. The combined market share of Smithfield and Pini Polonia turned out to be below the threshold of presumed dominant position used in the Polish law. Furthermore, a market study carried out by UOKiK did not demonstrate that the concentration would result in Smithfield gaining a contractual advantage over breeders, allowing the new entity to lower the purchasing price of livestock without losing a significant portion of suppliers.



## EUROCASH/MILA (FMCG RETAIL SALES)

The last few years saw the development of Eurocash Group, among others, through a strategy of acquisitions, which resulted in issuing a merger decision by UOKiK in Eurocash's concentrations at least once per year. In 2018, after almost 8 months of proceedings, UOKiK granted unconditional consent to the acquisition of 188 retail Mila stores by Eurocash.

The decision in the Eurocash/Mila case confirmed the previous practice in terms of the definitions of relevant markets in the retail FMCG distribution sector. According to UOKiK's approach, the decisive factor in determining if a particular store belongs to a relevant market is its sales area. UOKiK believes that hypermarkets, supermarkets and discount stores with a sales area above 350 m<sup>2</sup> operate on different markets than stores with a sales area up to 350 m<sup>2</sup>, even if such outlets belong to store chains operating in the modern FMCG distribution channel.



We believe that in UOKiK's approach to the relevant market definitions in FMCG retail sale sector too much importance is given to the sales area of a store, and too little emphasis is placed on the format in which stores operate, as well as the changing purchasing habits of Poles. Currently numerous stores with a sales area below 350 m<sup>2</sup> (especially convenience stores) represent a viable competition to supermarkets and discount stores, which justifies including them in the same relevant markets as larger stores.

## VISTULA/BYTOM (MENSWEAR)

In August 2018 UOKiK unconditionally cleared concentration consisting in the merger of two of the leading producers of menswear – Vistula and Bytom. The decision was issued after nearly one year of proceedings, in which the phase II – consisting of a market study – took 9 months. Such a long duration of proceedings might have been influenced by the multiple rounds of questionnaires being sent to competitors as part of the market study. According to the decision, it was additional information about competitors submitted by the parties which allowed to determine that the concentration would not lead to significant restriction of competition.

It appears that it was possible to issue a decision favourable for the parties thanks to the relatively wide relevant product market definitions determined in the case. UOKiK acknowledged that Vistula and Bytom compete on markets for the sale of smart menswear of medium class in traditional stores, as well as on the market of online menswear sales. In the case of both markets, UOKiK did not decide to carry out a further segmentation of the market into separate types of menswear (e.g. shirts, suits, jackets, trousers, coats, t-shirts). This was a shift from the previous practice of defining the relevant market narrowly in concentrations in the clothing sector.



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The constantly rising percentage of Poles shopping online (41.9% of Poles in 2016) did not affect UOKiK's approach to the existence of separate relevant markets for retail sales in brick-and-mortar shops and retail online sales.

## UPC/MULTIMEDIA (CABLE TV AND STATIONARY INTERNET)

The acquisition of Multimedia Polska by UPC Polska was hailed as the biggest M&A transaction of 2016 in Poland – its value was estimated at more than PLN 3 billion. However, its implementation was prevented by UOKiK.

After nearly 11 months of proceedings, in 2017 UOKiK issued a statement of objections to the concentration, indicating the risk of a significant impediment to competition on local markets of access to pay TV and fixed-line internet in almost a dozen cities in Poland (market for pay TV included, among others, satellite TV, cable TV, IPTV; on the other hand, wireless internet was not regarded as a substitute of fixed-line internet due to its speed, quality, stability of connection, and data limits).

Discussions between UOKiK and the parties concerning the legitimacy of the objections and proposed conditions took almost 5 months. The presented conditions did not affect UOKiK's objections to a concentration in 11 local markets (cities) of pay TV and access to fixed-line internet, which eventually led to a withdrawal of the notification at the end of March 2018.



It is worth mentioning that in August 2018 one of UPC's biggest competitors, Vectra, notified UOKiK about its intention to acquire control over Multimedia Polska. In that case, the phase II proceedings were launched and they had not yet been closed by the end of 2018.

## CONTACT DETAILS

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He specializes in concentration controls, representing Polish and foreign companies before the Competition Authority and the Commission. He advised in number of proceedings conducted in connection with large consolidations in the Polish sector of FMCG distribution. He also has extensive experience in concentrations carried out in the construction, real estate, metallurgy and animal food sectors. His PhD thesis deals with conditional concentration decisions issued by the Competition Authority. He has been with the SK&S Competition Law Department since 2005.

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## THE SK&S COMPETITION LAW DEPARTMENT

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- We provide comprehensive advice to Polish and foreign clients on all aspects of Polish and EU antimonopoly law. We handle cases regarding competition-limiting practices, abuse of dominant positions, concentrations of enterprises, and abuses of consumer rights. We also advise in cases involving unfair commercial practices in the supply chain of foodstuffs.
- Our team consists of eight lawyers who deal exclusively with cases involving competition law. Two members of the Department are former employees of the Competition Authority.
- Number of our projects have been of a precedential nature, among others: filing the first ever leniency application in Poland, and obtaining a binding decision regarding a charge of price fixing. Moreover, we have taken part in developing definitions of relevant markets, which definitions have come to be established in the decision-making practice of the Competition Authority.
- With regard to Polish and EU competition law, we regularly advise such companies as Mars, Microsoft, Górażdże Cement, Royal Canin, Jeronimo Martins Polska, Eurocash, Auchan, Selgros, Swiss Krono, Benefit Systems, Nike, Henkel, Agora Group, and many others.

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