

**GCP**

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# Competition Policy in Poland

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Poland created a post-communist competition law system in 1990.<sup>1</sup> The system is based on a public enforcement agency named the Office for Competition and Consumer Protection (“OCCP” or “Office”), which is part of a governmental administration.<sup>2</sup> The President heads the OCCP and is the sole decision maker with regards to restrictive practices and undertakings’ concentrations in Poland. According to the law, the OCCP’s President is appointed by Poland’s Prime Minister.<sup>3</sup> Competition

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<sup>1</sup> The Act on counteracting monopolistic practices of 1990 belonged to the public law. Competition authority, which at that time bore the name of the Antimonopoly Office, was part of a governmental administration in Poland. Since 1996, Polish competition authority has dealt both with competition and consumer protection issues. That is why its name was changed for the Office for Competition and Consumer Protection. During the pre-accession period, Polish competition law was harmonized with the EC competition legislation. The legal basis for this was established in the Act of 15 December 2000 on competition and consumer protection which expired in April 2007.

<sup>2</sup> In the field of competition, the crucial task of the Office is the enforcement of national and Community law prohibiting cartels and unilateral abuses. The Office is composed of the headquarters in Warsaw and nine regional branches located in big cities all around Poland.

<sup>3</sup> According to the law, the President of the Office of Competition and Consumer Protection is the central government administration body competent in the protection of competition and consumer interests. The President is appointed and supervised directly by the Prime Minister (there are no formal links between the OCCP and Ministry of Economics). The Prime Minister appoints Vice Presidents at the request of the President. The responsibilities of the Office’s President include both competition and consumer protection. The President of the OCCP is the responsible national competition authority within the meaning of Article 35 of Regulation No. 1/2003/EC. Merger control is in scope of its responsibilities as well. All responsibilities attached to the authority refer to the President and not to the OCCP although the President performs all tasks with the support of the OCCP.

decisions adopted by the OCCP can be appealed to the specialized civil court named the Court for Competition and Consumer Protection.<sup>4</sup>

The Polish government is responsible for the creation and enforcement of competition policy in Poland. Its aims and priorities are established in the official document, *Competition Policy*. According to Polish competition law, the President of the OCCP drafts a revised version of this document every two to three years and presents it to the government for the approval. For instance, the strategy of Polish competition policy for 2008 to 2010 is presented in *Competition Policy for 2008-2010* (hereinafter “Competition Policy Report” or “Report”) and was approved by the government in July 2008.<sup>5</sup> The scope of the Competition Policy Report is much wider than the authority of the OCCP because it also covers issues connected with the activities of the national sector-specific regulatory bodies (e.g., the telecommunications and energy regulators). No sector of the economy is excluded. The impact of EC competition policy and legislation as well as other international competition fora (such as the Organization for Economic Cooperation and Development) are also taken into account in the Report.

The strategic aims of the Competition Policy Report (e.g., counteracting restrictive practices, promotion of competition in the post-monopolistic sectors of economy, deregulation, and competition advocacy) have been priorities for the past several years. What makes the most recent version different is its intention to develop and

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<sup>4</sup> Appeals have to be sent to the OCCP. If the authority considers the appeal justified, it can annul or change the decision without involving the court. In those instances, a new decision can be appealed as well. The Competition Court deals with the decision of the OCCP on the merits. Private enforcement of the competition law is beyond the scope of its jurisdiction.

<sup>5</sup> Press Release, Office of Competition and Consumer Protection, Poland, Competition Policy 2008-2010 (Jul. 15, 2008), available at [http://www.uokik.gov.pl/en/press\\_office/press\\_releases/art121.html](http://www.uokik.gov.pl/en/press_office/press_releases/art121.html).

use more appropriate tools to pursue and achieve these goals. Both Polish and international experiences provide a good starting point for further reflection and formulation of strategy for the future.

## **I. COMPETITION PROTECTION**

The issue of competition protection is linked exclusively to the authority of the OCCP, which is the unique competition agency directly responsible for the enforcement of competition law in Poland. The activities of the OCCP are mainly based on a single piece of legislation, the Act of 16 February 2007 on competition and consumer protection (hereinafter “Polish Competition Act” or “Act”).<sup>6</sup> This Act contains provisions regarding practices restricting competition, merger control, and rules of proceedings. According to Article 1, the Act “determines conditions for development and protection of competition as well as the rules on protection of interests of undertakings and consumers, undertaken in the public interest.” According to the jurisprudence of the Supreme Court, the OCCP is obliged to prove in every case that an initiation of proceeding is justified because public interest would otherwise suffer.

