SOŁTYSIŃSKI KAWECKI SZLĘZAK

REPORT

MERGER PROCEEDINGS IN POLAND IN 2019

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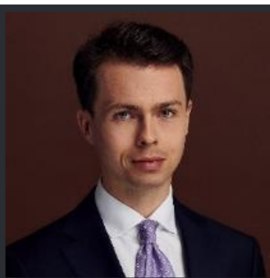
For several years now, the number of concentrations notified to the President of the Polish Competition Authority ("UOKiK") has been rising steadily, with 2019 being no exception. Over the previous 12 months, UOKiK initiated 278 merger control proceedings and issued 267 decisions[1].

In 2019, as in 2018, UOKiK has not issued any decisions that would prohibit an intended concentration. Likewise, we have recorded no withdrawals of notifications for clearance following receipt by the parties of UOKiK's statement of objections to the respective proposed concentration. In 4 cases, UOKiK raised objections to the planned mergers. However, eventually, they were all given conditional clearance decisions, one of them being issued in 2020[2]. In 1 case, UOKiK issued a conditional clearance, without first sending a statement of objections to the merger.[3]

The average duration of proceedings which ended with a phase I decision was slightly longer than 33 calendar days[4] (the shortest proceedings lasting 2 days, the longest being 202 days). As for the average time of proceedings ending with a phase II decision, this was slightly longer than 266 calendar days[5] (the shortest proceedings lasting 130 days, the longest being 381 days). Only 8 UOKiK decisions were issued after phase II proceedings, and in 7 cases, phase II was not closed by the end of 2019.[6] The average time to negotiate merger remedies was[7] 76 calendar days (the shortest negotiations lasting 47 days, the longest being 110 days).

AUTHORS





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[1] Data presented in this part of the report is based on the list of merger control cases available on UOKiK's website at https://www.uokik.gov.pl/koncentracje.php, but it may differ slightly from UOKiK's official statistics to be published in 2020.
[2] Case BP Europa/ ARGE's (assets),case Multikino/Cinama3D, case DOZ/MEDIX and case Vectra/Multimedia Polska (closed in 2020).
[3] Case Panthea/Dolnośląska Grupa Apteczna.
[4] Calculated based on the actual duration of a case, including proceedings initiated before 2019.
[5] Calculated based on the actual duration of a case, including proceedings initiated before 2019.
[6] The decision in the Vectra/Multimedia case was issued in January 2020.
[7] The period between the date of UOKiK's objections to a merger and the date of the relevant decision.

2019 IN NUMBERS
MERGER PROCEEDINGS IN 2019 | STATISTICS

278

278 proceedings were initiated (an increase of more than 12% compared with 2018). 276 proceedings were initiated upon an undertaking's request and 2 proceedings were initiated by UOKiK ex officio on suspicion of a concentration having been implemented without UOKiK's clearance

267

267 decisions were issued (an increase of more than 14% on 2018), of which 260 contained an unconditional clearance, while 5 clearance decisions were conditional (no conditional decisions were issued in 2018) and 2 decisions concerned the imposition of a fine for implementing a concentration without UOKiK's clearance

11

11 cases were referred to phase II (an increase of 10% relative to 2018)

