



REPORT SK&S

**MERGER PROCEEDINGS
IN POLAND IN 2021**

Subjective selection of the most interesting
merger control cases in Poland

www.skslegal.pl

30
YEARS



SOŁTYSIŃSKI
KAWECKI
SZŁĘZAK

MERGER PROCEEDINGS IN POLAND IN 2021

For several years, the number of concentrations notified to the President of the Office of Competition and Consumer Protection ("UOKiK") has been systematically increasing. Last year definitely confirmed this trend - significantly more concentration proceedings got underway than in the previous years.

In 2021, UOKiK initiated 329 proceedings and issued 300 decisions in such cases (przypis). At the same time, 13 cases were referred to the second phase of proceedings. One decision prohibiting a concentration was issued.

On six occasions, the notifying parties withdrew their applications to be granted consent to a concentration.

The average time of proceedings concluding with a decision in phase I amounted to just over 33 calendar days (the shortest proceedings lasted 7 days, and the longest, 157 days).

On the other hand, the average time of proceedings involving phase II amounted to slightly more than 223 calendar days (the shortest proceedings lasted 94 days, and the longest, 437 days).



Data based on the UOKiK report - Merger control in 2021. https://uokik.gov.pl/aktualnosci.php?news_id=18278

Own estimates based on data available in the public registry (BIP) of UOKiK as of the date the Report was published.



329

329 proceedings were initiated
(an increase of over 35% in comparison to 2020). All proceedings were initiated at the request of an undertaking



300

300 decisions were issued
(an increase of over 17% as compared to 2020), of which, 295 decisions contained an unconditional consent to the concentration, four contained conditions, and one involved a prohibition (in 2020, 5 approvals were subject to conditions, and no prohibition decisions were issued)



223

The average time to complete phase II proceedings was just over 223 calendar days



13

13 cases were referred to phase II
(in 2020, it was 11 cases)



33

The average time to complete phase I proceedings was **over 33 calendar days**
(6 days less as compared to 2020)



0

0 decisions imposing a fine for failure to notify a concentration
(2 decisions imposing a fine in 2020)

NOTIFICATION THRESHOLDS AND TIMEFRAMES IN MERGER CONTROL CASES



EUR 1 bilion | EUR 50 million

A concentration falls under the notification requirement to UOKiK if the combined turnover of all the undertakings concerned in the preceding financial year exceeded the equivalent of **EUR 1 bilion** worldwide or **EUR 50 million** in Poland (it is sufficient if either of the thresholds is met), and the statutory presumptions exempting the transaction from the notification requirement are not met

1 month

The prescribed time limit for UOKiK to issue a decision in phase I proceedings is **1 month**

+ 4 months

In particularly complex cases, in which there is a reasonable likelihood of a significant restriction of competition or which require a market study, UOKiK initiates phase II proceedings. The time limit to issue a decision is then extended by another **4 months**



Every formal request from UOKiK to a notifying party to submit additional information suspends the lapse of the statutory time limit to issue a decision



14 days

If an undertaking submits a proposal of conditions and obligations, the time limit to issue a phase II decision is extended by **14 calendar days**



Carrefour / Tesco (conditional clearance)

- For several years, the Tesco Group has been gradually phasing down its operations in Poland. Its competitors have been acquiring the locations where Tesco shops used to operate. For this reason, acquisitions of property where Tesco shops are sited have recently been regularly reported to UOKiK. One such case concerned Carrefour's purchase of a part of a property in the form of a retail space used for a Tesco hypermarket in Wrocław;
- The proceedings conducted by UOKiK revealed that the concentration might lead to a limitation of competition on the local market for the sale of FMCG in hypermarkets located within a 20-25 minute drive from the acquired hypermarket;
- Ultimately, UOKiK agreed to the condition proposed by the notifying party which consisted of reducing the sales area of one of Carrefour's shops operating in Wrocław by 1,500 m² - which, taking into account the use of the sales area criterion as one of the key measures to determine market share, made it possible to reduce Carrefour's market share on the local market - and thus, in UOKiK's opinion, prevent negative effects resulting from the transaction;
- Based on publically available information, it can be assumed that UOKiK was concerned with the high market shares of the parties to the concentration on the relevant market limited to hypermarkets. This means that the current practice of defining a separate market for shops with a sales area of more than 2,500 m² was maintained. However, in light of the increasing market position of discount shops, which usually have a significantly smaller sales area, this approach seems to be increasingly detached from market reality and consumer shopping preferences.