### **A. Restrictive Practices**

The provisions of the Polish Competition Act concerning prohibition of restrictive practices are fully in line with the rules established in the EC Treaty. The substantive rules of the Polish competition law have not been changed much over the last few years as they are harmonized with EU legislation. Conversely, quite significant modifications were introduced in April 2007 with regards to procedural aspects of investigations. The

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<sup>6</sup> Office of Competition and Consumer Protection, Poland, *Act of 16 February 2007 on competition and consumer protection*, 50 J. LAWS 2007 item 331 (2007), available at [http://www.uokik.gov.pl/en/legal\\_regulations/national\\_legal\\_acts/general\\_legal\\_regulations/](http://www.uokik.gov.pl/en/legal_regulations/national_legal_acts/general_legal_regulations/).

key change is that the OCCP is no longer obliged to initiate proceedings on the basis of received complaints. According to the new bill, the antimonopoly proceedings may be conducted only *ex officio*. This requirement strengthens the discretionary powers of the agency, especially with regards to establishment of priorities. The OCCP conducts antitrust investigations when a public interest demands an action. Currently, the proceedings may be conducted *ex officio* as explanatory<sup>7</sup> or antimonopoly proceedings.<sup>8</sup> This rule entitles the agency to set and follow its priorities because the OCCP has sole power to decide whether to open a formal investigation or to turn a complaint down. At the same time, this particular legal rule strengthens the agency's level of responsibility for the state of competition on the market. The OCCP should be more active in monitoring the market in order to properly identify the most dangerous distortions of competition and counteract them effectively.

The Competition Policy Report describes a number of activities and resources the OCCP can undertake to fulfill its obligations. One example is to strengthen the Office's ability to collect evidence more efficiently. It concerns, among other things, the collection of evidence during the time of inspections and searches, in particular electronic evidence.

A more notable example is the OCCP's intention to make better use of economic knowledge during its investigations. Within the Office, the Market Analysis Department

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<sup>7</sup> The explanatory proceedings may precede the antimonopoly proceedings and should be opened if the circumstances indicate a possibility that the provisions of the Polish Competition Act have been breached. If that suspicion proves to be legitimate, then the antimonopoly proceedings can be initiated. Following this stage of the process, the statement of objections is prepared.

<sup>8</sup> According to the former competition act, an investigation could be opened on the basis of a formal complaint. The OCCP was obliged to adopt a decision if it wanted to turn a complaint down and the complainant was entitled to appeal any decision of the OCCP.

is responsible for this aspect of the investigations. Economists are engaged in the everyday activities of the OCCP and provide necessary assistance during each stage of investigation, in particular by helping define relevant markets in more complicated cases, one of the core issues of antitrust policy. Economists are also consulted on all antitrust and concentration decisions before they are adopted.

At the same time, the Market Analysis Department is responsible for planning, organizing, and coordinating the permanent monitoring of the market. The agenda of the monitoring is prepared on a yearly basis. It includes a number of topics which seem to be important or problematic with regards to competition on the national, regional, and local markets. The OCCP branches are engaged in market monitoring as well, especially at the regional and local market level. The OCCP prepares detailed reports describing particular markets on the basis of the monitoring results which are later used in agency enforcement activities. Public versions of reports are also published and made available on the Office's website.<sup>9</sup> Market monitoring and conclusions stated in economic reports often encourage the opening of subsequent investigations to verify that any irregularities in the market are not the result of restrictive practices. On the basis of economic reports, other market investigations have been opened, namely in the distribution of roof tiles (a number of vertical cartel cases), distribution of salt, and wall coverings.

How the OCCP plans to strengthen the economic pillar of Polish competition law is provided in the Competition Policy Report. Notably, the OCCP plans to increase the use of intensive economic tools during investigations. More advanced economic analysis

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<sup>9</sup> See the website of the Office of Competition and Consumer Protection, Poland, at <http://www.uokik.gov.pl>.

(e.g., econometrics) will be applied as well. The Market Analysis Department will continue to concentrate on monitoring sectors where distortion of competition is most likely to occur.