33

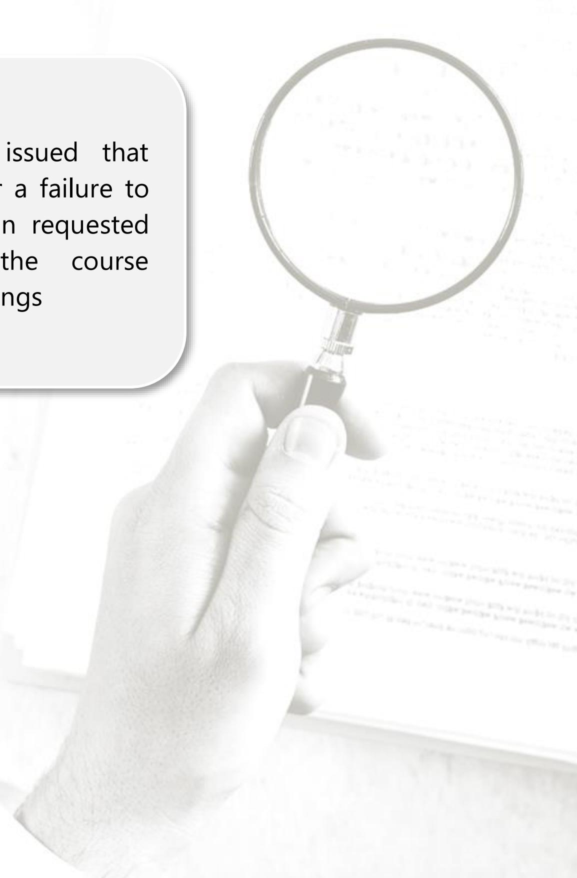
The average duration of proceedings ending with a phase I decision was more than **33 calendar days** (almost 3 days shorter than in 2018), while the median amounted to **29 days**

266

The average duration of proceedings ended with a phase II decision was slightly longer than **266 calendar days** (up by more than 51 days relative to 2018), while the median was almost **284 days**

1

1 decision was issued that imposed a fine for a failure to provide information requested by UOKiK in the course of merger proceedings



2

2 decisions imposed a fine for a failure to notify of a concentration (no decisions imposing a fine were issued in 2018)

NOTIFICATION THRESHOLDS AND TIMEFRAMES IN MERGER CONTROL CASES

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 billion** 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.

EUR 1 billion

EUR 50 million

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

1 month

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**.

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.

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**.

14 calendar days

SUBJECTIVE SELECTION OF THE MOST INTERESTING MERGER CONTROL CASES IN POLAND

In the past, UOKiK had twice analysed the effects of a concentration among cinema operators[8]. Based on the definition of the relevant market applied in assessing those cases, there are two separate markets: that of multi-screen (multiplex) cinemas, and that of single-screen cinemas.

In May 2019, UOKiK conditionally cleared the acquisition of the Cinema 3D chain by Multikino, one of Poland's largest cinema operators.[9] The clearance was conditional upon fulfilment of a structural condition, consisting of Multikino's disposal of assets used to operate one of the cinemas acquired from the Cinema 3D chain (Cinema 3D in Gdańsk). Pursuant to the condition the asset sale agreement is to secure the buyer's uninterrupted operation of the Cinema 3D in Gdańsk until 3 June 2026. Until then the buyer will be obligated to refrain from selling or encumbering those assets. However, we note that if the buyer breaches the above contractual obligations, it might be difficult for UOKiK to take any steps to restore competition on the market, as responsibility for the fulfilment of the condition lies solely with Multikino.

It is further worth noting that UOKiK's approach to the definition of the relevant market for film screening in cinemas has evolved. The Multikino/Cinema 3D concentration was reviewed for two alternative markets: the market of multiplex cinemas, and the narrower market of chain cinemas. In UOKiK's opinion, the identification of a separate chain cinema market is supported, among other things, by the fact that chain cinemas are mainly located in shopping centres. This is important to viewers who usually travel to a cinema by car. UOKiK also pointed out that the competitive pressure among chain cinemas is stronger than that among players on the wider market comprising both chain and independent (non-chain) cinemas.

However, in our opinion, the market segmentation into chain and independent cinemas is debatable. As a matter of fact, products of the same relevant market need not be perfectly substitutable. But, they must be substitutable to a customer in the event of a small, but significant and non-transitory increase in the prices of one of such products. In our opinion, the comparability of cinema programmes and standards (screen, sound amplification, food and drink offering) in both chain and non-chain cinemas supports the adoption of a wider approach to the definition of the relevant market.

[8]UOKiK's decision of 29 December2006, No RPZ–38/2006 Cinema City/Kinepolis; UOKiK's decision of 19 June 2008, No DKK–49/2008 Multikino/Silver Screen.
[9]UOKiK's decision of May 17th 2019, No DKK–104/2019 *Multikino/Cinema 3D*.

