GUIDELINES ON THE CRITERIA AND PROCEDURE OF NOTIFYING THE INTENTION OF CONCENTRATION TO THE PRESIDENT OF UOKiK

Warsaw 2010

TABLE OF CONTENTS

Introduction

Taking into account the existing jurisdiction achievements of the anti-monopoly authority in cases concerning concentration and meeting the expectations of undertakings, the President of the Office of Competition and Consumer Protection presents these *Guidelines on the criteria and procedure of notifying the intention of concentration to the President of UOKiK*.

The aim of the *Guidelines* is to increase the legal certainty of undertakings, both as to determination of the obligation to notify the intention of concentration to the President of UOKiK and as to issues related to anti-monopoly proceedings in concentration cases.

The *Guidelines* are not aimed at and they cannot govern issues related to determination of the obligation to notify the intention of concentration or issues related to conducting the anti-monopoly proceedings on concentration, in a manner contrary to the provisions of the Act of 16 February 2007 *on competition and consumer protection* (Journal of Laws No. 50, item 331 as amended). The *Guidelines* indicate only the method of assessing those issues by the President of UOKiK.

The *Guidelines* are not legally binding, nevertheless, the fact of their publication should mean that in cases concerning concentration, the President of the Office observes them.

Pursuant to Art. 32, para. 4 of the *Act on competition and consumer protection*, the *Guidelines* are subject to publication in the Official Journal of the Office of Competition and Consumer Protection.

List of applied abbreviations

Legal acts

k.p.a. – Act of 14 June 1960 – Code of Administrative Procedure (Journal of Laws of 2000 No. 98, item 1071 as amended)
k.p.c. – Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws No. 43, item 296 as amended)
k.s.h. – Act of 15 September 2000 – Code of Commercial Companies and Partnerships (Journal of Laws No. 94, item 1037 as amended)
o.s. – Act of 16 November 2006 on stamp duty (Journal of Laws No. 225 item 1635 as amended)
pr. ban. – Act of 29 August 1997 – Banking Law (Journal of Laws of 2002 No. 72, item 665 as amended)
p.s. – Act of 16 September 1982 – Cooperative Law (Journal of Laws of 2003 No. 188 item 1848 as amended)
p.u.n. – Act of 28 February 2003 – Bankruptcy and Reorganisation Law (Journal of Laws of 2009 No. 60, item 535 as amended)
r.o.o. – Regulation of the Council of Ministers of 17 July 2007 concerning the method of calculation of the turnover of undertakings participating in the concentration (Journal of Laws No. 134, item 935)
Regulation 139/2004 – Regulation of the EC Council No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (EU OJ L 24 of 29.01.2004, p.1)
r.z.z.k. - Regulation of the Council of Ministers of 17 July 2007 concerning the notification of the intention of concentration of undertakings (Journal of Laws No. 134, item 937)
u.g.k. – Act of 20 December 1996 on municipal services (Journal of Laws of 1997 No. 9, item 43 as amended)
u. KRS – Act of 20 August 1997 on the National Court Register (Journal of Laws of 2007 No. 168, item 1186 as amended)
Act or u.o.k.k. – Act of 16 February 2007 on competition and consumer protection (Journal of Laws No. 50, item 331 as amended)
u.o.d.u. - Act of 22 May 2003 on insurance activity (Journal of Laws of 2010 No. 11 item 66)
u.o.r - Act of 29 September 1994 on accounting (Journal of Laws of 2009 No. 152, item 1223 as amended)
u.s.d.g. – Act of 2 July 2004 on freedom of economic activity (Journal of Laws of 2004 No. 155, item 1095 as amended)
u.z.n.k. – Act of 16 April 1993 on combating unfair competition (Journal of Laws of 2003 No. 153, item 1503)
WID – annex to the Regulation of the Council of Ministers of 17 July 2007 concerning the notification of the intention of concentration of undertakings (Journal of Laws No. 134, item 937)

Other

Commission or **EC** – European Commission
NBP – National Bank of Poland
President of the Office or President of UOKiK – President of the Office of Competition and Consumer Protection
RP – the Republic of Poland
SOKiK – Court of Competition and Consumer Protection
Urząd or UOKiK – Office or Office of Competition and Consumer Protection (UOKiK)
UP – Post Office
EC – European Communities

I. CRITERIA FOR NOTIFYING THE INTENTION OF CONCENTRATION TO THE PRESIDENT OF UOKiK

1. Basic conditions related to notifying the intention of concentration

1.1. Intention of concentration

The proceedings on concentration of undertakings is initiated by the notification of the intention of concentration. Therefore, it is important for the undertaking(s) to notify that it intends to implement it before it is put into practice. In addition, the parties to concentration should refrain from its implementation pending obtaining the consent of the President of UOKiK or expiry of the time limit for considering the case (Art. 97, para. 1 of u.o.k.k.). This means that the implementation of a concentration ("consummation of the intention") is possible only after obtaining decision of the President of UOKiK expressing the consent to this concentration. The implementation of a concentration is also possible when the time-limit within which the decision should be issued, expired (more on calculating time limits in the anti-monopoly proceedings on concentration see point II.3.11).

Therefore, the undertaking(s) is obliged to notify the intention of concentration and not the fact of its implementation. Failure to fulfil this obligation may lead to application of specific sanctions by the President of UOKiK (more on sanctions see point III). The only exception to this rule is the implementation of a public offering for purchase or exchange of stocks, notified to the President of UOKiK, if the buyer does not exercise the voting right resulting from purchased stocks or exercises it only to maintain the full value of its capital investment or to prevent serious damage likely to occur to undertakings participating in a concentration (Art. 98 of u.o.k.k.).

1.2. Definition of the undertaking

The obligation of notifying the intention of concentration rests exclusively upon the undertaking. Therefore, the status of the undertaking plays a key role in assessing whether a given concentration is subject to the notification. Each entity intending to implement a concentration, must first of all assess whether it meets the conditions for being the undertaking within the meaning of u.o.k.k.

The definition of the undertaking is included in Art. 4 point 1 of u.o.k.k. This Act stipulates that the undertaking is defined as such mainly within the meaning of the provisions of u.s.d.g. The undertaking within the meaning of the provisions of u.s.d.g. is a natural person, legal person or non-corporate organisational unit, to which legal capacity is granted by a separate act, pursuing the economic activity on its own behalf. Undertakings are also partners of civil partnerships with regard to the economic activity they conduct, whereby the economic activity should be understood as the paid manufacturing, construction, commercial, service activity as well as exploration, recognition and extraction of minerals from deposits and the professional activity carried out in an organised and continuous manner.

The definition of the undertaking within the meaning of u.o.k.k. is, however, more extensive than that within the meaning of u.s.d.g. In u.o.k.k, undertakings are also:

- natural person, legal person or non-corporate organisational unit, to which legal capacity is granted by a separate act, which organises or provides public utility services which are not the economic activity within the meaning of the provisions on the freedom of economic activity. Here, it should be noted that both u.o.k.k. and u.s.d.g. do not contain a legal definition of "public utility services". Therefore,

when considering the fulfilment of this condition, we must refer to u.g.k. and use the guidelines contained therein.

- natural person practicing the profession on their own behalf and on their own account or pursuing the economic activity as part of practicing this profession. The list of professions considered to be liberal pursuant to the provisions on the partnership is included in Art. 88 of k.s.h. The following professions are regarded as liberal: lawyer, pharmacist, architect, construction engineer, expert auditor, insurance broker, tax advisor, stockbroker, investment advisor, accountant, physician, dental surgeon, veterinarian, notary, nurse, midwife, legal advisor, patent attorney, property appraiser and sworn translator.
- natural person who has control over at least one undertaking even if it does not pursue the economic activity within the meaning of the provisions on the freedom of economic activity, if it takes further actions subject to control of concentration. In this case, it is important that natural persons, even if they do not conduct the economic activity may – as a result of capital or actual connections – have a decisive impact on undertakings pursuing such activity.

In the anti-monopoly jurisdiction, undertakings within the meaning of u.s.d.g. are, in particular, limited companies (including municipal companies) and partnerships, cooperatives, state-owned enterprises, natural persons pursuing the economic activity on their own and partners of civil partnerships (civil partnerships themselves are not treated as undertakings).

Undertakings directly controlled by the State Treasury do not form one capital group. Concentrations between these undertakings are therefore considered by the President of UOKiK. They are not subject to the exemption provided for in Art. 14 point 5 of u.o.k.k., i.e. the one referring to concentrations implemented within one capital group (more on application of this exemption see point I.3.6). However, undertakings owned by the State Treasury, may create their own capital groups and concentrations implemented within those groups are exempted from the obligation to notify the intention of concentration to the President of UOKiK. Concentrations involving local government units, i.e. commune (*pl. gmina*), poviat and voivodeship of the local government, are subject to the notification to the President of UOKiK.

The provisions of Art. 1, para. 2 of u.o.k.k. stipulate clearly that the Act governs the rules and mode of preventing, *inter alia*, anti-competitive concentrations of undertakings and their associations if those concentrations have or may have effects in the territory of the Republic of Poland. However, the association of undertakings is not, pursuant to Art. 4 point 1 letter d of u.o.k.k., regarded as the undertaking for the purposes of the notification of the intention of concentration. Other provisions concerning control of concentrations also refer only to undertakings, not associations of undertakings. Thus, concentrations of associations of undertakings are not subject to the obligation to notify the intention of concentration to the President of UOKiK. An exception will be a situation when the association of undertakings conducts the economic activity. In this case, it would be regarded as the undertaking.

When assessing whether a given entity meets the conditions for being the undertaking within the meaning of u.o.k.k., it is not important whether this undertaking has its registered office in Poland or abroad.

1.3. Criterion of the turnover

The obligation of the notification to the President of UOKiK applies to those intentions of concentration of undertakings, whose total global turnover exceeded, in the year preceding the year of the notification, the equivalent of EUR 1 billion or whose total turnover in the territory of the RP exceeded the equivalent of EUR 50 million (Art. 13, para. 1 of u.o.k.k.) and provided that concentration has no Community dimension (more on Community

concentrations see point I.5). The global turnover includes the entire turnover obtained by the undertaking, regardless of its origin. The turnover achieved in the territory of the RP shall mean the turnover derived from sale of products and services provided to undertakings or consumers in Poland (more on calculating the turnover see point I.4).
Adopting the turnover criterion means that control of concentration includes both concentrations between competitors, undertakings operating at different levels of trade as well as between undertakings conducting their activities in separate markets. Market shares of participants of a concentration are also irrelevant for the emergence of the obligation to notify the intention of concentration.
In assessing whether the intention of concentration should be notified to the President of UOKiK, it is also not significant whether undertakings participating in it are seated in the territory of the RP or in the territory of another state. The obligation to notify the intention of concentration to the President of UOKiK applies both to Polish and foreign undertakings.

1.4. Effects in the territory of RP

The control of the President of UOKiK covers only those concentrations which cause or may cause effects in the territory of the RP (Art. 1, para. 2 of u.o.k.k.). Therefore, the scope of the Act covers also exterritorial concentrations, i.e. taking place between undertakings seated outside the territory of the RP provided that they have at least potential effects in the territory of the RP. The Act does not indicate the criteria according to which it should be assessed which exterritorial concentrations have effect in the territory of the RP. However, it should be assumed that the condition of the effect in the territory of the RP is fulfilled if at least one of participants of concentration (the capital group to which it belongs) achieves its turnover in the territory of the RP.

2. Forms of concentration

2.1. Catalogue of forms of concentration

The Act does not contain the typical definition of concentration. However, in Art. 13, para. 2 of u.o.k.k., it indicates the facts commonly known as forms of concentration, subject to the notification to the President of UOKiK as follows:

- combination of two or more independent undertakings, the so-called mergers (Art. 13 para. 2 point 1 of u.o.k.k.),
- takeover – by acquiring or taking up stocks, other securities, shares or in any other way – of direct or indirect control over one or more undertakings by one or more undertakings (Art. 13 para. 2 point 2 of u.o.k.k.),
- creation by undertakings of one joint undertaking (Art. 13 para. 2 point 3 of u.o.k.k.),
- acquisition by the undertaking of a part of the assets of another undertaking (whole or a part of the enterprise) if the turnover generated by these assets in any of the two financial years preceding the notification exceeded the equivalent of EUR 10 million in the territory of the RP (Art. 13 para. 2 point 4 of u.o.k.k.).

This catalogue is closed. This means that only the above-mentioned facts are subject to the notification to the President of UOKiK. Thus, the following are not subject to the notification, for example:

- so-called *quasi* concentrations consisting in acquisition or taking up shares or stocks which do not, however, lead to the acquisition of control (e.g. acquiring by undertaking A of a minority package of shares in company B which does not give undertaking A a possibility of having a decisive impact on undertaking B);
- so-called personal mergers, consisting in taking up by the person who already acts as a member of the managing body or control body in one undertaking, such a function in

another undertaking unless they lead to the acquisition of control (e.g. the acquisition of control would take place if the members of the management board of one undertaking were appointed to the management board of another undertaking and constituted more than half of its members, and thus the intention of such concentration would be subject to the notification to the President of UOKiK).

2.2. Combination of two or more independent undertakings

Concentration consisting in the combination of independent undertakings usually takes place as a result of two situations referred to in k.s.h, namely:

- incorporation – when all assets of the company being acquired are transferred to the acquiring company for shares or stocks issued by the acquiring company to partners of the company being acquired or
- merger – when a new capital company is established, to which assets of all merging companies are transferred for shares or stocks of the new company,

while the company being acquired or companies merging by establishment of the new company are dissolved.

In practice, cooperatives also merge frequently. The merger of cooperatives is based on the provisions of p.s.