It is the intention of the OCCP to improve efficiency of different investigative measures. Inspections and searches seem to be the most important, especially with respect to cartel cases. Polish competition law offers antitrust inspectors a wide scope of authority in this area. The OCCP may request undertakings, competitors, and administrative authorities to provide documentation and information. Witnesses may be summoned to participate in hearings. Fines may be imposed for providing misleading information. The antitrust inspectors have the power to enter premises, inspect commercial documentation (and make notes or copies), and request all information required for their investigation. Investigations in private premises and means of transportation are allowed with the prior approval of the court, provided that there is a legitimate suspicion that business documentation is kept there.

While the legal framework may be adequate, the investigation process requires further development, specifically with regards to permanent training of antitrust inspectors in cooperation with specialized authorities. Past experience shows that cooperation with the police has proven to be most effective. Specialized trainings for antitrust inspectors carried out by police experts have encouraged the adoption of operational techniques and procedural regulations for searches in antitrust investigations. At the same time, inspections and searches performed by the OCCP's inspectors and

specialized police forces have been organized. The training agenda for antitrust inspectors covers both basic and advanced workshops on more detailed aspects of inspections (e.g., collection and analysis of electronic evidence). On the basis of initial results, it is fair to say that these activities display the highest efficiency. That is why cooperation between the competition agency and the police will continue in the future. In addition, parallel cooperation and exchange of experiences between the OCCP and authorities with inspections powers (like the Supreme Chamber of Control) will also continue.

## **B. Mergers**

Merger control is a very significant part of competition protection in Poland. The Polish Competition Act introduced significant changes to the field of merger control, in particular turnover brackets were raised considerably. Currently, the intention of concentration is subject to a notification submitted to the OCCP if:

1. the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of notification exceeds the equivalent of EUR 1,000,000,000; or
2. the combined worldwide turnover of undertakings participating in the concentration on the territory of Poland in the financial year preceding the year of notification exceeds the equivalent of EUR 50,000,000.

Transactions below turnover brackets are not subject to the approval of the OCCP.

Another important change in the Polish merger control regime concerned the catalogue of forms of concentrations for which the notification is obligatory. According



to the Polish Competition Act, various forms of concentrations between undertakings have to be notified to the OCCP. This obligation concerns actions such as:

- merging two or more independent undertakings;
- taking over (by way of acquisition or entering into possession of shares or other stocks or by any other way obtaining direct or indirect control over) one or more undertakings by one or more undertakings;
- creating one joint undertaking by undertakings; or
- acquiring a part of another undertaking's property (the entirety or part of the undertaking) by the undertaking, if the turnover achieved by the property on the territory of Poland in any of the two consecutive financial years preceding the notification exceeded the equivalent of EUR 10,000,000.<sup>10</sup>

Despite modifications to substantial rules, significant changes in the internal organization of the Office were introduced last year with respect to merger review. One such change was the creation of a unit directly responsible for mergers and acquisitions named the Department for Control of Concentrations. Its main task is to monitor the level of concentration in the different domestic markets and conduct antimonopoly proceedings. The Department prepares the OCCP's decisions concerning concentrations of undertakings and fines.

Both the legal and structural changes mentioned above are aimed at achieving a more individual and economic-based approach to mergers that exert influence on the Polish market. This concerns mergers of undertakings present on markets which are important for the protection of state economy and which are likely to have an impact on

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<sup>10</sup> These rules do not apply in certain clearly described situations, in particular: 1) if the turnover of the undertaking taken over did not exceed the equivalent of EUR 10,000,000 in any of the two financial years preceding the notification on the territory of Poland; 2) if a financial institution acquires shares on a temporary basis (for one year maximum); or 3) if there is a concentration of the members of the same capital group.

consumer interests. Economic analysis of merger cases, to a large extent, will cover markets that could be even indirectly influenced if a concentration is cleared (such as upstream and downstream markets). These analyses may seem difficult and time-consuming, but are very important for final merger decisions.

### **C. Fines**

Enforcing a more efficient fining policy is one of the OCCP's top priorities. Decision-making powers of the OCCP include imposing financial fines (up to 10 percent of a company's revenue for the preceding financial year) and periodic penalty payments for infringements of the competition law. A lot of work has been done the last few years to improve the quality and efficiency of antitrust decisions adopted by the Office, including the creation of a unit named the Department for Competition Protection which is dedicated to dealing directly with restrictive practices in the national market<sup>11</sup> and the adoption of new internal rules for proceeding with cases. These new rules demand that case handlers cooperate more closely with legal service and the chief economist team, and that the cooperation begin at relatively early stages of the proceedings. Every antitrust decision must be accepted by both legal service and the chief economist team before being adopted.