AIR PRODUCTS | ACP | EUROCYLINDER

LIQUID CARBON DIOXIDE

In February 2019, after proceedings which lasted over 12 months, UOKiK finally cleared the acquisition of control of ACP Europe and Eurocylinder by Air Products and Chemicals.[10] One of the factors contributing to why the proceedings had lasted so long was the very strong market positions of the parties with respect to the marketing of liquid CO_2 and the retail sale of liquid CO_2 to end users. Despite the sizeable market shares of the undertakings involved (in excess of 50% on certain markets), UOKiK decided to conditionally clear the transaction.

The implementation of the transaction was made conditional on the fulfilment of certain structural and behavioural conditions, the latter especially deserving of notice. According to the wording of the conditional decision, following the concentration, Air Products and Chemicals will be obliged to maintain the wholesale prices of liquid CO_2 for three customers at the level in effect on the decision's date until the respective agreements with those three customers expire. The wholesale prices of CO_2 can only be raised if production costs increase, but such higher prices cannot exceed the maximum limit calculated according to a formula provided for in the decision. In our opinion, the condition applied in this case is akin to the administrative regulation of wholesale CO_2 prices. This is a questionable practice given that UOKiK's role is not to set market prices.

It is also worth noting that UOKiK's decision to accept this condition was preceded by a round of market consultation, based on which it revised the original condition proposed by the parties. To the best of our knowledge, this was the first ever concentration control case in which UOKiK resolved to carry out a market test of the effectiveness of a condition proposed by parties.

[10] UOKiK's decision of 25 February 2019, No DKK–51/2019 Air Products/ACP Europe/Eurocylinder.

ZAP SZNAJDER BATTERIEN | NEF BATTERY HOLDINGS

Among UOKiK's past decisions preventing business combinations, was prohibiting Orzeł Biały's acquisition of Baterpol in 2009. The merger control review carried out at the time found that the concentration would lead to Orzeł Biały gaining a monopolistic position on the domestic market of processing spent lead-acid batteries. The decision was later upheld by the Supreme Court in 2011.

Exactly 10 years later, another battery producer, ZAP Sznajder Batterien, notified its intention to acquire control over the undertaking controlling Orzeł Biały. Thus, the intended concentration concerned the same relevant market; however, this time it was Orzeł Biały that was to be acquired. The proposed concentration was referred by UOKiK to phase II, during which it re-examined the structure of the battery processing market. However, unlike in 2009, UOKiK did not identify any threats to competition and issued a decision unconditionally clearing the notified acquisition of control over Orzeł Biały.[11]

UOKiK's failure to provide a statement of reasons basically prevents us from commenting on the decision. A press release published on UOKiK's website contains scant information on the grounds underlying the assessment of the case. According to the press release, UOKiK maintained the definition of the relevant market adopted 10 years earlier. Particularly worthy of note is the fact that ZAP Sznajder Batterien closed down a waste battery recycling facility when the proceedings were under way which, in UOKiK's opinion, was the reason why the concentration would not adversely affect competition or harm consumers.

We believe the correct practice is for UOKiK to disclose the rationale behind its decisions that are preceded by market studies involving a more thorough merger control analyses. Based on the limited information available, we have drawn the tentative conclusion that the assessment of the concentration which consisted in the acquisition of Orzeł Biały could have been much more complex had ZAP Sznajder Batterien not chosen to get rid of its waste battery recycling facility.

[11] UOKiK's decision of 3 October 2019, No DKK - 193/2019 *ZAP Sznajder Batterien/ NEF Battery.*

ENGIE ENERGY

NATURAL GAS

The 2019 decision imposing a fine on Engie Energy is not strictly a concentration control decision[12]. However, given its strong correlation with merger control proceedings and relevance to the undertakings involved in such proceedings, the decision needs to be discussed in our summary.