Certain concentrations notified to the President of UOKiK consist in the combination of undertakings with their registered office outside Poland (the so-called exterritorial concentrations). In such a situation, appropriate provisions of the countries in which merging undertakings are seated shall apply, in principle, to their merger.

The merger, within the meaning of Art. 13, para. 2 point 1 of u.o.k.k., may also take place despite the lack of the merger in a legal sense, i.e. without a reduction in the number of undertakings as a result of the merger. An essential condition for establishing whether the merger took place in fact should be the existence, after the merger, of the permanent common economic management board.

The obligation to notify the intention of concentration consisting in the merger of undertakings regards independent undertakings only. The autonomy of merging undertakings should be understood in this way that those undertakings do not belong to the same capital group within the meaning of Art. 4 point 14 of u.o.k.k (more on the capital group see point I.3.6).

It happens that the undertaking being a shareholder of one or both merging undertakings may take control over merging undertakings. In such a situation, in fact we deal with one concentration implemented at the same time, even though it meets both the condition for the merger of undertakings and of the acquisition of control. It should be considered that the final result of this transaction, i.e. the acquisition of control is subject to the notification to the President of UOKiK.

(to identify the entity responsible for notifying the intention of concentration consisting in the merger of undertakings, see point II.1.2)

2.3. Acquisition of control

2.3.1. Methods of acquiring control

Acquisition of control is the most common form of concentration notified to the President of UOKiK. The definition of the acquisition of control is included in Art. 4 point 4 of u.o.k.k. Pursuant to this provision, the acquisition of control should be understood as any forms of direct or indirect gaining by the undertaking of rights which, separately or jointly, taking all

legal or factual circumstances into account, enable to have a significant impact on another undertaking(s), in particular:

- hold, directly or indirectly, the majority of votes at the meeting of shareholders or at the general meeting, also as the pledgee or user, or in the management board of other undertaking (dependent undertaking), also on a basis of agreements with other persons,
- right to appoint or dismiss the majority of members of the management board or of the supervisory board of another undertaking (dependent undertaking), also on a basis of agreements with other persons,
- situation in which members of the management board or supervisory board of one undertaking represent more than half of members of the management board of another undertaking (dependent undertaking),
- hold, directly or indirectly, the majority of votes in the dependent partnership or at the general meeting of the dependent cooperative, also on a basis of agreements with other people
- the right to the whole or partial assets of another undertaking (dependent undertaking)
- agreement providing for managing the other undertaking (dependent undertaking) or transferring of profits by this undertaking.

The above examples are the most common situations in which the acquisition of control takes place. This catalogue, however, is not closed. In connection with that, we will deal with the acquisition of control whenever one of undertakings becomes a dependent undertaking in relation to other undertaking(s).
Exemplary situations in which the acquisition of control takes place most frequently are also indicated in Art. 13, para. 2 point 2 of the Act. This will be, for example, purchase or take-up of stocks, other securities or shares. This catalogue is also open and the acquisition of control may occure also in any way other than that referred to in that provision. For instance, it may happen as a result of granting the rights to one or more undertakings, which give a possibility of deciding or co-deciding on key strategic issues for the business activity of another undertaking, concerning, in particular, issues such as the budget, economic plan, significant investments and appointment of members of the undertaking's authorities.
The acquisition of control will be determined both by legal circumstances (e.g. possession of shares in the quantity giving the right to more than 50% of votes in the bodies of another undertaking or to the power of veto when making decisions of key importance to strategic business activities) and factual circumstances (e.g. possession of a substantial package of shares, not giving the right to more than 50% of votes in the bodies of another undertaking, but e.g. to 40% with the significant fragmentation of votes of other partners). In practice, in case of capital companies, the acquisition of control occures most frequently as a result of the acquisition of sole or a majority package of stocks or shares, giving the possibility of having a substantial impact on decisions made by this company. The acquisition of control may also be a result of concluding an agreement between undertakings, which provides for the necessity of obtaining the consent of the undertaking to make a decision of key importance to strategic business activities of the controlled undertaking.
(to identify the entity responsible for notifying the intention of concentration consisting in the acquisition of control see point II.1.3)

2.3.2. Direct and indirect acquisition of control

The acquisition of control may take place directly (autonomously) or indirectly (through dependent entities). The division into the direct and indirect acquisition of control affects the identification of the undertaking obliged to notify the intention of concentration. In principle,

the obligation of the notification is the responsibility of the undertaking directly acquiring control. The exception is the acquisition of control through special-purpose companies (see point II.1.9.).

2.3.3. Sole and joint control

Control may be acquired by one or more undertakings. In the first situation, the acquisition of the so-called sole control takes place, i.e. one undertaking enjoys the possibility of having a significant impact. The second situation is defined as the acquisition of the so-called joint control.

As regards the joint control, undertakings exercising control must agree with each other to be able to influence the activities of the controlled undertaking, i.e. to make decisions of key importance to strategic business activities of the undertaking. The most common example of joint control is the situation in which two shareholders hold 50% of votes in the company and making a decision regarding essential issues of the controlled company requires the consent of both shareholders. Another example of joint control is the situation in which one of shareholders holds the majority of votes in the company but at least one of remaining shareholders has the power of veto and no relevant decisions of key importance to strategic business activities of the undertaking can be made without its prior consent.

To determine the existence of joint control, the scope of the power of veto should be more extensive than the scope of the power normally granted for the protection of financial interests of shareholders or of minority stockholders in the joint undertaking. As a rule, the right of veto is granted for this purpose in matters concerning the very substance of participation in the joint undertaking, for example, the change in the articles of association or statute, increase or reduction in the initial capital, sale of the enterprise or liquidation of the undertaking. Unlike the ordinary power of veto, the right of veto determining joint control involves the possibility of blocking decisions regarding issues such as: budget, business plan, major investments or appointment of the senior management. Apart from the above-mentioned typical powers of veto, in determining whether there is joint control, it is required to take into account also other types of such right, specific to markets in which the given undertaking operates.

The evidence of the existence of joint control will also be an applicable agreement of the undertaking's partners in this respect. However, exercising joint control is not the situation in which one undertaking has the possibility of having a decisive impact and shall conclude with other undertaking, e.g. an agreement on joint voting. In this situation, it should be stated that the undertaking having the possibility of enjoying a decisive impact has a sole control.

Also, family ties between members of the undertaking's partners are not a sufficient basis for recognising that they exercise joint control over the undertaking. For the purpose of such recognition, the existence of an applicable agreement between them is required, whereby such an agreement may be concluded both in written and oral form.

The acquisition of control over other undertaking by two undertakings from the same capital group is not identical to the acquisition of control by more than one undertaking. In fact, control is acquired by the dominant entity of these two undertakings.

2.3.4. Positive and negative control

The obligation to notify the intention of concentration to the President of UOKiK refers both to the so-called positive control and negative control. Positive control consists in the possibility of independent making of relevant decisions concerning the dependent undertaking and most often involves the possession of the majority package of stocks/shares (in case of the significant fragmentation of remaining stockholders/shareholders, positive control may involve the possession of a package giving less than 50% of votes). Negative control consists

in the possession of rights which give the ability to veto important decisions concerning the activities of the dependent undertaking.

2.3.5. The acquisition of control over one or more undertakings

The undertaking acquiring control may acquire it over one or more undertakings. The acquisition of control over more than one undertaking may take place both in case where control is acquired over undertakings which are not in the dominant/dependent relationship to each other and where it is acquired over the dominant undertaking and its dependent companies. It should be stressed that in the first case the notification of the acquisition of control over more than one undertaking within the framework of one application for the notification of the intention of concentration is acceptable only in case where the acquisition of control over these undertakings is made under the same transaction or interrelated transactions, in particular, where undertakings over which control is acquired belong to the same capital group.

2.3.6. Change from joint control to sole control and from sole control to joint control

Not only the acquisition of control itself but also the change from joint control to sole control should be notified to the President of the Office. The entity exercising sole control has a wider range of rights than that exercising joint control along with other undertaking or undertakings. In case of the change from sole control to joint control, the notification should be made only by the undertaking which acquired joint control. The undertaking which exercises sole control and seeks to change it over to joint control but has no such obligation (more on the obligation of the notification see also point II.1.3.).

2.3.7. Active and passive acquisition of control

The vast majority of cases regarding the intention of concentration, which are notified to the President of the Office, consist in the active acquisition of control, i.e. they result from actions of the undertaking acquiring control. However, we cannot rule out the situation where the acquisition of control takes place without active participation of the undertaking acquiring control e.g. as a result of the fragmentation of shareholding (e.g. the undertaking A and undertaking B own shares in the company X, which give each of them 50% of votes in the bodies of this company. Then, the undertaking B sells its package of shares to several tens of small investors, in consequence of which the undertaking A actually takes the sole control over the company X). Similar effects may be caused by the operation of redemption of stocks or shares, resulting in acquiring actual control. Such a situation does not exempt the undertaking which acquires control from the obligation to notify the intention of concentration to the President of UOKiK (more on the emergence of the intention see point II.2.).

2.4. Creating by undertakings of the joint undertaking

Establishment of the joint undertaking (*joint undertaking*) is one of the most common, apart from the acquisition of control, forms of concentration considered by the President of UOKiK. Creation of the joint undertaking usually takes place through establishment of commercial companies (limited liability company, joint stock company, general partnership, limited partnership and limited joint-stock partnership) and cooperatives.

Some cases notified to the President of UOKiK concern also establishment of the joint undertaking with its registered office outside Poland – the so-called exterritorial concentrations (see also point I.1.4. on the effects in the territory of the RP). In this situation,

the rules for its establishment will be specified by the provisions of the country in which this new joint undertaking is being created.
On the other hand, it is not required to notify to the President of UOKiK of establishing a civil partnership by undertakings. This company is not regarded as the undertaking within the meaning of u.o.k.k. Partners of such companies are regarded as undertakings (more on the definition of the undertaking see point I.1.2.). Transformation of the civil partnership into the general partnership will be subject to the notification to the President of UOKiK. Such transformation is regarded as establishing of the joint undertaking by undertakings (existing partners of the civil partnership).
It should be stressed that the obligation to notify the intention of concentration consisting in establishment of the joint undertaking by undertakings arises only in case when more than one undertaking participates in creating the joint undertaking. Thus, such obligation does not arise in the situation of establishing of the joint undertaking only by one undertaking or in the event of establishing the joint undertaking by one undertaking and entity or entities not being undertakings. In order to make such concentration subject to notification to the President of the Office, the process of establishing the joint undertaking should involve at least two undertakings within the meaning of Art. 4 point 1 of u.o.k.k.,(more on the definition of the undertaking see point I.1.2.)
The obligation to notify the intention of concentration consisting in creation of the joint undertaking refers both to the situation where participants of concentration (founding undertakings) establish, for this purpose, a new joint undertaking and to the situation where, for example, in order to create the joint undertaking, one of participants will establish a new company and then other participants will purchase or take up its shares/stocks. To establish the joint undertaking, participants of concentration may also use the existing undertaking (the joint undertaking is established, e.g. on a basis of a company functioning within the capital group of one of founders).
The Act does not provide for specific requirements in relation to the joint undertaking (otherwise than, for example, Regulation 139/04 where it is required from the joint undertaking to perform the functions of an autonomous economic entity on a permanent basis). Establishment of the joint undertaking that will not perform all functions of an independent undertaking on a permanent basis (e.g. products manufactured by the joint undertaking will be supplied exclusively or primarily to founding undertakings or capital groups to which founders belong), should also be notified to the President of the Office.
Concentration consisting in establishment of the joint undertaking is subject to the notification to the President of the Office regardless of the number of votes it will be ultimately granted to founders in the joint undertaking. Such concentration, therefore, should be notified even if one of founders holds shares/stocks in a quantity giving it the right of control over the joint undertaking and other founders hold minority shares.
(to learn who should notify the intention of concentration consisting in establishment of the joint undertaking see point II.1.4.)

2.5. Acquisition by the undertaking of a part of assets of another undertaking

For the purposes of control of concentration, the assets should be understood as the whole or part of the enterprise of other undertaking. Pursuant to Art. 55^1 of k.c., the undertaking is an organised group of intangible and tangible components intended for conducting the economic activity, including in particular:

- designation individualising the undertaking or its separate parts (name of the enterprise),

- ownership of immovable or movable property, including equipment, materials, goods and products and any other material rights to immovable or movable property,
- rights resulting from lease and rent agreements for immovable or movable property and the right to use immovable or movable property resulting from other legal relations,
- claims, rights in securities and cash,
- concessions, licenses and permits,
- patents and other industrial property rights,
- copyrights and related property rights,
- trade secrets,
- books and documents relating to the economic activity.

The intention of concentration consisting in the acquisition of the assets of another undertaking is subject to the notification to the President of UOKiK only in a situation when the purchased assets generate the turnover indicated in Art. 13, para. 2 point 4 of u.o.k.k.. This turnover, in the territory of the RP, must exceed the threshold of EUR 10 million in at least one of the two financial years preceding the notification of the intention of concentration. When calculating the turnover of the acquired part of the assets for the purposes of the possible notification of the intention of concentration, it is necessary to consider the entire process associated with that part of the assets taking into account the specific nature of the purchased part of the assets (e.g. production line, production plant or product brand) and the market environment and industry, with which this part of the assets is associated and not just the individual components. For example, in case of concentration consisting in purchasing the press title, it is not possible to separate this title from the economic activity related to sale of press under this title. Therefore, when calculating the value of the purchased assets, it is necessary to include the turnover derived from sale of this press title in the period laid down in the Act.

It should also be stressed that, if the assets belong to separate undertakings belonging to the same capital group and if they are purchased under the same transaction or interrelated transactions, in fact we deal with the same concentration. In this situation, when calculating the turnover, it is necessary to include the turnover achieved by the whole of the acquired assets.