DOZ / Euro-Apteka, Super Zdrowi, MLV18

- This is another example of a conditional decision issued by UOKiK in 2021. The proceedings in this case ended after just over 8 months;
- The authority maintained the current way of defining relevant markets as local markets for the retail sales of pharmaceuticals by pharmacies open to the public and pharmacy points, covering an area of up to 1 km from the pharmacy (pharmacy point);
- UOKiK imposed a structural condition on DOZ in the form of the sale of a pharmacy in Goleniów (Zachodniopomorskie Province). In addition, a clause is to be included in the sale agreement of this pharmacy to guarantee that the investor will continue pharmacy operations at this location. The investor and the content of the indicated clause will have to be accepted by the authority;
- Interestingly, in a press release issued in connection with the conditional decision, UOKiK indicated that, during the proceedings, it may *"be guided only by the provisions of the Act on Competition and Consumer Protection. In doing so, it cannot apply other legal acts, such as the pharmaceutical law."* This statement may raise some doubts, bearing in mind that the regulatory environment and legal regulations have a significant impact on the characteristics or functioning of a specific market (e.g. the existence of barriers to entry, the structure and dynamics of demand and supply).



The Salling Group (Netto) / Tesco Polska

- Another concentration related to the exit of the Tesco Group from Poland. It had a Community dimension but, by the decision of the European Commission, it was referred to UOKiK under Article 9(2)(b) of Regulation 139/2004;
- It is worth remembering that if the case is referred by the European Commission to the Polish authority, the notifying party is obliged to submit a new notification of the intention of concentration on the Polish “WID” form;
- Interestingly, UOKiK issued two decisions in this case. The decision of February 2021 pertained to the acquisition of eight Tesco shops by the Salling Group (in Gliwice, Szczecin, Kraków, Gdynia, Kielce, Katowice, Ostrowiec Świętokrzyski, and Warsaw). The Salling Group planned to permanently acquire only the Warsaw shop. The others were taken over temporarily and will have to be sold to other entities in the future. The Salling Group has committed to operate these shops under the Tesco brand until 31 August 2021. In a second decision issued in March 2021, UOKiK granted consents pertaining to the acquisition of control over Tesco Polska;
- As part of the proceedings, UOKiK conducted a market investigation by sending questionnaires to all competitors of the Salling Group and Tesco Polska active in the sale of everyday consumer goods (FMCG) in large format shops (HSDs - hypermarkets, supermarkets, discount stores) in local markets where the parties' pre-determined combined share exceeded 20%;
- UOKiK confirmed that the previous case law that defined markets for the retail sales of FMCGs in HSDs remains fully valid.

Air Liquide / Betamed

- The proceedings lasted almost 13 months (they were initiated at the beginning of August 2020 and concluded at the end of August 2021);
- The authority defined regional markets for mechanical ventilation services delivered in a home environment, financed with public funds (covering the territories of provinces - województwa) and local markets for long-term nursing care services delivered in a home environment, financed with public funds in a county (covering the territory of counties - powiaty);
- Interestingly, UOKiK conducted not only a market study, but also sent a request to the NFZ (National Healthcare Fund) for an "opinion on the concentration". This was a peculiar request, especially bearing in mind that the NFZ has no experience that would allow it to prospectively assess the planned concentration;
- UOKiK granted conditional consent to the concentration (the conditions were of a structural and behavioural nature) in which it, i.a.: (i) obliged Air Liquide to conduct activities under the existing Betamed contracts with the NFZ for long-term home care for mechanically ventilated patients in the Dolnośląskie and Małopolskie provinces until 30 June 2022; (ii) obliged Betamed to participate in the NFZ competition proceedings to provide the aforementioned services after 30 June 2022, and that it will submit a bid based on its knowledge and experience, within a scope not narrower than that offered in previous years, and if the NFZ selects its bid, the company will enter into an agreement with the NFZ; and (iii) obliged Air Liquide to create a company or companies to which it will transfer part of Betamed's assets related to the provision of mechanical ventilation services in home conditions to patients in the Lower Silesia (Dolnośląskie) and Lesser Poland (Małopolskie) provinces. The property should include, in particular, contracts with the NFZ, contracts with employees, accounting, technical and commercial documentation, patient databases, as well as equipment and fixed assets necessary to perform the contract with the NFZ. The company or companies should be sold to an independent investor that is not affiliated with Air Liquide and is approved by UOKiK.



Kaufland / E.Leclerc (withdrawal of notification)

- Following a market investigation, in July 2021, UOKiK decided to raise objections to a concentration involving the acquisition by Kaufland of assets used for the operation of an E. Leclerc hypermarket in Kielce;
- In UOKiK's opinion, the transaction could lead to a restriction of competition on the local market for retail sales of everyday consumer goods in HSDs. Faced with the risk of a negative decision, in August 2021, Kaufland decided to withdraw the application;
- Eventually, after the withdrawal of the application, E. Leclerc decided to close the retail shop in Kielce;
- Finally, in October 2021, Kaufland published an announcement that it maintained its interest in the retail space originally used to operate the E. Leclerc in Kielce and plans to open a smaller retail shop in this location. However, at the time of the Report's publication, UOKiK had not announced that a new merger notification had been received in this case.