The OCCP adopts over 100 antitrust decisions each year.<sup>12</sup> Many of these decisions are appealed to the Court for Competition and Consumer Protection. While judgments by the Court for Competition can be appealed to the Appeals Court, the

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<sup>11</sup> The "old" Department for Competition Protection was divided into two smaller units. One was responsible for merger control (the Department for Control of Concentration); the other was responsible for counteracting restrictive practices and setting priorities in this area (the "new" Department for Competition Protection).

<sup>12</sup> In 2007, 129 decisions were adopted concerning restrictive practices.

significant majority are upheld. Since 2003, over 80 percent of the decisions concerning restrictive practices have been confirmed in the appeals proceeding. Given this, it would seem important to strengthen the authority of the Office and legal certainty of undertakings. But, to improve the effectiveness of enforcement, the Office's fining policy must be more transparent and severe. The OCCP does not often use its discretion to impose fines to the level allowed by the law. Even though sanctions imposed on undertakings breaking competition law have increased over the last few years, there is still much progress to be made in this regard. The OCCP's long-term objective is to create and publish guidelines on fines. If they are clear and severe enough, the efficiency of the Polish leniency program should be improved as well.<sup>13</sup>

These changes are reasonable and justified because undertakings operating on the Polish market are well aware of bans on restrictive practices. Whether or not they decide to break binding rules, they should be informed of the risk of having to pay a high price if convicted. Otherwise, they would not be discouraged from such behavior and there would be no deterrent effect.

#### **D. Liberalization**

Liberalization of post-monopolistic sectors of the economy has also been progressing in Poland. Like elsewhere in Europe, it mainly concerns infrastructure sectors such as telecommunication, energy, rail transport, and air transport. In addition, it concerns areas traditionally limited to real competition due to strict qualification entry barriers (e.g., liberal and legal professions). The process of liberalization engages sector-

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<sup>13</sup> In order to provide companies engaged in cartel activity with an incentive to end their involvement and to inform the OCCP about the infringement, a leniency program was introduced in 2004. It largely reflects the Commission 2002 leniency notice.

specific regulators (e.g., the Office for Electronic Communication, the Office for Regulation of the Energy Market, the Office for Rail Transport, and the Office for Civil Air Transport). Determining which other authorities will be responsible for market surveillance is also necessary to open these sectors to competition.

The OCCP supports efforts aimed at creating conditions for fair competition in post-monopolistic sectors of the economy. Thus, close cooperation between the competition agency and sector-specific regulators is very important. The Office has performed numerous antimonopoly proceedings addressing sector-specific anticompetitive or exploitative abuses and firms such as ex-monopolistic telecommunication companies and railway firms are constantly under investigation by the OCCP.

Formally, the OCCP initiates its proceedings *ex officio*, but frequent complaints for certain behavior by a dominant undertaking can also prompt the opening of a case. The Office is constantly monitoring the market by conducting investigations in different sectors of economy. Monitoring of regulated markets is one of the Office's priorities because its findings encourage the drafting of competition infringement and consumer protection legislation. Reports prepared by the OCCP on the progress of competition enforcement in the energy, telecommunications (both landline and mobile), and postal service sectors provide an important and detailed source of information about those markets. This information is carefully analyzed and shared with sector-specific

regulators. When intervention is deemed necessary by both agencies, the relevant sector-specific regulator then opens an investigation.

In many cases, the sector-specific regulators have more accurate and efficient legal tools at their disposal to avoid abuses on post-monopolistic markets or to counteract such markets efficiently. When it is decided that a competition law has been broken, the OCCP opens an investigation which ends in the adoption of an infringement decision. If, in a specific situation, a market problem could be solved on the basis of the competition law or sector-specific legislation, then both agencies agree on which authority should react. Generally, parallel proceedings are viewed as inefficient and avoided, even though in some cases the law and jurisprudence make it possible to conduct them.

Polish competition law requires cooperation between the OCCP and the Office of Electronic Communication during the time of formal proceedings, especially with regards to the telecommunications sector. Nevertheless, the OCCP also stays in communication with other sector regulators. Information is exchanged and expert meetings are organized in each case where it could help to solve particular impediments to competition.