(to learn who should notify the intention of concentration consisting in purchase of a part of the assets of another undertaking see point II.1.5.)

3. Exemptions from the obligation to notify the intention of concentration

3.1. Catalogue of exemptions

The Act indicates the cases in which, despite the fulfilment of the conditions laid down in Art. 13 of u.o.k.k., the intention of concentration is not subject to the notification to the President of UOKiK. The catalogue of these exemptions, which constitutes a closed list of five cases, is included in Art. 14 of u.o.k.k.. These are the following cases:

- the acquisition of control over the undertaking whose turnover, in the territory of the RP, did not exceed the equivalent of EUR 10 million in any of the two years preceding the notification,
- temporary acquisition or take-up by the financial institution of stocks or shares for resale, if the subject of the economic activity of this institution is investment in stocks

or shares of other undertakings, on its own or someone else's account, provided that this resale takes place within a year from the date of purchase or take-up and that:
  a) this institution does not exercise rights in these stocks or shares, exclusive of the right to dividend or
  b) it exercises these rights only for the purpose of preparing resale of the whole or part of the enterprise, its assets or these stocks or shares,
- temporary acquisition or take-up by the undertaking of stocks or shares for the purpose of securing claims, provided that it is not going to exercise rights in these stocks or shares, exclusive of the right to sell them,
- concentration taking place in the course of the bankruptcy procedure, excluding cases when the entity planning to acquire control is a competitor or belongs to the capital group to which competitors of the acquired undertaking belong,
- undertakings belonging to the same capital group.

3.2. Turnover of the undertaking over which control is to be acquired does not exceed EUR 10 million in the territory of the RP

The exemption from the obligation of the notification, pursuant to Art. 14 point 1 of u.o.k.k. covers the intention of concentration if the turnover of the undertaking, over which control is to be acquired, does not exceed, in the territory of the RP, the equivalent of EUR 10 million in any of the two financial years preceding the notification. This exemption applies only to concentrations consisting in the acquisition, by one or more undertakings, of control over another undertaking (Art. 13, para. 2, point 2 of u.o.k.k.). The exemption applied is independent of whether the acquisition of sole or joint control or a change in the way of exercising control takes place.
For application of this exemption it is necessary that in each of the two years preceding the year of the notification, the turnover of the acquired undertaking achieved in the territory of the Republic of Poland was lower than or equal to EUR 10 million. It is sufficient, however, that the threshold of the turnover amounting to the equivalent of EUR 10 million euro was exceeded even in one of the two years preceding the year of the notification and the undertaking acquiring control will be obliged to notify the intention to the President of UOKiK. For the purposes of applying the exemption, the term "turnover" covers only the turnover of the undertaking over which control is to be acquired as well as the turnover of its dependent entities, directly or indirectly (Art. 16, para. 2 of u.o.k.k.) (more on calculating the turnover see point I.4)
If control is acquired over at least two undertakings, belonging to the same capital group, and the acquisition of control takes place under the same transaction or interrelated transactions, we deal in fact with one concentration. In such a situation, when calculating the turnover for the assessment of whether the exemption applies, it is required to include (sum up) the turnover achieved by all undertakings over which control is acquired (of course taking into account their potential dependent entities). Such interpretation also results from the fact that for the purposes of competition law, undertakings belonging to one capital group are treated as one economic body (one undertaking).
As applying the exemption depends on "the turnover achieved in the territory of the Republic of Poland", for the assessment of its application, it is required to adopt not the entire turnover of the undertaking but only this part that was achieved in the territory of the Republic of Poland (more on this see point I.4.4).
In practice, it happens that concentration is implemented at multiple stages: the parties determine that the undertaking will acquire the specific assets but first the seller establishes a

special-purpose company, contributes the determined assets to it and then sells shares in such a company to the buyer. If sale takes place in the year of establishment of the special-purpose company, then this company does not have any turnover for the two years, preceding the year of the notification. In such a situation, the President of the Office is of opinion that such concentration should be considered as the acquisition of control over the special-purpose company, however, for the purposes of calculating the turnover for determining whether the exemption in question applies, it is necessary to include the turnover achieved by these contributed assets. This calculation should be made as with respect to concentrations consisting in purchase of the assets, however, applying the above-mentioned rules.

3.3. Temporary acquisition or take-up by the financial institution of stocks and shares for resale

The exemption from the obligation of the notification covers also, pursuant to Art. 14. point 2 of u.o.k.k., temporary acquisition or take-up by the financial institution of stocks or shares for resale, if the subject of the activity of this institution is investment in stocks or shares of other undertakings, on its own or someone else's account, provided that this resale takes place within a year from the date of purchase or take-up and that:

a) this institution does not exercise rights in these stocks or shares, exclusive of the right to dividend or
b) it exercises these rights only for the purpose of preparing resale of the whole or part of the enterprise, its assets or these stocks or shares.

This exemption applies to the so-called temporary acquisition of stocks or shares (for a period not longer than one year), but only and exclusively by the financial institution, whose subject of the activity is investment in stocks or shares of other undertakings, on its own or someone else's account, and only exclusive of exercising by this institution the rights in these stocks or shares. Due to the fact that u.o.k.k. does not define the concept of "financial institution", in recognising the given undertaking as such an institution, it is required to take into account the definition included in the guidelines to z.z.k. (Chapter XI WID). The financial institutions constitute in particular the following: banks, insurance companies, national investment funds, investment or trust fund companies, pension companies and brokerage houses. This is the open catalogue, therefore, it is necessary to make the additional use of the provisions included in other legal acts, *inter alia*, k.s.h. (Art. 4 § 1 point 7) and pr. ban. (Art. 4, para. 1, point 7). The definition included in the guidelines to z.z.k. does not limit the catalogue of financial institutions to only those with their registered office in Poland, so it should be considered that the exemption applies also to financial institutions seated abroad.
To be able to make use of this exemption, the undertaking must be the financial institution and, at the same time, pursue the activity in the field of investment in stocks or shares of other undertakings. Failure to meet any of these conditions makes it impossible to apply the exemption. For example, a regular joint-stock or limited-liability company, even if the subject of its activity is investment in stocks of other undertakings, will not be able to make use of the said exemption, since it is not regarded by the President of UOKiK as the financial institution.
To be able to make use of the exemption, the financial institution may acquire or take up stocks or shares for a period of not more than one year from the date of take-up or acquisition (purchase or take-up must be made with such an intention). The buyer, wishing to make use of the exemption, from the moment of take-up or acquisition of stocks or shares till their sale may not, in principle, exercise rights in purchased stocks or shares. To be able to make use of the exemption, it is necessary to acquire or take-up with the above-mentioned intention.
The prohibition to exercise rights in stocks or shares is not, however, absolute. Two exceptions to this rule are envisaged, namely, the financial institution may exercise:

- the right to dividends, and
- rights related to preparation of resale of stocks or shares and the whole or part of the enterprise or its assets.

The definition "exercise of rights related to preparation of resale", due to the fact that it constitutes an exception to the general rule, must be interpreted strictly and understood as the exercise of rights in shares or stocks to a necessary extent, serving directly their sale. The assessment will be carried out depending on the circumstances of the given case. Certainly, however, in principle, the exercise of rights relating to preparation of resale will not be making personal decisions concerning changes in the bodies of the company whose stocks or shares were purchased by the financial institution. It should also be stressed that the above-mentioned restrictions refer both to undertakings in which the financial institution temporarily holds stocks or shares and to dependent entities of these undertakings.

If the financial institution sees that sale of shares is not possible or economically justified (for example: due to the fall in prices on the stock exchange) within one year from the date of their purchase – then it may, pursuant to Art. 23 of u.o.k.k., apply to the President of UOKiK for extending the time limit for holding stocks or shares by this financial institution. Such an application must be submitted in advance – so that the President of UOKiK could issue a decision before the end of the year from the date of purchase of stocks or shares. The Act does not specify the period by which the period of holding stocks or shares may be extended. The President of UOKiK assumes, however, that this period cannot be longer than that specified in Art. 14. point 2 of u.o.k.k.

3.4. Temporary acquisition or take-up by the undertaking of shares for the purpose of securing claims

The exemption provided for in Art. 14 point 3 of u.o.k.k. covers also temporary acquisition or take-up by the undertaking of stocks or shares for the purpose of securing claims, provided that it will not exercise rights in these stocks or shares, excluding the right to sell them. This exemption, as in the situation described in Art. 14. point 2 of u.o.k.k., applies to temporary acquisition of stocks or shares (the undertaking purchasing stocks or shares in order to secure claims is ultimately obliged to sell these stocks or shares). In this case, however, the legislator does not indicate how long the undertaking purchasing stocks or shares for the purpose of securing claims may hold them so that the exemption could be applied. Therefore, it should be stated that the buyer may hold purchased stocks or shares as long as the claim secured with them is satisfied. Also, this exemption does not indicate any particular category of undertakings representing a specific industry or pursuing the specific activity which is subject to this exemption, therefore, it should be stated that each undertaking (national or foreign) may benefit from it.

In addition, this exemption applies only to acquisition or take-up of stocks or shares in order to secure claims. In view of the fact that the provision does not indicate the form of security, it should be stated that this regards any forms of security provided for by currently binding legal regulations (including pledge or lien).

To be able to apply this exemption, the creditor, acquiring or taking up stocks or shares in order to secure claims may not exercise the rights arising from these stocks or shares. This prohibition does not concern only the execution of the right to sell them.

3.5. The intention of concentration taking place in the course of the bankruptcy proceedings

The exemption covers the intention of concentration taking place in the course of the bankruptcy proceedings, excluding cases, when the undertaking intending to acquire control is

a competitor or belongs to the capital group to which competitors of the acquired undertaking belong (Art. 14 point 4 of u.o.k.k.). The exemption in question applies to each form of concentration laid down in Art. 13, para. 2 of u.o.k.k. (i.e. the merger of two or more undertakings, the acquisition by one or more undertakings of control over other undertaking/ undertakings, establishment of one joint undertaking by undertakings and acquisition of assets). This exemption covers both the so-called liquidation bankruptcy and bankruptcy filing open to arrangements. With this exemption, the lack of the obligation of the notification should be referred exclusively to the situation in which the bankruptcy proceedings directly covers the company being the subject of concentration. The fact of belonging of such a company to the capital group, in which individual companies (other than the company being the subject of the proceedings) were covered by the bankruptcy proceedings remains invalid. The intention of concentrations taking place in the course of the bankruptcy proceedings relates both to bankruptcy proceedings conducted pursuant to national rules in this regard and with respect to undertakings with their registered office in the territory of Poland and to undertakings based abroad, to which the bankruptcy provisions applicable to the legal order of the state of where they are seated shall apply.
This exemption does refer to cases of the acquisition of control by a competitor or the undertaking belonging to the capital group to which competitors of the acquired undertaking belong. This means that if the undertaking intending to acquire control is a competitor or belongs to the capital group to which competitors of the undertaking acquired in the course of bankruptcy proceedings belong, then it may not make use of the exemption in question.

3.6. The intention of concentration of undertakings belonging to the same capital group

The exemption refers to the intention of concentration of undertakings belonging to the same capital group (Art. 14 point 5 of u.o.k.k.). This exemption applies to all forms of concentration provided for in Art. 13, para. 2 of u.o.k.k. (i.e. the merger of two or more undertakings, the acquisition by one or more undertakings of control over (an)other undertaking(s), establishment of the joint undertaking by undertakings and acquisition of assets). Its scope covers only concentrations involving only undertakings belonging to the same capital group. If concentration involves at least one undertaking not belonging to the same capital group as other participating undertakings, such concentration shall not apply the said exemption. The capital group, pursuant to Art. 4 point 14 of u.o.k.k., should be understood as all undertakings controlled directly or indirectly by one undertaking, including also this undertaking.
For the purposes of competition law, the capital group is treated as one economic body. The exemption in question does not apply in case of concentration indicated in Art. 13 para. 2 point 2 of u.o.k.k., leading to the change from joint control exercised jointly by two or more undertakings to control exercised solely by one undertaking which so far has exercised joint control. The undertaking, over which joint control is exercised, does not belong to the capital group of any undertaking exercising joint control over it.

4. Calculating the turnover for the purposes of notifying the intention of concentration

4.1. Financial year

When notifying the intention of concentration, undertakings are required to present their total turnover for the financial year, preceding the year of the notification of the intention of concentration. The financial year should be understood as the financial year laid down in

u.o.r. Not always will it be identical to the calendar year as it may begin on any day of the calendar year and therefore it does not end on 31 December of each year. In some cases (e.g. in case of change in the financial year or the commencement of the activity in the course of the calendar year), it may also be exceptionally longer or shorter than the calendar year. If merging undertakings have different accounting periods (for example, for one it is identical with the calendar year and for the other it lasts from October to September), each of them should, when calculating the turnover, use data regarding its financial year.

4.2. Turnover of the capital group

The turnover of undertakings participating in concentration involves both the turnover of undertakings directly involved in concentration and the turnover of other undertakings belonging to capital groups, regardless of whether the undertaking directly involved in concentration is the dominant undertaking of the whole group or only one of undertakings being direct or indirect dependent entity of the dominant undertaking (Art. 16, para. 1 of u.o.k.k.).

The turnover calculated for the purposes of the exemption provided for in Art. 14 point 1 of u.o.k.k. (see point I.3.2.) includes both the turnover of the undertaking over which control is to be acquired and the turnover of its dependent undertakings (Art. 16, para. 2 of u.o.k.k.).

It should be stressed that the total turnover of undertakings participating in concentration does not include the turnover made between undertakings belonging to the same capital group (§ 12, para. 1 r.o.o.).