In November 2019, UOKiK imposed a EUR 40 million (PLN 172 million) fine on Engie Energy for its refusal to provide information and documents relating to contracts concluded by undertakings belonging to the same corporate group as Engie Energy with Gazprom Export LLC. The request to provide such documents was addressed to Engie Energy in the course of unprecedented proceedings initiated against Gazprom and 5 entities financing the construction of the Nord Stream 2 pipeline (including Engie Energy), in respect of the alleged creation of a joint venture without UOKiK's prior clearance[13]. According to the decision published on UOKiK's website, Engie Energy refused to provide the requested documents invoking formal deficiencies in the requests addressed to the company; namely: UOKIK's failure to specify the reasons for its requests, and the irrelevance of the documents requested to the proceedings concerning the alleged creation of a joint venture. UOKiK refused to recognise both the formal deficiencies and the arguments regarding the irrelevance of the requested documents. In its decision, UOKiK argued that, as a rule, undertakings may not contest the scope of its requests because it is up to the competition authority itself to determine whether specific documents and information are necessary for the performance of its tasks.

The fine imposed on Engie Energy is not only the highest financial penalty for a procedural infringement involving the refusal to cooperate with UOKiK, but is also the highest fine UOKiK has ever imposed on an undertaking. In comparison, the highest fine previously imposed by UOKiK against a cement cartel amounted to approximately EUR 27 million (PLN 115 million). The fine imposed on Engie Energy is also incomparably more severe than those imposed on undertakings in recent years for failing to provide documents requested by UOKiK. Between 2015 and 2019, the highest fine imposed on an undertaking for such procedural infringement amounted to EUR 6,000 (approximately PLN 26,500).

[12] UOKiK's decision of 7 November 2019, No DKK-217/2019 *Engie Energy Management Holding*.

[13] For information on the proceedings, see our previous report (https://skslegal.pl/wp-content/uploads/2019/01/RAPORT-Post%C4%99powania-w-sprawach-kontroli-koncentracji-w-Polsce-w-2018-roku-2.pdf).

Heavy fines imposed by UOKiK in the past were significantly reduced in appeal proceedings. For example, a fine of approximately EUR 28 million (PLN 123 million) for obstructing a search was reduced by the court to approximately EUR 230,000 (PLN 1 million). Notwithstanding the assessment of the grounds for imposing the fine on Engie Energy, we believe the court's decision in this case should answer the question about the level of detail in reasons stated by UOKiK in its requests for information and documents, and in particular, whether it is sufficient to just specify the subject matter of UOKiK's proceedings for the purposes of which information and documents are being requested.

KAUFLAND | TESCO

THE RETAIL SALE OF FMCG

The decision announced by Tesco, the UK-based chain of hyper and supermarkets, to pare down its operations in Poland has led to a number of transactions in the market for real properties used to operate large-format FMCG stores. By the end of 2019, Kaufland and Carrefour (as well as the DIY chain Leroy Merlin) notified UOKiK of their intention to take over selected Tesco hypermarkets.

The ensuing assessment of the concentration effects of the proposed acquisitions of large-format FMCG stores operating as hypermarkets was an opportunity to verify the validity of the definition of the relevant market narrowed down to hypermarkets, adopted by UOKiK in 2014 in the Auchan/Real case[14]. Based on the 2019 decisions concerning the acquisition of three Tesco hypermarkets by Kaufland,[15] it can be concluded that UOKiK continues to identify arguments supporting the existence of asymmetrical substitution between hypermarkets and supermarkets/discount stores, and thinks that smaller large-format stores do not exert sufficient competitive pressure on hypermarkets. The practical implications of this approach are that the effects of the concentrations between supermarkets or discount operators, and between the operators of such stores and hypermarkets, are assessed in the context of local markets that comprise hypermarkets, supermarkets and discount stores (HSD). The effects of concentrations between hypermarket operators, on the other hand, are additionally assessed by UOKiK in the context of a single-format market comprising solely the largest stores; that is, outlets with a retail sales area in excess of 2,000 square meters.