Such a model of cooperation between different agencies responsible for competition on the market should be continued and developed in order to improve efficiency and benefit from the synergy of the system. As long as there is a common goal, teamwork can only accelerate the process of reaching it.

### **E. Local Markets**

The OCCP has a relatively decentralized structure. It is composed of the headquarters in Warsaw and nine regional branches situated in big cities throughout Poland. The division of authority between the headquarters and branches is established in a separate regulation. Generally, the branch offices deal with competition restraints in local or regional markets. Mergers between companies with a combined turnover of up to the equivalent of EUR 500,000,000 are under their authority as well.

To be clear, it is necessary to stress that “branches” are not separate bodies. They act under the supervision of the OCCP President who performs all the tasks supported by the Office. All responsibilities attached to the authority refer to the President (also sometimes called Chairman) and not to the OCCP (nor the headquarters or branches).

The decentralized structure of the Office has a very important impact on its activities and priorities which are defined separately for national and local (regional) markets. The Department for Competition Protection (based at the OCCP’s headquarters) is responsible for counteracting restrictive practices which occur on the national market. Here infringements are mainly caused by undertakings with a significant market share which may distort competition on a wider scale (e.g., the whole territory of Poland) or may even have an impact on international trade.

At the same time, the OCCP’s branches deal with cases of abuses in local and regional markets. Very often they are connected with general interest or community services. Water-supply, sewage, waste disposal, and cemeteries are examples of areas in

which restrictive practices in local markets most frequently occur. Even though it may seem that their impact on the state economy is marginal, they are very burdensome to consumers who make regular use of these services. The OCCP's branches receive numerous consumer complaints about providers of such services.

When competition law seems to be infringed, an antimonopoly proceeding is conducted. Around 100 antitrust decisions regarding protection of competition in local or regional markets are adopted every year. The relatively high number of such decisions proves that their influence on the state of competition in Poland is quite significant. That is why the Office will continue to intensify this part of its activities.

The OCCP will also concentrate on fighting cartels in local markets (frequently under the scope of public tenders). In line with this objective, the OCCP will promote increased cooperation with regulators of infrastructural sectors. The various branches of the OCCP should also continue monitoring the markets which are under their respective jurisdictions. This task is normally fulfilled by fielding complaints, keeping in contact with undertakings operating on local markets, and preparing market analysis. Upon encountering any irregularities, proceedings are opened.

The decentralization of the OCCP's enforcement activities has proven to be more efficient in so much as it avoids divergent decisions. It requires that the branches perform certain coordination proceedings with regards to legal and economic aspects of investigations. At present, every draft decision prepared by any branch is controlled at the Office's headquarters by the legal service and the chief economist team. These units are

responsible for the uniformity and correctness of jurisprudence. At the same time, the enforcement activity of the branches is permanently monitored and coordinated. More and more often participants of the local market are not only “local” small- or medium-sized undertakings, but also entrepreneurs with a wider scope of activity (e.g., members of international holdings active in numerous local markets in different countries). These international undertakings usually possess real market power that could be used against their weaker competitors. In such cases, the Office reacts by expressing its objections. When an undertaking distorting competition is active on numerous local markets, the proceedings are carried out in the OCCP’s headquarters. This type of horizontal coordination will be performed more frequently to increase the speed with which the Office reacts.

Despite the increasingly wider scope of activity, it is worth mentioning that the active enforcement of competition law in local and regional markets in Poland is an important component of competition advocacy and promotion. It helps to develop awareness of the competition rules among consumers and small- and medium-sized undertakings operating in local markets.

#### **F. State Aid Monitoring**

As Poland is an EU member state, national rules on granting state aid to undertakings have to be harmonized with existing EU state aid legislation. According to the *State Aid Policy Programme 2005-2010*,<sup>14</sup> an official document approved by the government, the key objective of state aid policy in Poland is to uphold standards binding

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<sup>14</sup> Office of Competition and Consumer Protection, Poland, *State aid Policy Programme 2005-2010* (2005).



at the EU level in order to diminish distortion of competition in the market caused by government aid. It is focused on promoting development and increasing the efficiency with which aid is allocated. Poland works in close and current cooperation with the European Commission to achieve these goals.