4.3. Differences in the composition of the capital group

If on the day of the notification of the intention of concentration, the composition of the capital group differs from the composition of the group in the year preceding the notification of the intention (i.e. the capital group includes less or more undertakings), when calculating the turnover, only the current state of the capital group should be taken into account. In other words, the turnover of undertakings which on the day of the notification of the intention of concentration do not belong to the capital group any longer, should not be taken into account. On the other hand, it is necessary to take into account the turnover of undertakings belonging, at the time of the notification of the intention of concentration, to the capital group of direct participants of concentration, even if they did not belong to that capital group in the year preceding the notification of the intention of concentration.

4.4. Global turnover and turnover achieved in the territory of the RP

The Act contains the term "global turnover" (Art. 13, para. 1, point 1 of u.o.k.k.), and "turnover in the territory of the RP" (Art. 13, para. 1, point 2 and Art. 14, point 1 of u.o.k.k.). In this first case, account should be taken of the entire turnover achieved by the undertaking, regardless of its origin. The turnover achieved in the territory of the RP should be understood as the turnover derived from sale of products and services provided to undertakings or consumers in Poland. This turnover does not include revenue from the export of goods or services but only revenue from the import into the territory of Poland.

4.5 Conversion of the value of currencies into EUR

To demonstrate that the total turnover of undertakings participating in concentration in the year preceding the year of the notification exceeds the amounts laid down in Art. 13 para. 1 of u.o.k.k. and that the exemption of the notification provided for in Art. 14 point 1 of u.o.k.k does not apply to intended concentration, it is necessary to convert the turnover achieved in PLN into EUR at the appropriate exchange rate. This exchange rate, pursuant to Art. 5 of

u.o.k.k., is the average EUR exchange rate announced by NBP on the last day of the calendar year preceding the year of the notification of the intention of concentration (tables of average exchange rates are available on the website of NBP). In case of currencies other than PLN, they must be converted into PLN and then into EUR, according to the above-mentioned rules.
It should be stressed that the exchange rate at which the conversion of PLN and other currencies to EUR should be made, is the average EUR exchange rate announced by NBP on the last day of the calendar year, preceding the year of the notification of the intention of concentration. Therefore, in the event of calculating the turnover for the purposes of:

- concentration consisting in acquisition by the undertaking of a part of the assets of another undertaking (whole or part of the enterprise), if the turnover generated by these assets, in any of the two financial years preceding the notification, exceeded in the territory of the RP the equivalent of EUR 10 million (Art. 13, para. 2, point 4 of u.o.k.k.) and
- exemption regarding the intention of concentration, if the turnover of the undertaking over which control is to be acquired, did not exceed, in the territory of the RP, in any of the two financial years preceding the notification, the equivalent of EUR 10 million (Art. 14 point 1 of u.o.k.k.)

account should be taken of the same EUR exchange rate for each of the two years preceding the notification of the intention of concentration, i.e. the exchange rate as of the last day of the calendar year preceding the year of the notification of the intention of concentration.

4.6. General rule for calculating the turnover

The general rule regarding calculating the turnover was laid down in r.o.o. (§ 3). Consequently, the turnover of undertakings participating in concentration is the sum of revenue from sale of products and from sale of goods and materials, constituting the operational activity of undertakings, after deduction of granted discounts, abatements and other reductions and value added tax as well as other turnover-related taxes, if they have not been deducted, demonstrated in the profit and loss account drawn up pursuant to the accounting provisions. The sum of revenue is increased by the value of obtained specific subsidies.

4.7. Specific rules for calculating the turnover

From the general rule of calculating of the turnover, r.o.o. provides for 8 exceptions that apply to banks, insurers, national investment funds, investment funds, pension funds, brokerage houses, undertakings being natural persons and local government units. For these undertakings, the turnover is calculated as follows:

- banks (§ 4 of r.o.o.) – the turnover is the sum of amounts demonstrated in the following items of the bank's profit and loss account for the preceding year:
  - interest revenue,
  - fee and commission revenue,
  - revenue from stocks, shares and other securities,
  - the sum of the result on financial operations and foreign exchange result, if positive

drawn up pursuant to the accounting provisions for banks, after deduction of any potential value added tax related to these items, if was not deducted.

- insurers (§ 5 of r.o.o.) – the turnover is the sum of gross premiums written in the financial year, demonstrated in the technical account for the preceding year, drawn up pursuant to the accounting provisions for insurance companies.
- national investment funds (§ 6 of r.o.o.) – the turnover is revenue from investments, excluding the share in the net financial result, demonstrated in the profit and loss

account for the preceding year, drawn up pursuant to the accounting provisions for national investment funds.

- investment funds (§ 7 of r.o.o.) – the turnover is the amount equal to the net asset value of the fund determined as of the end of the preceding year, pursuant to the accounting provisions for investment funds.
- pension funds (§ 8 of r.o.o.) – the turnover is the amount equal to the net asset value of the fund determined as of the end of the preceding year, pursuant to the provisions governing the organisation and functioning of pension funds and the accounting provisions for pension funds.
- brokerage houses (§ 9 of r.o.o.) – the turnover is the sum of revenue from brokerage activities demonstrated in the profit and loss account for the preceding year, drawn up pursuant to the accounting provisions for brokerage houses.
- undertakings being natural persons:
  - in case of the undertaking referred to in Art. 4 point 1 of u.o.k.k, which does not draw up the profit and loss account pursuant to the accounting provisions – the turnover is the sum of revenue obtained in the preceding year from sale of products and from sale of goods and materials, after deduction of granted discounts, abatements and other reductions and tax on goods and services as well as other turnover-related taxes, if they have not been deducted. The sum of revenue is increased by the value of obtained specific subsidies (§ 10 para. 1 of r.o.o.),
  - in case of the undertaking being a natural person, referred to in Art. 4 point 1 lit. c of u.o.k.k – the turnover is the turnover achieved by undertakings over which this person has control within the meaning of Art. 4 point 4 of u.o.k.k (§ 10 para. 2 of r.o.o.).
- local government units (§ 11 of r.o.o.) – the turnover is revenue obtained by budgetary units of communes *(pl. gmina*), poviats and voivodeships and contributions from budgetary entities and auxiliary entities of budgetary units of communes, poviats and voivodeships.

4.8. Method of calculating the turnover depending on specific types of concentration

The specific rules for calculating the turnover apply to concentrations consisting in acquisition of a part of assets and to concentrations consisting in taking control over the management of the investment or pension fund. If concentration consists in purchase of a part of assets, in calculating the turnover only the turnover achieved by this part is taken into account. It is assumed that the turnover of undertakings belonging to the capital group including the undertaking, part of whose assets or enterprise is acquired, amounts to zero (§ 12, para. 2 of r.o.o.). In addition, it should be taken into account that as the financial year in case of the turnover generated by the undertaking's assets, the financial year of the organisational unit to which the assets belong is assumed.

In case of concentration consisting in the acquisition of management of the investment or pension fund:

- the turnover is the sum of revenue of investment fund companies or pension fund companies and of the amount of net assets of funds managed by these companies (§ 12, para. 4 point 1 of r.o.o.),
- the turnover, referred to in Art. 14 point 1 of u.o.k.k, does not include revenue of the investment fund company or pension fund company from which management is acquired (§ 12, para. 4 point 2 of r.o.o).

5. Concentrations with the Community dimension

5.1. The rule of the EC's exclusive competence to consider concentrations with the Community dimension

Some concentrations, despite meeting thresholds regarding the achieved turnover and other conditions laid down in u.o.k.k., shall not be subject to the obligation to notify to the President of UOKiK. This refers to the so-called concentrations with the Community dimension. In accordance with the principle of the "one-stop shop", referred to in Regulation 139/2004 governing control of concentrations of undertakings by the EC, the intention of these concentrations should be notified to the EC only. Therefore, only concentrations not covered by the scope of this regulation are subject to the jurisdiction of the Member States, including the President of UOKiK.

5.2. Community thresholds

Concentration is of the Community nature (Art. 1, para. 2 of Regulation 139/2004) if:

- the total global turnover of all participants exceeds EUR 5 billion; and
- the total turnover on the EC scale of each of at least two participants is more than EUR 250 million.

The exception is a situation when each participant achieves more than two thirds of its total turnover on the EC scale within one Member State (the so-called rule of two thirds). In such a situation, concentration, despite achieving the above thresholds, does not have the Community dimension.

Concentration has also the Community dimension where the following conditions are met jointly (Art. 1, para. 3 of Regulation 139/2004):

- the total global turnover of all participants is more than EUR 2,5 billion;
- in each of at least three Member States, the total turnover of all participants exceeds EUR 100 million;
- in each of at least three Member States included for the purpose of the above-mentioned point, the total turnover of each of at least two participants exceeds EUR 25 million; and
- the total turnover on the EC scale of each of at least two participants is over EUR 100 million.

Similarly as before, the exception is a situation when each participant achieves more than two thirds of its total turnover on the EC scale within one Member State (the rule of two-thirds). Then, this concentration, despite achieving the above thresholds, also does not have the Community dimension.

5.3. Definition of Community concentration

Whether or not the intention of concentration is subject to the notification to the EC, is also determined by the definition of concentration included in Art. 3 of Regulation 139/2004. We are dealing with Community concentration in the event of:

- merger of two or more previously independent undertakings (the concept of the undertaking within the meaning of Regulation 139/2004 should be regarded in principle as equivalent to the definition of the undertaking within the meaning of u.o.k.k.) or parts of enterprises;
- acquisition, by one or more persons already controlling at least one enterprise or by one or more enterprises, of direct or indirect control of the whole or part of one or more other enterprises, either by purchase of securities or assets, by contract or by any other means;

- establishment of the joint undertaking performing all the functions of the autonomous economic entity on a permanent basis.

Transactions not included in this scope are not subject to the notification to the EC. In the absence of the obligation to notify the intention of concentration to the EC due to non-fulfilment of the conditions relating to the definition of concentration, despite fulfilling the condition regarding the amount of the turnover provided for in Art. 1 of Regulation 139/2004, such a transaction may fulfil the conditions laid down in u.o.k.k., obliging to notify the intention of such concentration. In this case, in principle, the obligation to notify the intention of concentration to the President of UOKiK arises.

II. PROCEDURE OF NOTIFYING THE INTENTION OF CONCENTRATION TO THE PRESIDENT OF UOKiK

1. Undertakings obliged to notify the intention of concentration

1.1. Parties to the proceedings on concentration

The notification of the intention of concentration is made only by its active participants, i.e. those who merge, acquire control, purchase the assets, establish a new undertaking. Only those undertakings have the status of the party to the proceedings before the President of UOKiK. Passive participants of concentration, i.e. those over which control is being acquired or those which sell the assets (subject of the transaction), do not have the rights of a party to such proceedings. Thus, they are not informed on the initiation of the anti-monopoly proceedings on concentration, are not informed of its course, are not recipients of the President of UOKiK's decision and are not entitled to any legal remedies.

It should be noted, however, that information on conducted anti-monopoly proceedings on concentration is placed, on an ongoing basis, on UOKiK's website (see: http://www.uokik.gov.pl/koncentracje.php). UOKiK's website contains also the ‚decisions in concentration cases (see: http://www.uokik.gov.pl/decyzje_prezesa_uokik2.php). Entities interested in information on currently conducted proceedings on concentration as well as decisions issued in these cases may, therefore, follow them on the above-mentioned websites.

Entities obliged to notify the intention of concentration, i.e. parties to the proceedings on concentration, are defined in u.o.k.k. separately for each of the facts mentioned in Art. 13 para. 2 of the Act (the so-called forms of concentration).

1.2. Merging undertakings

In case of concentration consisting in the combination of two or more separate undertakings (Art. 13 para. 2, point 1 of u.o.k.k., more on the merger of undertakings see point. I.2.2.), the notification of its intention should be made by all combining undertakings (Art. 94, para. 2, point 1, u.o.k.k.). This rule applies regardless of the method of the combination (incorporation or merger).

1.3. The acquisition of control

In case of concentration consisting in the acquisition – by acquiring or take-up of stocks, other securities, shares or in any other way - of direct or indirect control over one or more undertakings by one or more undertakings (Art. 13, para. 2, point 2 of u.o.k.k., more on the acquisition of control see point. I.2.3.), the notification of its intention should be made by the undertaking acquiring control (Art. 94, para. 2, point 2 of u.ok.k.). Usually, this is one undertaking. However, the situation of the acquisition of the so-called joint control by two or more undertakings will be different. For example, if the undertaking A and undertaking B acquire shares/stocks giving them 50% of votes in the bodies of the company C, the notification of the intention of concentration should be made by all undertakings which will exercise joint control, i.e. both the undertaking A and undertaking B.

If, however, the undertaking, which exercises sole control, disposes of its partially for the benefit of another undertaking, as a result of which they will exercise joint control (the so-called change in the quality of control will take place, e.g. the undertaking A holds shares giving it 100% of votes in the bodies of the company C and then sells to the undertaking B shares giving 50% of votes in this company), the obligation to notify the intention of

concentration is a sole responsibility of the undertaking which acquires joint control. The undertaking, which previously exercised sole control, is not obliged to notify the intention of such concentration. The undertaking, exercising joint control, also is not obliged to notify the intention of concentration in the event of change of the undertaking with which this joint control is exercised. The obligation to notify the intention of concentration in such circumstances is a sole responsibility of the undertaking that intends to accede to joint control. E.g. the undertaking A and undertaking B control the company C, by holding shares/stocks giving them 50% of the votes in the bodies of this company. However, the undertaking B intends to sell its package of shares/stocks to the undertaking D. In such a situation, the obligation to notify is a sole responsibility of the undertaking D.