Lux Med / Lecznice Citomed

- The notification was made in early November 2020 and the decision was issued in late October 2021 (the proceedings lasted almost a year). The case concerned the takeover of five clinics and a hospital belonging to Lecznice Citomed in Toruń;
- The way in which UOKiK defined the geographical markets may raise some doubts: (i) privately financed medical services provided by medical centres and private clinics; and (ii) imaging diagnostic services (primarily, omitting facilities in Bydgoszcz – located about 45/50 km from Toruń). In defining the market as comprising of the area of Toruń and its vicinity, the authority referred to the high proportion of Lux Med's patients who generally use medical facilities located no more than 20 km from their place of residence, and to the opinions of the parties' competitors operating in and around Toruń, who indicated medical entities located "predominantly" in Toruń as their competitors. Thus, the only statutory criterion UOKiK used to determine the relevant market was consumer preference;
- UOKiK issued objections during the proceedings and the notifying party presented a proposal of conditions. The authority agreed to the following behavioural conditions: (i) maintaining prices for diagnostic magnetic resonance imaging and computed tomography services in Lux Med and Citomed at the level specified in the decision; (ii) ensuring non-discriminatory access to diagnostic imaging services; (iii) not terminating contracts concluded with public hospitals for reasons concerning Lux Med or Citomed; (iv) maintaining discounts granted to public hospitals in the agreements in force; (v) not making any changes to the price list for diagnostic imaging services for public hospitals which do not result from a justified change in the costs of providing these services; and (vi) maintaining the availability of diagnostic laboratories for technicians on duty in public hospitals.



Orlen / Polska Press

- After relatively short proceedings and seeing no impediment to effective competition (the participants to the concentration do not operate on overlapping relevant markets), UOKiK approved PKN Orlen's (an oil company) acquisition of control over Polska Press (a major publisher of local press);
- An unprecedented appeal in this case was filed by the Ombudsman (RPO) who accused UOKiK of failing to take into account a number of important circumstances in their analysis of the effects of the concentration (including the aspect of media pluralism). Along with the appeal, the RPO also filed a motion with the Court of Competition and Consumer Protection ("SOKiK") for an injunction in the form of suspending the execution of UOKiK's decision, i.e. the de facto suspension of the acquisition of shares until the substantive resolution of the case by SOKiK;
- On 8 April 2021, SOKiK granted an injunction and ruled that the parties to the transaction must suspend the execution of the decision challenged by the RPO until the outcome of the appeal;
- Despite SOKiK's ruling, PKN Orlen purchased shares in Polska Press and changed the composition of its management board. The proceedings concerning the appeal against the decision of UOKiK's President are still pending. Therefore, the issue of legal effects of a potential verdict of SOKiK overturning the decision of UOKiK may turn out to be extremely interesting from a legal point of view.



Orlen / PGNiG (referral of an EU-dimension case)

- Due to the high turnover of PKN Orlen and PGNiG, the transaction involving the acquisition of control over PGNiG by PKN Orlen was subject to notification to the European Commission;
- However, UOKiK exercised its right and applied to the Commission to refer the case, indicating that the planned effects of the transaction under consideration will occur primarily in Poland, and therefore, the national authority is in the best position to assess the planned concentration;
- The case was finally received by the authority on 10 May 2021, but interestingly, already in March, communication from UOKiK suggested conducting a market investigation in the case (i.e. initiating the second phase of the proceedings);
- After conducting a market survey, in March 2022, UOKiK finally gave his consent to the concentration, albeit on the condition that Gas Storage Poland - the company managing PGNiG's gas storage facilities - is divested. According to UOKiK, this will increase access to gas storage facilities of other market participants.



The SK&S Competition Law Department

- 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.



Krzysztof Kanton

Partner, attorney-at-law

☎ +48 22 608 70 64
📞 +48 600 042 234
✉ krzysztof.kanton@skslegal.pl



Damian Kopera

Senior Associate, attorney-at-law

☎ +48 22 608 71 53
📞 +48 606 801 494
✉ damian.kopera@skslegal.pl



Szymon Murek

Associate, attorney-at-law

☎ +48 22 608 70 60
📞 +48 883 391 722
✉ szymon.murek@skslegal.pl



Warsaw

Jasna 26, 00-054 Warszawa

T +48 22 608 70 00

F +48 22 608 70 70

E office@skslegal.pl

Katowice

Wojewódzka 10, 40-026 Katowice

T +48 32 731 59 86

F +48 32 731 59 90

E office.katowice@skslegal.pl

Poznań

Mickiewicza 35, 60-837 Poznań

T +48 61 856 04 20

F +48 61 856 05 67

E office.poznan@skslegal.pl

Wrocław

Plac Solny 16, 50-062 Wrocław

T +48 71 346 77 00

F +48 71 346 77 09

E office.wroclaw@skslegal.pl