The tasks discussed above are generally the responsibility of the government, but the OCCP plays a significant role as well. According to the law, the Office is required to provide legal opinions on every draft program or decision granting state aid before the European Commission is notified. The Office is also the appointed representative of the government during state aid notification proceedings in the European Commission and during appeals before the Community Courts. Finally, the OCCP is responsible for monitoring overall state aid efficiency.

With respect to efficiency, quite a few changes are being planned for the following years, namely a new methodology to measure efficiency of already granted aid will be implemented. The monitoring will focus on areas where the risk of abuses (i.e., using aid for purposes other than what it was granted for) seems highest or most probable as well as on areas which are particularly sensitive because they either receive a large amount of aid or are significant in the state economy. To facilitate this process, a new IT tool (a central database of state aid granted in Poland) will be introduced.

## **II. CREATING AND STRENGTHENING COMPETITION IN REGULATED MARKETS**

As one of the priorities of the Polish government, creating and strengthening competition mainly concerns monopolistic or post-monopolistic (i.e., newly opened to competition) sectors of the economy such as the electronic media, telecommunications, energy, air and rail transport, and postal services sectors. The regulatory authority in these sectors should perform the following:

- open monopolistic markets to competition;
- create conditions for competition development onto liberalized markets by elimination of existing barriers of entry (in particular, legal obstacles); and
- strengthen competition through the enforcement of effective regulation.

The public body responsible for the regulation of electronic media, telecommunications, and postal services is the Office for Electronic Communication, which executes its tasks under the leadership of its President and in cooperation with the OCCP.

The process of liberalization in the telecommunication sector in Poland has lasted for several years and its results are becoming more and more visible in the market. During the process of regulation, the Office for Electronic Communication must take into consideration the technological changes which have occurred recently, in particular the growing popularity of mobile phones and the Internet. While the ex-monopolistic telecommunication company still has a dominant position on the market, the number of its competitors—other telecommunication services providers—is constantly growing.

The efforts of the sector regulator should concentrate on using the most appropriate regulatory tools to support this process in the following years.

Outside of the telecommunications sector, the priorities are largely in line with EU legislation. In the electronic media sector, priorities are linked to the implementation of the Directive on audiovisual media services (2007/65/EC) and to providing a smooth transfer from analogue to digital broadcasting as supported by a detailed agenda. In the energy market (both electricity and gas supply), the Minister of Economy and the President of the Office for Regulation of the Energy Market are the public bodies responsible for creating and strengthening competition. Liberalization in both rail and air transport is also based mainly on EU legislation and regulatory bodies such as the Office for Rail Transport and the Office for Civil Air Transport, which (under the surveillance of their respectful ministries) are in charge of competition issues.

### **III. PROMOTION OF COMPETITION**

Promotion of competition covers a number of activities realized or supported by the government in order to create or strengthen a pro-competitive environment, in particular the legal framework for economic activities and competition advocacy among entrepreneurs and consumers (promoting the benefits that result from competition).

The distortion of competition in the market is not necessarily caused by illegal practices of undertakings in every case, sometimes they result from legal or administrative barriers set up by public authorities. In order to avoid such problems, or at least to diminish the frequency of their occurrence, the Office is engaged in intra-

governmental legislative proceedings. This authority enables the OCCP to monitor the creation of the legislative framework for the economic activities and to intervene if competition protection is threatened. The OCCP does not have decisive powers with respect to legislation, but every draft legal act concerning economic activity in its broad meaning has to be presented to the agency to obtain an opinion on compatibility with competition and consumer protection. The opinion of the OCCP is not binding to the government, but it must be analyzed carefully and discussed if it is rejected. In practice, a majority of these opinions are taken into consideration while drafting new laws. That is why this authority seems to be very important in creating a legal framework which protects and promotes competition.

On the basis of detailed knowledge of markets and regulation, the OCCP may also initiate discussions leading to the introduction of more pro-competitive legal solutions. These activities will be continued in the following years and will be treated as one of the Office's priorities because, with the appropriate legal framework, they can facilitate the development and functioning of fair competition in the market and help avoid interventions which are much more frequent in monopolistic or overregulated markets. Consequently, the OCCP will focus on sectors such as local water supply, local public transport, liberalization of professional services, and new technologies (e.g., compatibility of IT network tools).