1.4. Creation by undertakings of the joint undertaking

In case of concentration consisting in establishing by undertakings of the joint undertaking (Art. 13 para. 2, point 3 of u.o.k.k., more on establishment of the joint undertaking see point. I.2.4.), the notification should be made jointly by all undertakings participating in this venture (Art. 94, para. 2, point 3 of u.o.k.k). This means that for determination of the existence of the obligation to notify this form of concentration it is not relevant how founders divide among themselves votes in the joint undertaking, i.e. how many votes they will ultimately have. Even if it turns out that one of founding undertakings will have sole control over the joint undertaking, the obligation to notify will also be a responsibility of other founders. On the other hand, in case when establishment of the joint undertaking involves the entity not being the undertaking (more on entities treated as undertakings see point I.1.2), this entity is not obliged to notify. The obligation to notify the intention of concentration applies to undertakings only.

1.5. Acquisition by the undertaking of a part of assets of another undertaking

In case of concentration consisting in acquiring by the undertaking of a part of assets of another undertaking (the whole or part of the undertaking) (Art. 13, para. 2, point 4 of u.o.k.k., more on concentration consisting in purchase of a part of assets see point I.2.5.), the notification of its intention should be made by the undertaking purchasing these assets (Art. 94, para. 2, point 4 of u.o.k.k.).

1.6. The notification of the intention in a situation when the obligation of the notification rests upon more than one undertaking

In the event when the obligation of notification rests upon more than one undertaking (merger, acquisition of joint control, establishment of the joint undertaking, joint purchase of assets by several undertakings), obliged undertakings may notify the intention of concentration jointly or separately, whereby, regardless of the number of entities obliged to notify we always deal with one concentration application and one proceedings. Of course, submission of one, joint application is practically justified. Otherwise, after receiving the notification from only one undertaking and after stating that in the same proceedings the notification should be made also by other undertakings, the President of UOKiK waits for the notification to be made by other obliged undertakings. In such a situation, the time limit for consideration of concentration by the President of UOKiK does not run pursuant to Art. 96, para. 3 of u.o.k.k. (more on calculating time limits see point II.3.11). It should be stressed that, in a situation of concentration, where there is more than one party to the proceedings, one fee is charged because the fee is paid on the application for the initiation of the anti-

monopoly proceedings, not on the number of parties to the proceedings (more on fees on the application for the notification of the intention of concentration see point II.3.6.).

1.7 Concentrations made by means of dependent entities

In principle, the intention of concentration is notified by the undertaking directly participating in it. However, where the dominant undertaking implements a concentration through at least two dependent undertakings, the intention of concentration is notified by the dominant undertaking (Art. 94, para. 3 of u.o.k.k.), i.e. the first entity in the capital group structure, which may be defined as the dominant entity – directly or indirectly – in relation to undertakings directly involved in concentration. This applies only to a situation where none of dependent undertakings themselves may be assigned the acquisition of control (e.g. undertakings A, B and C, being entities dependent on the undertaking X, acquire shares in the company Y, giving them 30% of votes in the bodies of the company).

In a situation where at least two dependent entities are involved in concentration, whereby one of them may be assigned to acquire control, it is under the obligation of notification (e.g. undertakings A and B, controlled by the undertaking C purchase shares in the company X, whereby A purchases shares giving it 80% of votes in the bodies of X and B purchases shares giving it 20% of votes in the bodies of X. In such a situation, the notification should be made by the undertaking A).

If at the time of submitting the notification, it is not certain yet which of entities belonging to the group of the buyer will be the direct participant of concentration or the agreement between parties provides for the possibility of the change in this regard or free indication of the direct buyer by one of parties not before the stage of closing the concentration, the notification may be submitted by this entity which in any case will control the final direct participant of concentration from the part of the buyer.

1.8 Multi-stage concentrations

It happens that concentration consists of more than one stage (e.g. the acquisition of sole control may precede exercising joint control; sole control may be exercised for some period by the undertaking other than ultimate one, etc.). In such circumstances, it is possible to notify only the last stage to the President of UOKiK. However, it is required for this purpose that, firstly, on the day of the notification of the intention of concentration it was certain that the intermediate stage is only temporary (in practice, this means that there should be an agreement of undertakings, specifying these issues). Secondly, the duration of the temporary stage should not, in principle, exceed one year.

1.9 Concentrations made by means of special-purpose companies

Derogation from the principle according to which the notification of the intention of concentration is submitted by its direct participant, exists also in case of transactions in which the direct participant of concentration is the so-called special-purpose company. Special-purpose companies are usually undertakings established specially for implementing or settling a concentration and often they do not pursue any economic activity. It also happens that at the time of making the notification, they may not function yet. Special-purpose companies are not active participants in the transaction, because it is assumed that there are not centres in which decisions are made. In such situations, the notification may be submitted by the undertaking being the dominant undertaking in relation to this special-purpose company (or undertakings exercising joint control over the special-purpose company), to which making the “intention” may be ascribed. In this case, the undertaking submitting the notification of the intention of

concentration should prove, however, that the entity through which concentration is to be implemented is such a special-purpose company.

2. Moment in which the intention of concentration should be notified

The concept of the intention of concentration is a legal category. Thus, all those undertakings which meet the statutory criteria obliging them to notify the intention of concentration to the President of UOKiK should be regarded as undertakings having the intention of concentration.

In practice, a problem often appears as for the stage of preparing concentration at which its intention should be notified. Of course, the obligation of the notification to the President of UOKiK refers to concentration and not to the fact of its implementation. In case of e.g. concentration consisting in creating of the joint undertaking in the form of a limited liability company or joint stock company, the entry in the register is regarded as the last operation required for establishment of this type of entities (Art. 163 and Art. 306 of k.s.h.). This entry is of constitutive nature, which means that the company is established at the time of its making and at this time it obtains a legal personality. The intention of concentration, consisting in creation of the joint undertaking should therefore be notified no later than prior to making the entry in the register.

In addition, the parties to concentration should refrain from implementing a concentration, pending the consent of the President of UOKiK or the expiry of the time limit for considering the case (Art. 97, para. 1 of u.o.k.k.). The exception to this rule is the implementation of a public offering for purchase or exchange of stocks, notified to the President of UOKiK, if the buyer does not exercise the voting right resulting from purchased stocks or exercises it only to maintain the full value of its capital investment or to prevent serious damage likely to occur to undertakings participating in concentration (Art. 98 of u.o.k.k.).

Failure to refrain from implementing a concentration, pending the consent of the President of UOKiK or the expiry of the time limit for considering the case may result in sanctions (more on sanctions related to infringement of the provisions on concentration see point III).

It should be stressed that the intention of concentration should be real and precise. For this reason, the notifications based solely on the subjective belief of the undertaking or on non-binding negotiations are treated as untimely and subject to return. Depending on the circumstances of specific cases of concentration, u.o.k.k. allows to assume that various legal or factual acts may constitute events with which this Act involves the emergence of the obligation of the notification. The most frequent evidence of the existence of the intention of concentration are the following: conditional agreements, preliminary agreements, letters of intent or public invitation to sell stocks in case of public companies (see also point II 3.4.6.).

On the other hand, draft agreements, statements of the undertaking's managing authorities, announcements or press statements are not regarded as sufficient to demonstrate the intention of concentration. The result of the untimely notification of the intention of concentration will be its return (more on the return of the notification see point II.3.13.1).

3. Proceedings before the President of UOKiK

3.1. Where the notification of the intention of concentration of undertakings is to be submitted

All notifications of the intention of concentration are considered by the President of UOKiK – Head Office in Warsaw:
Office of Competition and Consumer Protection
Department of Concentration Control
Plac Powstańców Warszawy 1
00 – 950 Warsaw
phone: (+48 22) 556 01 22
e-mail: koncentracje@uokik.gov.pl or dkk@uokik.gov.pl
The notification may be made in person, by post or courier. If the notification of the intention of concentration is submitted to the Branch Office of UOKiK, it will be forwarded, according to the competence, to the Head Office of UOKiK in Warsaw. Due to the need to send the application to the Head Office, incorrect submission of the application may affect the duration of the proceedings on concentration and issuance of a decision in a later, although, obviously, legal time.

3.2. Possibility of consulting, with the employees of UOKiK, of issues related to notifying the intention of concentration

In the course of the proceedings before the President of UOKiK, the principle of written form is binding. In situations requiring clarification of particularly complex issues, the President of UOKiK permits the possibility of their verbal presentation by the notifying entity at a specially organised meeting with authorised representatives of the President of UOKiK (this possibility also exists prior to the initiation of the proceedings). Undertakings or other interested parties, in justified cases, also prior to the institution of the proceedings may apply to UOKiK for presenting the interpretation of the provisions of u.o.k.k., or relevant clarifications, both by phone [phone (+48 22) 556 01 22] and in writing (by mail at the above-mentioned address of the Office or by e-mail to the address: koncentracje@uokik.gov.pl).

3.3. General remarks regarding the application for the notification of the intention of concentration of undertakings

The notification of the intention of concentration constitutes the application for the initiation of the anti-monopoly proceedings on concentration. The notification is submitted by undertakings referred to in Art. 94, para. 2 of u.o.k.k. (more on this issue see also point II.1).
If the notification is submitted by representatives or proxies of the above-mentioned undertakings, they submit appropriate documentation (an up-to-date extract from the National Court Registry, power of attorney).
The list of information and documents to be included in the notification, the so-called WID, constituting an attachment to r.z.z.k., consists of paper and electronic version (e.g. on CD or sent by e-mail to the address koncentracje@uokik.gov.pl or dkk@uokik.gov.pl). Letters submitted by the undertaking in the course of the proceedings, which supplement the notification of the intention of concentration, should also be submitted in electronic version. The complete application is the original notification and supplement(s) thereto.
The notification of the intention of concentration should be compliant with the facts existing as of the date of its submission. However, it should be remembered that the undertaking is obliged to inform the President of UOKiK of any changes in the facts and new circumstances of the case, which will occur after submitting the application. The lack of such information

may result in imposing significant financial sanctions on the undertaking or even in repealing and amending the decision (more on this issue see point III).
Amounts of money contained in WID are given in thousands of PLN. Conversion into PLN of the values expressed originally in EUR or any other foreign currency is made according to the principles laid down in Art. 5 of u.o.k.k., i.e. according to the average exchange rate of foreign currencies announced by NBP on the last day of the calendar year preceding the year of the notification of the intention of concentration or of imposition of a fine (tables of average exchange rates are available on the website of NBP).

3.4. Specific issues regarding preparation of the notification of the intention of concentration

3.4.1. Chapter I WID

In this chapter, it is necessary to provide basic information on undertakings directly participating in concentration, i.e.:

- in case of the merger – both merging entities (active undertakings),
- in case of the acquisition of control – both the undertaking acquiring control (active undertaking) and that over which control is acquired (passive undertaking),
- in case of establishment of the joint undertaking – all entities establishing this undertaking (active undertakings) and the undertaking being created (information which is already known about this undertaking) or in a situation when the joint undertaking is created on a basis of the existing company, this company (passive undertaking),
- in case of purchase of a part of the undertaking's assets – both the entity purchasing these assets (active undertaking) and the undertaking whose assets are purchased (passive undertaking).

The information contained in this chapter pertain to, *inter alia*, data identifying these undertakings, authorities authorised to represent them and the subject of the actual activity. When referring to the subject of the activity, it should be stressed that undertakings should present only this scope of activity which they actually deal with. The full range disclosed in the appropriate register (e.g. KRS) should not be presented.

3.4.2. Chapter II WID

In this chapter, the detailed description of intended concentration is included, which covers, *inter alia*, indication of the form of concentration, reasons and purpose of concentration, envisaged effects of concentration and its impact on the relevant market. Undertakings should present this information in a precise and exhaustive manner, regardless of whether or not concentration affects any relevant market.

3.4.3. Chapter III WID

This chapter contains information regarding the turnover of undertakings participating in concentration (more on calculating the turnover see point I.4) by demonstrating that concentration is subject to the notification to the President of UOKiK (turnover thresholds from Art. 13, para. 1 of u.o.k.k. have been met, the exemption from Art. 14, point 1 of u.o.k.k. is not applicable and in the acquisition of a part of the assets of another undertaking pursuant to Art. 13 para. 2, point 4 of u.o.k.k.). It should be emphasised that the above information should also illustrate the turnover achieved separately by each of participants in concentration (each of capital groups).
It is also required to indicate that concentration is not subject to the notification to the EC pursuant to the Regulation 139/2004. This is of key importance because in a situation when

the intention of concentration is subject to the notification to the EC, the President of UOKiK has no competence to consider it (more on this issue see point I.5).

3.4.4. Chapter IV WID

In this chapter, it is required to provide information on the ownership and control within the capital group for each undertaking directly participating in concentration (more on the capital group see point I.3.6.). It is required to provide the listing of all undertakings belonging to capital groups within the meaning of Art. 4 point 14 of u.o.k.k., which include undertakings directly participating in concentration and to indicate formal and actual grounds for direct or indirect control. This also applies to capital groups established by natural persons. This information should be presented in a descriptive form and in a form of graphs, graphical charts or tables.

Separately, it is requested to provide information regarding undertakings with their registered office in the territory of the RP and achieving the turnover in the territory of Poland, with their full name, address and subject of the actually pursued economic activity (bearing in mind the observations presented in Chapter I WID).

In addition, in this chapter it is required to provide information on the characteristics of capital groups (in a descriptive form), to which undertakings directly participating in concentration belong.

3.4.5. Chapter V WID

In this chapter, for each undertaking directly participating in concentration and for each undertaking belonging to the capital group of the active undertaking(s) and for each undertaking belonging to the group established by the passive undertaking, it is required to prepare a list and a brief description of concentrations implemented in the last two years. This information should be presented with respect to all transactions affecting the territory of Poland (more on effects in the territory of Poland see point I.1.4.) including those subject to the notification to the President of UOKiK with respect to concentrations consisting in the notification to the EC (more on concentrations subject to the notification to the EC see point I.5) and authorities of the Member States. In any case when the notification took place, it is required to indicate the authority, the date and reference number of the decision or other decision terminating the proceedings.