[14] UOKiK's decision of 21 January 2014, No DKK-4/2014 *Auchan/real.*
[15] UOKiK's decisions of 15 November 2019, No DKK-224/2019, DKK-225/2019 and DKK-226/2019 *Kaufland/Tesco.*

MERGER CONTROL BY UOKiK
TRENDS AND DEVELOPMENTS

EFFECTS IN THE TERRITORY OF POLAND OF THE CREATION OF A JOINT VENTURE OUTSIDE OF POLAND

The creation of a joint venture falls under the notification requirement to UOKiK if the turnover of the undertakings concerned meets the relevant statutory thresholds (of EUR 1 billion worldwide or EUR 50 million in Poland) and the concentration does not qualify for an exemption from the notification requirement (subject, especially, to the de minimis rule applicable to turnover generated in Poland by the capital groups involved in a concentration). Irrespective of the turnover thresholds triggering the notification requirement, the Polish merger control regulations apply exclusively to transactions with effects or potential effects in the territory of Poland. Unfortunately, the provisions currently in force do not provide any guidance on how the criterion of effects should be interpreted. In light of UOKiK's guidelines, that criterion is met even if only one of one undertakings involved in a concentration generates its turnover in Poland.

Given the way in which UOKiK interprets the effects of a concentration in the territory of Poland, a notification to UOKiK is required in the case of many transactions unlikely to produce even hypothetical effects in Poland. 2019 saw many examples of such concentrations, as UOKiK cleared, among other:

- the creation of a joint venture registered in Japan for the construction of a power plant;
- the creation of a joint venture active in the wholesale and promotion of animal feed, operating exclusively in the People's Republic of China;
- the establishment of an SPV to design, construct, and lease office buildings and parking space in Germany;
- the establishment of a US company engaged in the manufacture of car seat components; and
- the creation of a joint venture operating on the Chinese market as a manufacturer of metal parts for the automotive industry.

We believe that at least some of the transactions involving the creation of a joint venture could have avoided the mandatory notification to UOKiK if the concentration effects in the territory of Poland were interpreted based not only on: (i) the turnover of the undertakings concerned; but (ii) mainly on the scope and geographical area of the joint venture's activity. In our opinion, the mere fact that the entities creating a JV achieve their turnover in Poland does not warrant the conclusion that the proposed transaction would have any effects in the territory of Poland. In fact, the joint venture may operate within a completely different business and on other geographical markets than its founder's in Poland. However, looking at the actions taken by UOKiK in 2019, there is nothing to suggest it could be inclined to revise its approach to the interpretation of the concept of effects. Not only did UOKiK review, but it also issued decisions concerning JVs whose activities appeared not to have any connection whatsoever with Poland. Until UOKiK revises its approach, undertakings that generate turnover in Poland and are looking to create a joint venture should bear in mind that they could be required to notify such transaction to UOKiK even if the JV's planned operations would have no connection with the territory of Poland.

LEASE (RENTAL) CONTRACT AS A CONCENTRATION REQUIRED TO BE NOTIFIED TO UOKIK

The acquisition of another undertaking's assets (comprising the whole of or a part of its business) is a separate form of concentration in Poland, requiring clearance from UOKiK if: (i) the turnover achieved by the acquirer and the acquired assets meet the statutory turnover thresholds; and (ii) the turnover generated in Poland by the acquired assets exceeds EUR 10 million. This form of concentration has been introduced into Polish law mainly to extend the scope of UOKiK's powers of review to cover those transactions that do not involve the acquisition of control of another undertaking, but only the acquisition of another undertaking's assets.

The catalogue of transactions that should be classified as acquisitions of another undertaking's assets has raised a number of doubts. According to UOKiK's practice, the execution of a lease (rental) contract for certain assets should be considered the acquisition of another undertaking's assets if the leased property is to be used by the lessee to continue the activity previously carried out by the lessor. Some of the concentrations notified to UOKiK in the previous year indicate the existence of lease (rental) agreements that might also potentially require competition clearance, i.e. contracts with the lessor who was using the leased assets to conduct activities other than those carried out by the new lessee. The key criteria taken into account in such assessments are the use of property by the previous lessee and the time that has passed since the termination of the previous lease contract.