Competition advocacy is another important part of the OCCP's activities. It is obvious that the promotion of benefits resulting from fair competition among

entrepreneurs and consumers can have only a positive impact on the situation in the market and on consumer welfare. That is why new initiatives in this area will be undertaken by the Office. Advocacy programs, which will be mainly informative and educational, will target consumers, undertakings, and associations of undertakings as well as local and regional authorities (e.g., self-government). Some of the Office's planned activities include press conferences and press releases, TV and radio broadcasts, brochures, improvements to the OCCP's website, the hosting and organizing of conferences dedicated to competition protection issues, and publication of specialized papers.

#### **A. Interaction between Public and Private Enforcement**

In Poland, as in other EU member states, public authority deals with the majority of competition cases. As the OCCP is responsible for both competition protection and consumer interests, the President conducts antitrust investigations if the public interest demands an action. At the end of the investigation, an infringement decision is normally adopted. There is also a legal possibility to impose financial fines. These infringements decisions can be appealed to the specialized civil court called The Court for Competition and Consumers Protection. This Competition Court deals with decisions of the OCCP on the merits; the private enforcement of the competition law is beyond of the scope of its jurisdiction.

There are no special legal rules concerning private enforcement of the competition law in the Polish legal order. Polish civil courts are not legally obliged to

deliver their judgments based on existing competition law which means that the general rules of civil law have to be applied.

Thus far, there have not been many private enforcement cases in Poland. There are several reasons for this situation. First, court proceedings are rather long-lasting and costly. Second, there is no clear legal distinction between the scope of the responsibilities of the Office and the civil courts. Last, Polish law does not clearly state whether decisions of the Office are legally binding to the courts.

Existing Polish case law provides little guidance in this area. In a 1994 judgment, the Supreme Court ruled that when there is a disagreement between parties, the court has the power to decide on its own whether competition laws were broken. According to that judgment, the court is not bound by decisions adopted by the Office. In 1995 and 2004 judgments, however, the Supreme Court ruled that a civil court could not determine the validity of the contract without a prior infringement decision by the OCCP. Given the lack of uniformity in the jurisprudence and the absence of a clear legal rule on the issue, it is not possible to predict the outcome of the next antitrust case that may appear before the Supreme Court.

The Office does not have complete information about all of the court proceedings concerning private competition law enforcement. The extent of the Office's visibility into private enforcement is based on regular requests made by civil courts to deliver concrete antitrust decisions. Civil judges are not experts in competition law and economics; they do not have experience in that area. Clearly decisions adopted by the Office are helpful

for courts in deciding whether charging a defendant with competition law infringement is justified.

The introduction of rules into Polish law that bind civil courts to antitrust decisions could be a reasonable solution to this problem and may help promote private enforcement of competition law in Poland. It is worth noting that this could also encourage follow-on actions based on the prior decision of the competition agency. Both individuals claiming to be victims of competition law infringement and civil judges would benefit because it would shorten courts proceedings. There would be less of a burden on the judges as they would not be obliged to decide whether a competition law was broken. They could treat the infringement decision by the agency as sufficient proof. On the basis of the decision, they would be responsible for awarding damages or nullifying the contract. The introduction of such rules is also consistent with the views of the Supreme Court and with the current practice of numerous civil courts who demand antitrust decisions by the Office even though they are not formally bound by them.

Unlike public enforcement, private enforcement seems to be much more complicated and time-consuming for potential litigants. It usually demands specialized knowledge about competition law and economics. In that context, it is very difficult to lodge successful damage claims in Polish courts with relation to losses suffered from a cartel or monopolist abusing its dominant position. Given this, consumers and other individuals expect the OCCP to solve their problems with anticompetitive sellers while businesses expect the OCCP to address their issues with competitors. However, both

sides will be disappointed when the Office does not react because there is no legal basis for action.

That does not mean, however, that the OCCP is not interested in private enforcement. Although private enforcement concerns judicial activities, the OCCP can play a significant role in the promotion of the court system. The promotion of competition law knowledge generally and efforts to increase understanding of the Competition Act can exert significant impact on the promotion of private enforcement of competition law in Poland. This could be achieved by widely distributing information about the activities of the OCCP, in particular about infringement decisions which are a starting point for follow-on actions (e.g., action for damages). From an institutional standpoint, the introduction of the legal tools which facilitate private enforcement of the competition law demands cooperation with the Ministry of Justice.