3.4.6.Chapter VI WID

This chapter indicates documents to be attached to the notification of the intention of concentration, in order to confirm the information contained in Chapters I to V. Documents listed in this chapter include, *inter alia*:

- the up-to-date copy of the National Court Register or other register of direct participants of concentration (point 6.1 of WID),

It is assumed that this copy should bear a date not earlier than one month before submitting the application.

- copies of final or most recent versions of agreements or documents identifying acts in law, on a basis of which concentration is to be implemented (point 6.2 of WID).

In particular, the notification of the intention of concentration may be submitted on a basis of a conditional agreement, which may be implemented provided that the President of UOKiK issues a decision expressing the consent to the implementation of a concentration. The experiences of the President of UOKiK show that an agreement with the condition precedent is one of the most common bases for the emergence of the obligation to notify the intention of concentration.

It is also possible to notify the intention of concentration on a basis of a concluded preliminary agreement. It has only an obligation, not disposition effect. A similar situation will take place in the event of a framework agreement.
In case of concentrations having the form of a merger implemented pursuant to the provisions of k.s.h., usually the document being a basis for the notification of the intention of concentration is an agreement on the merger. In addition, documents to be submitted in case of the merger, may be resolutions on the merger passed by meetings of shareholders or general meetings of shareholders of each merging undertaking.
A letter of intent concerning the intention of concentration may also constitute a document identifying the acts in law, on a basis of which concentration is to be implemented.
In case of concentration consisting in establishment of the joint undertaking, this document may be the articles of association in relation to a limited liability company or the statute signed by founders in relation to a joint stock company.
In addition, the document identifying the act in law, on a basis of which concentration is to be implemented, is an invitation to sell or exchange stocks.
On the other hand, draft agreements, statements of the undertaking's managing authorities, announcements or press statements are not regarded as sufficient to demonstrate the intention of concentration.

- copies of approved annual financial statements of undertakings participating in a concentration from the last two preceding years (point 6.5 of WID)

Undertakings being in possession of consolidated statements of entire capital groups should submit such statements.
Undertakings not drawing up consolidated financial statements submit, for each entity of the capital group, *inter alia*, the balance sheet, the profit and loss account.
Foreign undertakings submit additionally a sworn translation of provided documents.
If the undertaking still does not have the financial statement for the last financial year, it is required to present reliable estimates regarding financial results for this year and to explain the reason for failure to submit the statement. The missing financial statement should be provided as soon as possible, if it is drawn up in the course of the proceedings.

- copies of analyses, reports, studies and research prepared for members or for a meeting of the management board, supervisory board or general meeting or meeting of shareholders in order to assess or analyse concentration in terms of competitive conditions, actual and potential competitors and also conditions existing in the market (point 6.8 of WID)

In particular, it refers to copies of economic, financial and market analyses, on a basis of which decisions on its implementation were made, i.e. the impact of concentration on the undertaking's market and financial position was given a positive assessment. It refers both to studies drawn up specially for the assessment of the planned transaction and to materials prepared/obtained originally for other purposes, which substantially contributed to such an assessment. Experience shows that each major transaction is preceded by more or less thorough analyses.

- list of publicly available sources of information about the markets affected by intended concentration, in particular industry periodicals, statistics and analyses made available (also for a fee) to third parties, websites containing information useful for the assessment of the notified intention of concentration (point 6.9 of WID)

The applicant should provide a list of publicly available sources of information about the markets affected by intended concentration. It is necessary to stress the fact that this list applies only to markets affected by concentration and not e.g. to all markets in which participants in concentration operate.

3.4.7. Chapter VII WID

In this chapter, it is required to identify relevant markets and then to indicate markets affected by concentration.

In point 7.1 of WID, it is required to indicate product markets on which participants of concentration operate (undertakings participating in concentration are not individual companies but entire capital groups) separately for the geographic market covering the territory of Poland or a part thereof and the wider geographic market (regional, European, global).

In determining the relevant market, it is necessary to use the definition included in Art. 4 point 9 of u.o.k.k. Reference to scope of activities of individual companies forming capital groups is not considered as indication of the relevant market. For example, in case when within the capital group a dozen or so companies operate in the beer sale market, it is required to indicate that the capital group operates in the beer sale market.

The obligation of the preliminary determination of the relevant market rests upon the undertaking submitting the notification, however, in the course of the conducted proceedings, it is subject to verification by the President of UOKiK. When determining relevant markets, it is also possible to use the jurisdiction of the President of the Office (decisions by the President of the Office concerning concentration are published on the website of UOKiK) and of the EC (EC decisions on concentration are published on its website).

In this chapter, it is also required to indicate relevant markets affected by concentration in the horizontal and vertical manner, on a basis of the definitions contained therein.

The horizontal impact means that undertakings participating in concentration are, firstly, competitors, i.e. they operate in at least one the same relevant market (e.g. both are beer producers) and, secondly, their share in this market exceeds 20%. Undertakings participating in concentration are entire capital groups to which direct participants of concentration belong.

On the other hand, the vertical impact means that between undertakings participating in concentration supplier-customer relationships are present or may potentially be present (e.g. the undertaking acquiring control is a beer producer while the undertaking over which control is being acquired pursues the activity related to wholesale trade in beer; the undertaking company is a manufacturer of metal sheets used by the undertaking, over which control is being acquired, to produce its cars) and at the same time their share at one of the trade levels exceeds 30% (the most common example of different levels of trade is wholesale and retail).

3.4.8. Chapter VIII WID

In this chapter, it is required to provide, in accordance with the WID points, the basic information about the relevant markets affected by concentration in a horizontal or vertical manner. The obligation to provide such information exists only in case where concentration has such an impact. This information must be provided separately for each of the relevant markets affected by concentration in a horizontal or vertical manner and separately for each of the last two years, preceding the year of submitting the notification of the intention of concentration. Data referred to in this chapter should be presented for the full calendar year and not for the financial year, in case where it does not agree with the calendar year. It is required to provide information regarding the size of the market (in value and in quantity), sales volume and market share of undertakings participating in concentration (in value and in quantity), the importance of foreign trade, major competitors, major customers and suppliers. In case where the undertaking does not have the full data, it should be presented on a basis of estimates.

3.4.9. Chapter IX WID

In this chapter, it is required to provide, in accordance with the WID points, the detailed description of relevant markets affected by concentration in a horizontal and vertical manner (the structure of supply and demand, the estimated total cost of market entry, legal barriers to market entry, such as concessions, permissions or any standards, restrictions resulting from patents, know-how and other exclusive rights in the area of intellectual and industrial property in those markets and restrictions in obtaining licenses for such rights, conducted research and development, works, cooperative agreements and membership in unions of undertakings). As in case of Chapter VIII, the obligation to provide such information exists only in case when there are relevant markets affected by concentration in a horizontal or vertical manner.

3.4.10. Chapter X WID

In this chapter, it is required to provide remaining information about markets and effects of concentration, which include, *inter alia*:

- information on relevant markets affected by concentration in a conglomerate arrangement within the meaning of the definition provided for in this chapter (the conglomerate market is the market where there are no horizontal or vertical relationships and at the same time the share of one of participants to concentration exceeds 40%) with indication of the estimated value of this market and share of capital groups in it.

In this chapter, it is necessary to limit only to indication of relevant markets in the conglomerate arrangement, covering, in geographical terms, the territory of Poland or a part thereof (e.g. local, national, regional, European or global market). In each case, the obligation of information under point 10.1. of WID concerns only the market showing the geographical connection with the territory of Poland.

- information whether the intention of concentration should be notified to another national or supranational competition protection authority, names of authorities and dates of the notifications, if already made and dates of positions of these authorities, if already taken by them (10.2.2. of WID),
- information about positive effects of concentration offsetting its negative effects on competition, whose existence may allow the President of UOKiK to issue a decision pursuant to Art. 20 para. 2 of u.o.k.k., (in point 10.3.1. of WID, Art. 19 para. 2 of u.o.k.k. was indicated by mistake).

It should be stressed that the information required by this provision should be obligatorily provided by undertakings in a situation where notified concentration leads to substantial restriction of competition but there are positive effects offsetting the negative impact of this transaction on competition, in particular, the conditions referred to in Art. 20, para. 2 of u.o.k.k.. Where concentration leads to substantial restriction of competition, failure to provide such information may have an adverse effect on the entity notifying the intention of concentration. The burden of demonstrating in such a situation that concentration would have positive effects which would compensate its negative effects on competition rests upon the applicant.

- information stating that intended concentration will contribute to economic development or technical progress will have a positive impact on the national economy and other positive effects (10.3.2 of WID).

The above information, as opposed to the information required in point 10.3.1 of WID, may be submitted by undertakings in any situation, i.e. even if concentration does not lead to substantial restriction of competition.

The notification should be signed by the person(s) representing the undertaking(s) obliged to submit the notification in accordance with the information contained in KRS or by duly authorised proxies, with indication of the place and date of preparing WID.

3.5. Completeness of the application

The information provided by the undertaking in WID must be true and complete (§ 4 of z.z.k.). The President of the Office may, upon request of the undertaking making the notification, regard the notification as complete and true despite the lack of information or documents covered by WID in two cases (§ 5 and § 6 of z.z.k.).
Firstly, if the notifying undertaking does not have access to the whole or part of such information or documents and actions taken by it in order to obtain them did not bring any result, whereby this undertaking must render plausible the due care in taking actions aimed at obtaining such information or documents. In such a situation, the undertaking submitting the notification, however, is obliged to provide estimates and indicate sources and grounds for estimates made. If in the course of the proceedings, the undertaking obtains the missing information or documents, it shall send it without delay to the President of UOKiK. The undertaking making the notification may not invoke the lack of access to the information or documents regarding the capital group to which it belongs.
Secondly, the President of the Office may regard the notification as complete, if the undertaking making the notification renders plausible that the missing information or documents are not objectively necessary to issue a decision on the notified intention of concentration. This does not apply, however, to the notification of the intention of concentration of undertakings being competitors within the meaning of Art. 4 point 11 of u.o.k.k.. In such a case, regarding the notification as complete and correct, however, does not exempt the undertaking from the obligation to submit, upon request of the President of the Office, information or documents, if in the course of the proceedings they became necessary to issue a decision on the notified intention of concentration.
The President of the Office examines the completeness of the notification of the intention of concentration made by the undertaking. In case when the notification does not meet formal requirements and does not contain the information required by law, the President of the Office may return such a notification of the intention of concentration (Art. 95 para. 1 point 2 of u.o.k.k.). In such a situation, if undertakings still wish to implement a concentration, they should resubmit the notification of the intention of concentration (new application). However, if the submitted application does not contain only some information required by law or additional information is needed, the President of the Office may apply to undertakings for the appropriate completion of the application. At the same time, the President of the Office sets a time limit to complete the application. If the undertaking does not complete the application within the stipulated time limit, the President of the Office may return it. In case when the undertaking is not able to complete the application within the fixed time limit, it may apply to the President of the Office for its extension. The President of the Office assesses such applications and if considers them reasonable, may extend the time limit for the completion.
It should be emphasised that, in case of request by the President of the Office to complete the application, the notification of the intention of concentration is the original application with the supplement(s). It should also be noted that in the event of a request by the President of the Office to complete the application, the time limits of waiting for the completion are not

included in the time limit provided for issuance of a decision (more on calculating time limits in the anti-monopoly proceedings on concentration see point II.3.11).

3.6. Fees related to the notification of the intention of concentration of undertakings

The application for the initiation of the anti-monopoly proceedings on concentration is subject to a fee amounting to PLN 5,000, which should be paid by the applying undertaking in cash at the cashier's office or to the bank account of the tax office competent for its registered office [competence of individual tax offices results from the Regulation of the Minister of Finance of 19 November 2003 *on the territorial range of activities and seats of the tax offices heads and tax chambers directors* (Journal of Laws No. 209 item 2027 as amended)].
The foreign undertaking pays the fee at the 2nd Tax Office Warszawa-Śródmieście.
In the event of concentration, where there is more than one party to the proceedings, one fee is paid because the fee is paid on the application for the initiation of the anti-monopoly proceedings and not on the number of parties to the proceedings.
The proof of payment must be attached to the application of the notification of the intention of concentration. If the fee is not paid together with the submitted application, the President of UOKiK will request the applicant to pay the fee within 7 days, instructing it that failure to pay the fee will leave the application without consideration. If the notification is made by proxies of undertakings, it is required to submit the proof of payment of the stamp duty amounting to PLN 17 (point IV of annex to o.s.), on each of the power of attorney (relationship), which should be paid in cash or to the bank account of the tax authority (Mayor, President of the city), competent for the place of submission of the document (Art. 12, para. 2, point 2 of o.s.). In case of submitting the power of attorney at UOKiK, it is the Office of the Capital City of Warsaw for Śródmieście District, ul. Nowogrodzka 43, 00-691 Warsaw. As indicated above, the fee is charged on each power of attorney. In case of appointing more than one proxy by the party, it is necessary to pay the appropriate multiple of the above-mentioned amount (e.g. in case of appointing three proxies, it will be 3 x PLN 17 = PLN 51).
The paid power of attorney should also be presented when a person not being previously authorised to represent the undertaking and whose power of attorney is not in the case files, would like, for example, to get access to case files or receive a decision in person.

