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**HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE
CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

Contribution from Poland

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Introduction

1. From the perspective of the Office for Competition and Consumers' Protection ('OCCP', 'Office'), the past thirteen years of implementing the competition policy in Poland proved quite clearly that there exist a positive correlation between the effective implementation of competition policy and the quality of economic development.

2. On the macroeconomic level, the enforcement of competition law facilitated the success of the economic liberalisation of Polish economy. During the privatisation of the State assets the OCCP played crucial role in the process of introducing the competition in the sectors, which at the beginning of transformation were deemed as structurally uncompetitive. This in turn facilitated the overall economic growth, by enhancing the welfare of the consumers as well as providing the level playing field for the competitors operating in those sectors. The positive influence of competition policy enforcement on the economic development demonstrates itself also on the microeconomic level, where numerous antimonopoly proceedings of the Office allowed for the increase of the undertakings' economic effectiveness, benefiting the consumers in terms of greater availability of goods and services, their better quality and better price.

3. The cases supporting the existence of positive interrelations between the competition policy and the economic development might be found in practically all sectors of the Polish economy. However, judging on the past experiences of the Office, they manifest themselves most visibly in the telecommunications' services sector.

4. Prior to the 1991, the sector of telecommunications' services, together with postal services sector, has been monopolised by the State company "*Przedsiębiorstwo Użyteczności Publicznej Polska Poczta, Telegraf, Telefon*". As of 1992, the aforementioned company has been divided into two independent entities, i.e. Polish national post – "*Poczta Polska*" and the national telecommunications' operator "*Telekomunikacja Polska*" ('TP S.A.', 'incumbent'). In 1998, the TP S.A. has been privatised. Even more important from the abovementioned shift in the ownership of the national incumbent was gradual liberalisation of the telecomm markets. This has been achieved by introduction of competition from the private sector, combined with counteraction of any anticompetitive behaviours of the TP S.A.

5. The exemplary cases from the telecommunications' sector discussed in the herby paper fall into two categories, i.e. anticompetitive practices affecting consumers, and those affecting the competitors. The scope of the paper covers the historical proceedings as well as the most recent ones. The chronological structure has been adopted for two reasons, i.e. to provide an additional information on how the nature of anticompetitive behaviours have been changing on different stages of transformation process and to identify how the abovementioned process has been affected by the successful combating of those behaviours.

1. Anticompetitive Practices Affecting the Consumers

6. In the early 1990s, one of the most typical misbehaviours of the national telecomm operator – TP S.A. stemmed from a need for rapid development of the telecommunications' infrastructure. During that

period the TP S.A. frequently involved its would-be customers as well as local municipalities in the process of co-financing expansion of the network infrastructure it used for providing services (so called 'joint financing'). In exchange for the contributions the potential subscribers waited shorter time for obtaining the telephone line. The joint financing contracts always contained a provision transferring rights to the property originated as a result of the joint-financing onto TP S.A.

7. At this point it ought to be mentioned, that in the early nineties, when the TP S.A. was still a State owned-company, supporting the development of the telecommunications' network (as illustrated above) has been socially acceptable, since it was considered as acting in the public interest. However the situation changed drastically after commercialisation of the TP S.A. in 1992, as from that time on, the joint financing schemes amounted to upgrading the property of the commercial enterprise.

8. From the very beginning of the nineties, the position of the OCCP on the issue of joint financing was clear: such schemes are in fact an out-of-tariff payments, and as such contribute to the unjustified strengthening of the market power of the TP S.A. unless of course the costs incurred by the scheme participants are properly reimbursed either financially or in the form of free packages of telecomm services. Theoretically the TP S.A. did acknowledge the need for compensation. In practice however it used all sorts of tricks in order to escape from those liabilities

9. There were numerous OCCP proceedings dealing with the practices depicted above. The good example of such practice might be found in one of the OCCP proceedings from 1992. In the discussed case the TP S.A. induced the people who wanted to obtain the telephone line to make donations to the Foundation of Development of Telecommunication in Lublin (*Fundacja Rozwoju Telekomunikacji Lubelskiej*, 'FRTL'). Since those donations were not paid directly to the TP S.A., but to one of its proxy entities, legally speaking they could not be treated as out-of-tariff charges. In due process of the proceedings the OCCP discovered however that the donations were clearly linked with shortening of the time for which the contributors had to wait for obtaining the telephone line from the TP S.A. In light of the above the aforementioned practice have been considered as an abuse of dominant position by the TP S.A., therefore cease and desist order has been issued and the fine imposed.

10. As it has been mentioned at the beginning of this section, also the municipalities were quite often participating in the joint financing schemes. However in contrary to the natural persons the municipalities were not reimbursed by the TP S.A. This led to the initiation of investigation by the OCCP on the grounds of suspected abuse of dominant position. Upon the completion of the proceedings, the Office found the practice to be in breach of the Polish competition law and issued a cease and desist order. The TP S.A. appealed to the Court of Competition and Consumers' Protection, but the Court in its verdict issued in 1994 supported the position of the OCCP.

11. The joint investment schemes generated also other sorts of misconducts which were the subject of the OCCP's investigations, for example on regular grounds the TP S.A. was withholding from paying the interest on the financial assets contributed by the participants. This, given the high inflation rate at that time, eroded significantly their value.