According to the position adopted by UOKiK, a lease of retail space may amount to a concentration consisting of the acquisition of another undertaking's assets if the previous lessee of the space and its new lessee operate in the same relevant market (e.g. they both operate DIY stores) and the time that passed between the termination of the previous lease contract and the execution of the new lease is relatively short. In determining whether a transaction is notifiable, it is irrelevant that the lease contract is executed with the owner of retail space that does not use it for any business activity other than property rental. In such cases, the amount of rent income received by the lessor from the previous tenant is also irrelevant. The relevant issue is the previous tenant's turnover generated by the business carried out on the retail premises.

We believe that the practice of taking into account the turnover generated by a third party (the previous tenant) which is not a party to the alleged 'concentration' is questionable in assessing whether a lease (rental) contract should be subject to the notification requirement. After all, the parties to a lease contract do not need to know what turnover was achieved by the previous tenant from its business. In such cases, the new lessee may not be able to determine whether the execution of a contract requires prior clearance from UOKiK. It is also unclear how much time must pass between the termination of the previous lease contract and the execution of a new lease contract to preclude its classification as an acquisition of assets.

RESIGNATION OF MAREK NIECHCIAŁ FROM THE POSITION OF PRESIDENT OF UOKIK AND THE APPOINTMENT OF A NEW PRESIDENT

Towards the end of December 2019, the existing President of UOKiK, Marek Niechciał, tendered his resignation. In trying to summarise his tenure in terms of the merger control area which spanned more than 3.5 years, the following should be highlighted:

- Although the number of concentrations notified to UOKiK increased year on year, the average time of proceedings that ended with a phase I decision did not lengthen. This was achieved while maintaining the number of staff employed at the UOKiK's Merger Control Department at a comparable level.
- During Marek Niechciał's term of office as President, no decision prohibiting a concentration was issued (although several undertakings may have avoided such prohibition only by the fact their notifications were withdrawn). Over the same period, 8 conditional decisions were issued, some of them containing behavioural conditions. Marek Niechciał was not afraid to resort to solutions unprecedented in Poland with respect to conditional decisions and conditions imposed on undertakings involved in an intended concentration.
- While Marek Niechciał was holding the office of President, UOKiK became much more active in prosecuting both Polish and foreign undertakings for having implemented a concentration without the required clearance. 3 cases are worthy of note: (i) a decision imposing a fine for leasing a bankrupt undertaking's property from its insolvency administrator; (ii) a decision imposing a fine for the acquisition of key assets and material business secrets without entering into a written agreement; and (iii) proceedings initiated in respect of an alleged failure to notify an intended concentration by entities financing the construction of the Nord Stream 2 pipeline based on a precedent-setting concept of circumventing merger control rules. We believe each of those cases will have a bearing on UOKiK's future merger control practice.

On 29 January 2020, the position of President of UOKiK was assumed by Tomasz Chróstny who was previously Vice President of UOKiK. We hope that, under the new President's stewardship, UOKiK will continue to deliver many more equally interesting merger control cases and decisions as it did during his predecessor's term of office.

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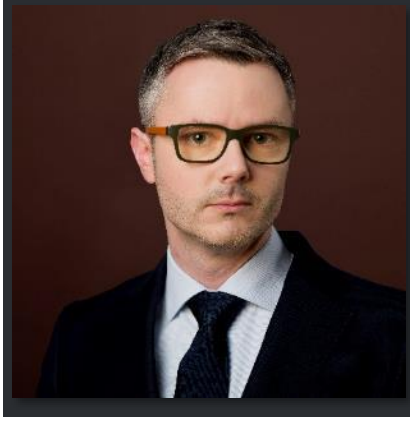

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THE SK&S COMPETITION LAW DEPARTMENT

- 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.