### **B. Synergy between Competition and Consumer Protection**

When it was first established in 1990, the main task of the OCCP was to enforce competition law. Since then, the responsibilities of the Office have increased rapidly. 1996 was a crucial year in that the Antimonopoly Office became the Office for Competition and Consumer Protection and, as a consequence, acquired new responsibilities, namely the protection of consumer interests. This name underscores the defining feature of the Office: synergy between fair competition and consumer protection policy.



The Office's responsibility over both policies strengthens the level of coordination of its enforcement activities. Any dishonest practice on the market can be analyzed from two perspectives at the same time. With a new case in the first stage of the internal proceeding, there is an opportunity to define the most effective tool to counteract the anticompetitive action. There are many market problems which can be solved on the basis on competition law or protecting consumer interests. Once the most appropriate legal basis is decided, the new case is sent to the relevant unit to be dealt with. That unit could be either the competition protection or consumer policy department.

Furthermore, a constant and effective exchange of experiences and ideas between competition and consumer protection teams is provided. It is a platform for cooperation and an increase of effectiveness. Sometimes it leads to the transfer of solutions from the area where they proved to be useful to the other. A good example is the law the agency's enforcement activities are based on, namely the Polish Competition Act. On the one hand, this bill provides a legal framework for proceedings protecting competition; on the other hand, it provides very similar rules aimed at protecting consumer interests (this similarity includes formal aspects of investigations such as collecting evidence or inspections, the types of decisions that could be adopted, and the financial penalties for breaking the law).

The synergy between competition and consumer protection policy also has another, very pragmatic side which is that it substantially reduces related state costs (e.g., costs for administration, analytical and research projects, trainings, and so forth).

This dual, pillar-based institution requires the right balance between competition and consumer protection. Criticisms can be made on both sides. Some consumers representing non-governmental organizations claim that competition protection dominates over direct consumer interests. At the same time, the associations of undertakings state that consumer protection dominates the promotion of competition.

It is worth stressing that these two pillars, on which the OCCP's activities are based, pursue the goals of consumer protection and upholding entrepreneurs' interests at the same time. The intention is to improve the wellbeing, safety, and confidence of the consumers by creating adequate conditions for fair competition and its protection. The Office's activities have so far been focused on this target and its results seem to be visible.

#### **IV. CONCLUSION**

This article provides a general overview of the competition protection system in Poland with a particular focus on current priorities and their nature within this system. As Poland is a member state of the European Union, substantive rules of the national competition law are fully in line with EU legislation in this respect. But, the structure and organization of the institutions responsible for competition protection in Poland, while intent on fulfilling common EU standards, is based on an original Polish framework established by the Office for Competition and Consumer Protection. The Office is led by its President and sole decision maker with respect to restrictive practices and mergers of undertakings in Poland. Apart from competition issues, the Office is responsible for the

protection of consumers' general interests, which means its scope of responsibility is much wider in comparison to the majority of other EU national competition authorities. The structure of the OCCP is also largely decentralized, composed of a headquarters and nine regional branches located in big cities across Poland, each of which are responsible for counteracting restrictive practices and analyzing mergers that may have an impact on competition in local and regional markets.

The wide scope of authority and decentralized structure obviously has a significant impact on the way the Office functions and the outcome of its work. A number of the decisions it renders to solve competition problems have effects not only on the national or international markets, but also at a local, individualized level. Consequently, objectives of Polish competition policy are intended to address both levels at the same time.

In accordance with the Polish Competition Act, the OCCP is in charge of setting priorities for competition and consumer protection, but the general framework for the Office's activities is approved by the government.<sup>15</sup> With regards to competition protection, this strategy is implemented in close cooperation with other public bodies which have overlapping responsibilities, in particular sector-specific regulators.

Decision-making powers of the OCCP are executed independently. In the appeal proceedings, infringement decisions are verified on the merits by specialized civil court dedicated to market issues, namely the Court for Competition and Consumer Protection.

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<sup>15</sup> That is, the strategy of the competition policy and strategy of the consumer protection policy must be approved by the Polish government.

The legal framework for the competition protection system in Poland with respect to its structural, substantive, and procedural rules seems to be mature, modern, and adequate to set and achieve ambitious goals. Another and more difficult question is the ability to use it in practice to enforce and achieve expected results. But this is a challenge for every modern competition authority, and one which the OCCP is eager to take on.