3.7. Evidence in the anti-monopoly proceedings on concentration

Pursuant to Art. 83 of u.o.k.k. to matters not regulated by this Act, the provisions of k.p.a shall apply, subject to Art. 84 of u.o.k.k., which envisages that to matters regarding the evidence in the proceedings before the President of UOKiK, Arts. 227-315 of k.p.c shall apply accordingly. Therefore, the assessment of the evidence takes place according to the evidence proceedings rules provided for in the civil proceedings. In connection with that, it is mainly the responsibility of parties to the proceedings (the applicants), pursuant to Art. 232 file 1 of k.p.c., to indicate the evidence to establish facts from which they derive legal effects.
The most common evidence in the anti-monopoly proceedings on concentration is the documentary evidence. It should be stressed that the Act contains its own definition of the document. Pursuant to Art. 51, para. 1 of u.o.k.k., the documentary evidence in the proceedings before the President of the Office may be only the original document or a copy certified by a public administration authority, notary, lawyer, legal advisor or authorised employee of the undertaking. It should be remembered that if a copy of the document is submitted, each page of it should be certified separately. In addition, the document should be drawn up in Polish. However, if the document has been drawn up in a foreign language, it is

also required to submit the translation of this document, or its part constituting the evidence in the case, into Polish, certified by a sworn translator.
From the practice of the anti-monopoly authority it results that submission of documents which do not comply with the above-mentioned requirements is one of the most common formal infringements (e.g. the notification was accompanied by documents that have not been certified by a public administration authority, notary, lawyer, legal advisor or authorised employee of the undertaking; the notification was accompanied by translations of documents drawn up in a foreign language, which have not been certified by a sworn translator) which results in requesting the undertaking to resubmit documents in the form required by law. In order to collect the evidence needed for the assessment of the intention of concentration of undertakings, the President of the Office may also execute, in undertakings, an inspection referred to in Chapter 5, Section VI of u.o.k.k.. Such an inspection does not need to cover only participants in concentration but may also cover other undertakings (e.g. their competitors or trading partners).

3.8. Protection of the trade secret

In anti-monopoly proceedings on concentration, undertakings are obliged to submit all the information necessary due to the subject of the proceedings. This information may be trade secrets. Pursuant to Art. 4 point 17 of u.o.k.k., the "trade secret" means the trade secret within the meaning of Art. 11, para. 4 of u.z.n.k., i.e. technical, technological, organisational information or other information of the economic value, undisclosed to the public, towards which the undertaking has taken necessary measures in order to keep their confidentiality. From the jurisdiction it results that the following are particularly treated as the trade secret: market shares, data showing the volume of production and sales as well as sources of supply and sale, tax declarations, data contained in the financial statement (they illustrate both the assets and liabilities of bidders, income, profits, operating costs, losses, financial commitments), information on discounts and pricing formulas.
It should be stressed that all trade secrets are protected in the course of the anti-monopoly proceedings on concentration.
This means, firstly, that the employees of UOKiK are required to protect the trade secret as well as other information subject to the protection pursuant to separate provisions (e.g. the state secret), of which they became aware in the course of the proceedings.
Secondly, the President of UOKiK may, upon request or *ex officio*, to the necessary extent restrict the right of access to the evidence attached to case files, if disclosure of this evidence involved disclosure of the trade secret as well as other secrets to be protected pursuant to separate provisions. The entity applying for restriction of the right of access to the evidence is required to submit to the President of the Office also a version of the document that does not contain restricted information, with an appropriate annotation that this version does not contain trade secrets. Such an open version is necessary because only in this form documents can be made available to the parties to the proceedings.
It should be remembered that the President of UOKiK assesses the submitted application on their own. In practice, we can encounter attempts to abuse the right to submit applications for restriction of access to the files of the proceedings, e.g. by requesting to classify all documents, while only a part of the document is the trade secret or by regarding data publicly available or being not subject to classification as the trade secret, for example, the fact of the initiation of the proceedings, parties and subject thereto or the content of the conditions imposed by a conditional decision. In connection with that, undertakings should submit precise applications for restriction of the right of access and always attach a justification. It is worth remembering that the President of UOKiK may *ex officio* restrict the right of access to the files of the proceedings if they find that these files include legally protected secrets. What

is also important, restriction in question also applies to materials included into the proceedings pursuant to Art. 73, para. 5 of u.o.k.k.. Restriction of access to the files takes place in a form of a decision which may be appealed against.
Thirdly, pursuant to Art. 73, paras. 1 and 2 of u.o.k.k., information obtained in the course of the proceedings may not be used in other proceedings conducted pursuant to separate provisions, subject to:

- criminal proceedings regarding offences prosecuted *ex officio* or fiscal proceedings;
- other proceedings conducted by the President of the Office;
- the exchange of information with the European Commission and competition protection authorities of the European Union Member States pursuant to Regulation No. 1/2003/EC;
- the exchange of information with the European Commission and competent authorities of the European Union Member States pursuant to Regulation No. 2006/2004/EC;
- provision competent authorities with information which may indicate infringement of separate provisions.

3.9. Role of other undertakings (competitors, trading partners of participants to concentration) in the anti-monopoly proceedings on concentration

Competitors of undertakings planning concentration are not the party to the anti-monopoly proceedings on concentration. In connection with that, competitors have no basic rights of the party, i.e. the right of access to case files or the right to appeal against a decision issued. This does not mean, however, that competitors do not have any rights in the proceedings.
The competitor is entitled to:

- receive information about the pending proceedings (all information on pending and concluded concentration proceedings is available on the Office's website at http://www.uokik.gov.pl),
- submit, in writing, on its own initiative or upon request of the President of the Office, explanations regarding relevant circumstances of the case.

3.10. Obligation of cooperation

In the course of the anti-monopoly proceedings on concentration, both the party to the proceedings and other undertakings are obliged to cooperate with the President of UOKiK. The anti-monopoly authority is obliged to verify the information provided by the participants of concentration and to determine the actual image of the market. For this purpose, it often requests other undertakings (competitors, trading partners) pursuant to Art. 50 of u.o.k.k. to submit information. Such a request shall contain:

- indication of the scope of information;
- indication of the purpose of the request;
- indication of the time limit to provide information;
- instruction on the sanctions for failure to provide information or for providing inaccurate or misleading information.

Having received the request from the anti-monopoly authority, undertakings are obliged to provide the requested information. If anything raises their doubts or questions, before sending a response they may contact the person conducting the case, whose contact details are indicated in the request. In any case, the undertaking is informed of the purpose for which information is collected.
If the response to the request of the President of UOKiK contains information constituting the trade secret, it should be clearly indicated, justified why certain information constitutes the

trade secret and a version of the letter that does not contain these secrets should be submitted (more on the trade secret see point II. 3.8.). The justification why specific information constitutes the trade secret allows the President of UOKiK to verify whether the provided information or part thereof includes such secrets. On the other hand, submission of a version of the letter which does not contain these secrets will help the President of the Office separate them properly from the rest of the information and, in case of publication of a decision which will contain such information, will enable or facilitate their removal from the version available on the website and version available to the public.

3.11. Calculating time limits in anti-monopoly proceedings on concentration

Pursuant to Art. 96, para. 1 of u.o.k.k., the anti-monopoly proceedings in concentration cases should be concluded not later than within 2 months from the date of its initiation. Therefore, due to, *inter alia*, a specific time limit for the conclusion of the proceedings, exceedance of which means serious consequences for the President of UOKiK – in accordance with the content of Art. 97 para. 1 of u.o.k.k., undertakings, whose intention of concentration is subject to the notification, are not obliged to refrain from the implementation of a concentration in case of the expiry of the time limit within which a decision should be issued – the legislator imposed on the party to the proceedings on concentration an obligation to provide the relevant information and documents concerning concentration just at the stage of the initiation of this proceedings. It should be stressed that, when submitting WID, the party has not only a possibility but also an obligation to submit all relevant information of a given concentration. Therefore, there is a fundamental difference between proceedings on concentration and other proceedings conducted by the President of the Office, in particular concerning competition restricting practices.

Pursuant to Art. 61 § 3 of k.p.a., the date of the initiation of the proceedings upon request of the party is the day of delivery of the request to the state administration authority and therefore the starting date of the time limit provided for dealing with the matter regarding control of concentration will be the date of receipt of the notification by the President of the Office whereas the date on which this time limit expires is the expiry of this date which corresponds to the starting day of the time limit in the second month from the initiation of the proceedings and if there was no such a day in this month – on the last day of this month. This principle of calculating time limits results from Art. 57 § 3 of k.p.a., pursuant to which time limits specified in months are ended with the lapse of this day in the last month which corresponds to the starting day of the time limit and if there was no such a day in this month – on the last day of this month. If the end of the time limit falls on a bank holiday, the last day of the time limit is the nearest business day (Art. 57 § 4 of k.p.a.).

Examples:

Event	Example 1	Example 2	Example 3
Initiation of the proceedings (date of receipt of the complete notification application by the President of UOKiK)	31.12.2008	31.12.2009	01.07.2010
Deadline for the conclusion of the proceedings	28.02.2009 (the time limit expires on Saturday	01.03.2010 (two-month time limit falls on	01.09.2010

	which is not a bank holiday)	28.02.2010 – Sunday (bank holiday), thus, the date of the conclusion is the nearest business day)	

In addition, the Act in Art. 96, para. 2 of u.o.k.k. states that in case of submission by the undertaking of the conditions laid down in Art. 19 para. 2 of this Act, the above-mentioned time limit for dealing with the anti-monopoly proceedings on concentration is extended by 14 days, even if the party submits own proposals for conditions in response to proposals made by the President of UOKiK. In such a situation, if the President of UOKiK takes into account the comments made by the party (in whole or in part), sends a letter with a proposal for new conditions, specifying another time limit for taking a position on them. If the President of UOKiK does not take into account the commitments proposed by the party, then, it is necessary to be aware that failure to accept the conditions set forth by the President of UOKiK, within the specific time limit (the party may ask for extension of this time limit) will result, pursuant to Art. 95, para. 2 of u.o.k.k., in issuance of a decision prohibiting the implementation of a concentration.

Examples:

Event	Example 1	Example 2	Example 3
Initiation of the proceedings (date of receipt of the complete notification application by the President of UOKiK)	31.12.2008	31.12.2009	01.07.2010
Submission of the conditions by the undertaking (date of receipt by the President of UOKiK)	14.01.2009	29.01.2010	20.08.2010
Deadline for the conclusion of the proceedings	14.03.2009	15.03.2010	15.09.2010

At the same time, pursuant to Art. 96, para. 3 of u.o.k.k., the above-mentioned time limits do not include:

1. periods of waiting for submitting the notification by other participants of concentration (in case when more than one undertaking is obliged to make the notification),
2. periods for removal of deficiencies or completion of the information to which the applicant was requested by the President of the Office,
3. periods for taking a position on the conditions presented by the President of the Office and referred to in Art. 19 para. 2 of u.o.k.k. and
4. periods of waiting for incurring the fee referred to in Art. 94, para. 4 of u.o.k.k.

This statutory provision is a reason for which the two-month time limit for dealing with the case is actually extended by the above-mentioned periods.
In case of the first and fourth situation, the beginning of the time limit is, respectively, the day of submission of the notification application by the last party and the day of receipt of the fee

payment confirmation by UOKiK. In other two cases, the suspension of the running of the time limit takes place from the day following the day of sending by the anti-monopoly authority the letter at the post office while another running of the time limit begins on the day following the date of receipt of the complete supplement or letter in which the party takes its position on the conditions presented by the President of the Office (according to Art. 57 § 1 of k.p.a., if the beginning of the time limit specified in days is an event, when calculating this time limit, the day on which the event occurred is not taken into account). If, however, during the suspension of the running of the time limit, the President of the Office sends another letter requesting to remove deficiencies and supplement the information (before the party responds) the time limit is resumed on the day following the day of receipt of the complete response of the undertaking to the last letter from the President of the Office.

Examples:

Event	Example 1	Example 2	Example 3
Initiation of the proceedings (date of receipt of the complete notification application by the President of UOKiK)	31.12.2009	31.12.2009	31.12.2009
Letter from the President of UOKiK requesting to remove deficiencies (date of sending at the post office)	12.01.2010	12.01.2010	12.01.2010
Letter from the President of UOKiK requesting to send relevant information (date of sending at the post office)		19.01.2010	02.02.2010
Response of the undertaking to the first letter of the President of UOKiK (date of receipt by the President of UOKiK)	28.01.2010	28.01.2010	28.01.2010
Response of the undertaking to the second letter of the President of UOKiK (date of receipt by the President of UOKiK)		02.02.2010	18.02.2010
Deadline for the conclusion of the proceedings	17.03.2010 (01.03.2010 +16 days)	22.03.2010 (01.03.2010 +21 days)	02.04.2010 (01.03.2010 +16 days +16 days)

With the simultaneous occurrence of situations consisting in requesting the undertaking by the President of the Office to complete necessary information and submission by the undertaking of the conditions laid down in Art. 19 para. 2 of u.o.k.k., calculating the time limit for each of them must be treated separately and therefore the waiting period for the undertaking's response will be calculated in accordance with the principles set out above, it will be added to the time limit provided for dealing with the case (2 months) and additionally extended by 14 days pursuant to Art. 96, para. 2 of u.o.k.k..

Examples:

Event	Example 1	Example 2	Example 3
Initiation of the proceedings (date of receipt of the complete notification application by the President of UOKiK)	31.12.2009	31.12.2009	31.12.2009

Letter from the President of UOKiK requesting to remove deficiencies (date of sending at the post office)	12.01.2010	12.01.2010	12.01.2010
Letter from the President of UOKiK requesting to send relevant information (date of sending at the post office)		19.01.2010	02.02.2010
Response of the undertaking to the first letter of the President of UOKiK (date of receipt by the President of UOKiK)	28.01.2010	28.01.2010	28.01.2010
Response of the undertaking to the second letter of the President of UOKiK (date of receipt by the President of UOKiK)		02.02.2010	18.02.2010
Submission of the conditions by the undertaking (date of receipt by the President of UOKiK)	04.02.2010	03.02.2010	10.02.2010
Conclusion of the proceedings	31.03.2010 (01.03.2010 +16 days +14 days)	06.04.2010 (01.03.2010 +21 days +14 days; the time limit falls on 05.04.2010 which is a bank holiday, thus, the date of the conclusion is the nearest business day)	16.04.2010 (01.03.2010 +16 days +16 days +14 days)

The suspension of the anti-monopoly proceedings on concentration pursuant to Arts. 97-98 k.p.a. is independent of the above-mentioned issues. The suspension of the proceedings takes place on the day of issuance of a decision on the suspension and stops the running of time limits provided for dealing with the case. The running of the time limit is resumed at the time of issuance of a decision on resumption of the suspended proceedings.

3.12. Decisions issued in anti-monopoly proceedings on concentration, determining on the merits of the case

The anti-monopoly proceedings on concentration is most commonly concluded by issuing a decision determining on the merits of the case. Such decisions are:

- decision expressing the consent to the implementation of a concentration, as a result of which competition in the market is not substantially restricted, in particular through the creation or strengthening of a dominant position in the market (Art. 18 of u.o.k.k.);
- decision expressing the so-called conditional consent to the implementation of a concentration, if after the fulfilment by the undertaking of any specific conditions, competition in the market is not substantially restricted, in particular through the creation or strengthening of a dominant position in the market (Art. 19 of u.o.k.k.);

- decision prohibiting the implementation of a concentration, as a result of which competition in the market is substantially restricted, in particular through the creation or strengthening of a dominant position in the market (Art. 20 para. 1 of u.o.k.k.);
- decision expressing the consent to the implementation of a concentration, if, as a result of the concentration there is significant restriction of competition, in particular, through the creation or strengthening of a dominant position, in case when a derogation from the prohibition of concentration is reasonable, in particular, where it contributes to economic development or technical progress or may have a positive impact on the national economy (Art. 20 para. 2 of u.o.k.k.).

It should be stressed that decisions expressing the consent to the implementation of a concentration (referred to in Art. 18 and Art. 19 para. 1 or Art. 20 para 2 of u.o.k.k.), expire, if within 2 years from the date of their issuance concentration has not been implemented (Art. 22, para. 1 of u.o.k.k.). This means that following the consent expressed by the President of UOKiK undertakings have 2 years to fulfil the intention of concentration. Depending on the form of concentration, within this period the merger of undertakings, the acquisition of control, establishment of the joint undertaking or purchase of assets should take place. However, the President of UOKiK may, upon request of the undertaking involved in concentration, extend this time limit by one year, if it proves that there has been no change in circumstances, as a result of which concentration could cause significant restriction of competition in the market (Art. 22, para. 2 of u.o.k.k.).

Decisions of the President of UOKiK are sent, in principle, through the post office. After prior informing of the employee conducting the proceedings, it is also possible to receive a decision in person (UOKiK, the Department of Concentration Control).

The decision of the President of the Office may be appealed against to the Court of Competition and Consumer Protection, within two weeks from the date of its delivery, through the President of the Office (see Art. 81 of u.o.k.k.).

3.13. Other methods of the conclusion by the President of UOKiK of the anti-monopoly proceedings on concentration

The anti-monopoly proceedings may also be concluded formally, without a substantial decision on the request of the undertaking. The formal conclusion of the case will take place in a situation of:

- return of the application,
- leaving the application without consideration,
- termination of the proceedings.

3.13.1. Return of the application

The return of the application is a method of the formal conclusion of the proceedings due to major and irremovable formal defects of the notification application. We may distinguish obligatory and optional situations when the application is returned.

The President of the Office is obliged to return the application to the undertaking if the intention of concentration is not subject to the notification pursuant to Art. 13 in conjunction with Art. 14 of the Act (Art. 95, para. 1, point 1, of u.o.k.k.). In practice of the anti-monopoly authority it may be observed that some undertakings know that the intention of concentration is not subject to the notification but still they submit the notification due to the so-called “ex abundante cautela”. In such a situation, concentration is not analysed in substantive terms and the application of the undertaking is returned.

In addition, the President of UOKiK may return the notification of the intention of concentration of undertakings, if it does not meet the requirements to which it should conform

or, despite a request to remove identified deficiencies in the notification or supplement it with the necessary information, the entity notifying the intention of concentration does not remove these deficiencies or does not supplement this information within the set time limit (Art. 95 para. 1 point 2 and 4 of u.o.k.k.). From the rulings of the anti-monopoly authority it results that in some situations undertakings notify the intention of concentration which in fact does not exist (e.g. a letter of intent or preliminary agreement have not been signed yet) or submit the notification immediately after the signing of the relevant agreement, despite the lack of basic data and information. In such situations, applications of undertakings are usually returned. The practice shows also that some undertakings deliberately prolong the proceedings, not responding either in time or at all to the anti-monopoly authority's request to supplement the application. In this situation, the President of UOKiK may also return the application.

3.13.2. Leaving the application without consideration

It should be remembered that each application for the initiation of the proceedings on concentration should be adequately paid (more on fees on the application for concentration see point II. 3.6). In case when the undertaking does not submit the proof of payment of the fee, the President of UOKiK requests the applicant to pay it within 7 days. The lack of payment within this time limit leaves the application without consideration (Art. 94, para. 4 of u.o.k.k.). In such a situation, if the undertaking(s) uphold the intention of concentration, they should resubmit the applicable notification application.

3.13.3. Termination of the proceedings

The anti-monopoly proceedings on concentration may be terminated if it becomes irrelevant (Art. 105 of k.p.a). We deal with such a situation when e.g. the agreement being a basis for the notification of the intention of concentration is terminated. This obliges the President of UOKiK to terminate such proceedings (i.e. it will not be continued). In addition, the Act envisages that the anti-monopoly authority terminates the proceedings in case of:

1. withdrawal of the notification of the intention of concentration of undertakings;
2. take-over of the case by the European Commission pursuant to the provisions of Community law.

Except for the situations indicated above, the termination of the proceedings may take place in other circumstances governed by k.p.a. In particular, we should remember here about the provision contained in Art. 98 § 1 of k.p.a., pursuant to which the public administration body may suspend the proceedings if requested by the party at whose request the proceedings was initiated and other parties do not oppose and it does not pose a risk to social interest. However, if within a period of three years from the date of the suspension of the proceedings, neither party will apply for resumption of the proceedings, the request to initiate the proceedings is deemed withdrawn. This causes the termination of the anti-monopoly proceedings on concentration.

III. SANCTIONS FOR FAILURE TO NOTIFY THE INTENTION OF CONCENTRATION AND INFRINGEMENT OF OTHER CONCENTRATION-RELATED PROVISIONS

1. General remarks on concentration-related sanctions

Whoever does not fulfil its obligation or otherwise infringes the provisions of u.o.k.k., must be prepared for bearing the consequences referred to in this Act. This also applies to issues associated with concentrations of undertakings. The recipient of such sanctions may be both the undertaking and any other entity indicated in u.o.k.k.. All sanctions are imposed in a form of a decision which may be appealed against to the Court of Competition and Consumer Protection (SOKiK).

2. Fines imposed on undertakings

The first type of sanctions are fines imposed on undertakings. These fines are optional, which means that (after analysing all circumstances of the case), the President of UOKiK may but does not have to impose them. There are two types of fines:

(a) fines for infringement of certain obligations resulting from u.o.k.k.
The President of UOKiK may impose on the undertaking a fine for infringement of certain obligations resulting from u.o.k.k., i.e. in case of:

- the implementation of a concentration without obtaining the prior consent of the President of UOKiK (Art. 106, para. 1, point 3 of u.o.k.k.),
- providing untrue data in the notification of the intention of concentration (whereby it should be stressed that the notification is the original application along with its further possible supplements) or in a request of the financial institution for extension of the time limit within which resale of stocks or shares is to take place (Art. 106 para. 2, point 1 of u.o.k.k.)
- failure to provide the information requested by the President of UOKiK pursuant to Art. 19 para. 3 of u.o.k.k. or Art. 50 of u.o.k.k. or provision of the untrue or misleading information (Art. 106, para. 2, point 2 of u.o.k.k.)
- failure to cooperate during the inspection performed as a part of the anti-monopoly proceedings on concentration (Art. 106 para. 2, point 3 of u.o.k.k.).

The undertaking must be aware that it may pay fines indicated in this point even if it committed the specified infringements unintentionally.

(b) fines imposed to induce (enforce) undertakings, to which decisions of the President of UOKiK and judicial decisions of SOKiK are addressed, to implement them as soon as possible.
The President of UOKiK may, pursuant to Art. 107 of u.o.k.k., impose a fine on undertakings to induce (enforce) undertakings, to which decisions of the President of UOKiK and judgments of SOKiK are addressed, to implement them as soon as possible, i.e. for a default in the implementation of:

- decision granting the conditional consent to concentration
- decision prohibiting the implementation of a concentration,
- decision aimed at restoring competition containing the specific order after the implementation of a concentration,

- provisions on seizure of files, books, all kinds of documents which may constitute the evidence in case,
- judgments in cases on concentration.

3. Fines imposed on persons performing managerial functions or being members of the undertaking's managing authority

The second type of fines are fines imposed on a person performing a managerial function or being a member of the undertaking's managing authority. These fines are also optional. The condition for imposing of a fine on such a person is the fact that the actual violator of these provisions (undertaking) is managed by the designated person.
This person bears responsibility if it, intentionally or unintentionally:

- has not implemented decisions or judgments (Art. 108, para. 1, point 1 of u.o.k.k.),
- has not notified the intention of concentration (Art. 108 para 1 point 2 of u.o.k.k.),
- has not provided the information requested by the President of UOKiK pursuant to Art. 50 of u.o.k.k. or provided incorrect or misleading information (Art. 108, para. 1, point 3 of u.o.k.k.).

4. Non-financial consequences

The third type of sanctions that may be applied to undertakings is of the non-financial nature and is also optional. This is the possibility of repealing by the President of UOKiK of its decision in case where it has been based on incorrect information provided by undertakings participating in concentration or when the undertaking does not implement the condition imposed on it (Art. 21 para. 1 of u.o.k.k.). In addition, if concentration has already been implemented and restoring competition in the market is not possible in any other way, the President of UOKiK may order the undertaking to act in a specific way (Art. 21, para. 2 of u.o.k.k.) and in case of delay in its implementation, as indicated earlier, impose a fine on the undertaking as a coercive measure. The President of UOKiK may act in the same way in the event of the implementation of a concentration by undertakings without obtaining its consent (Art. 21, para. 4 of u.o.k.k.).
The President of the Office may also, by way of a decision, divide the undertaking or apply to the court for declaring the agreement invalid or taking other legal measures aimed at restoring the previous state.

5. Amount of fines

According to the case provided for in u.o.k.k., fines are determined in different ways, i.e.:

- for even the unintentional implementation of a concentration without obtaining the consent of the President of UOKiK, the undertaking may be punished with a fine not exceeding 10 per cent of revenue achieved in the financial year preceding the year of imposing a fine (Art. 106, para. 1, point 3 of u.o.k.k.)
- for even unintentional provision of incorrect data in the notification of the intention of concentration, failure to provide the information requested by the President of UOKiK or provision of incorrect or misleading information and failure to cooperate in the course of inspection executed within the framework of the anti-monopoly proceedings on concentration, the undertaking may be punished with a fine in the amount equivalent up to EUR 50 million (Art. 106 para. 2 of u.o.k.k.)
- in order to coerce undertakings to which decisions as well as judgments of SOKiK are addressed, for each day of delay in their implementation, a fine may be imposed in the amount equivalent up to EUR 10 thousand (Art. 107 of u.o.k.k.),

- on a person performing a managerial function or being a member of the undertaking's managing body, a fine may be imposed of up to fifty-fold of the average salary (Art. 108, para. 1 of u.o.k.k.).

Fines are used primarily to ensure the compliance with the provisions of u.o.k.k. and decisions of anti-monopoly authorities issued pursuant to it. It should also be remembered that:

- when the undertaking was established as a result of the merger or transformation of other undertakings, in calculating the amount of its revenue, revenue achieved by these undertakings in the financial year preceding the year of imposing a fine shall be taken into account (Art. 106 para. 3 of u.o.k.k.)
- when the undertaking has not achieved revenue in the financial year preceding the year of imposing a fine, the President of UOKiK may set a fine of up to two hundred-fold of the average salary (Art. 106, para. 4 of u.o.k.k.)
- a fine for the implementation of a concentration without the consent of the President of UOKiK may be imposed even if the prohibition on the implementation of a concentration was issued by the President of UOKiK after repealing the earlier decision giving the consent to concentration or giving the conditional consent to concentration (i.e. when the President of UOKiK repealed any of these decisions before the implementation of a concentration by undertakings),
- imposition of a fine for the implementation of a concentration without the consent of the President of UOKiK does not depend on finding the negative impact of concentration on the state of competition in the market. The occurrence of the negative impact of concentration on the state of competition may, however, affect the amount of a fine,
- a fine for failure to provide information requested by the President of UOKiK or for provision of incorrect or misleading information may be imposed not only on undertakings being parties to the proceedings but also on another undertaking, to which the President of UOKiK has sent a request for information.

A fine imposed by the President of UOKiK is payable to the state budget and the number of the bank account is always indicated in the decision. It should be incurred within 14 days from the date on which the decision becomes legally valid. The decision of the President of the Office imposing a fine – similarly as in case of other decisions issued by this authority – may be appealed against to the Court of Competition and Consumer Protection, within two weeks from the date of its delivery, through the President of the Office (see Art. 81 of u.o.k.k.).