12. The joint-investment schemes formed an extremely heavy burden on the budget of the participating consumers. Therefore, by safeguarding the reimbursement of the costs by the TP S.A., the OCCP's antimonopoly investigations contributed to enhancing the consumers' overall welfare. Similar could be said about imposing on the TP S.A. the obligation to compensate to the municipalities, which came thru due to the outcomes of the OCCP's investigations. Relieving the municipalities from the need to subsidise the development of infrastructure belonging to the profit-making enterprise allowed them to redirect the additional resources to other tasks, thus via their increased performance to contribute to the economic development. Additionally, the aforementioned proceedings by preventing the TP S.A. from

strengthening its market position, created the conditions for the gradual development of the competition in this sector.

13. The OCCP cases dealing with joint financing were typical in the first years of the nineties; however with the progress of the economic transformation, their share in the enforcement of the competition policy started to dwindle, while their place has been taken over by cases dealing with other types of misconducts.

14. In 1998 TP S.A. introduced a new system of applying the interest on overdue subscription payments. Namely, TP S.A began adding default interest to the bills of those consumers whose payments have been transferred to TP S.A. after the 15th day of the month following the month for which the payment was calculated. There would be nothing unusual in the practice except for the fact that as date of payment TP S.A. considered the date on which the money were transferred to its accounts, and not the date on which the payment has been made by the customer, as it is usually the case. Such behaviour amounted to punishing the customers for the faults of the banking system (i.e. long delays between transferring the money from one account to another).

15. The implementation of practice in question triggered an investigation from the OCCP on the grounds of suspected abuse of dominant position.¹ Upon the completion of the investigation the OCCP stated that the practice in question was by no means justified, it violated consumers' rights and also brought unjustified financial profits to the company. The proceeding also revealed that the TP S.A. has been misinforming its customers. In light of the above the OCCP concluded the case with issuing the cease and desist order and imposing a fine.

16. The proceedings of the OCCP discussed above, on one hand contributed to the raising of the consumers' economic welfare by preventing the undertaking with dominant position from unjustified rising of capital and by redirecting this capital to its rightful owners – the consumers. The discussed case enhanced also the overall levels of competition in the sector by preventing the strengthening of the dominant position held by the incumbent.

17. As it has been illustrated above, the nature of the anticompetitive practices in the telecommunications' sector changes with time. So does change the nature of the correlations between the economic development and the fact of counteracting those practices.

18. On 24th November 2003 the OCCP imposed a fine of EUR 1.500.000 on the TP S.A. for the abuse of dominant position. The scope of the investigation covered the unjustified 60% rise in the prices of ISDN services provided by the TP S.A. to its subscribers. The prices have been changed as a result of removing by the TP S.A. two ISDN tariff plans from its offer. The subscribers to those plans has been transferred without their consent to the new more expensive ones. Upon the completion of the investigation the OCCP issued a cease and desist order accompanied by the abovementioned fine.

19. In that case, the positive impact on economic development manifests itself very clearly, in two ways. Firstly, as in the previous examples the economic welfare of 320.000 of Polish consumers has been improved. Secondly, prevention of sharp and unjustified price-hikes, has a general positive impact on the competition in the markets for providing the internet services. Since the prices remained unchanged the potential pace of expansion of those services subscribers' base has grown, as compared with the hypothetical situation in which OCCP losses the case and the prices eventually go up, and the growth is slower. It is possible, that the faster growth of the subscribers' base could spread the incomes of the providers generated by those new customers more evenly between the incumbent and its competitors. Should such case occur the competitors (who in the Poland are more effective that the incumbent) are more likely to invest the surplus capital, since due to their comparatively small size there very strongly

orientated toward expansion. The additional rise in the level of aggregated investments within the sector shall amount to its development, thus rising the overall level of economic development in the economy as a whole.

2. Anticompetitive Practices Affecting the Competitors

20. The overwhelming majority of OCCP proceedings against TP S.A. having as their scope incumbent's relations with the competitors are the proceedings against its abuse of the dominant position it has on many of the markets in telecommunications' sector.

21. As for the earliest cases falling into the abovementioned criteria, it could be stated that the cases did not differ much from the cases of early nineties discussed in the previous section of this paper (i.e. the cases regarding the joint-financing schemes).

22. In 1996, upon the complaint from one of the undertakings willing to become local telephone operator, the OCCP launched an investigation on the grounds of suspected abuse of dominant position by the TP S.A. During the investigation it has been revealed, that upon the entering the market the undertaking in question has been requested by the TP S.A. to contribute to the development of the infrastructure facility which was an exclusive property of TP S.A. The lack of undertaking's compliance resulted in the incumbent's refusal to connect the undertaking to the network. Upon the completion of the investigation the OCCP found the practice to be in breach with the provisions of the Polish competition law. Therefore, a cease and desist order has been issued and the fine imposed by the Office.

23. Another area in which the TP S.A. abused its dominant position was the lease of the telephone lines to other fixed and mobile operators. In 1997 the Office launched the investigation on the grounds of possible overstatement by TP S.A. of fees, it collected for leasing the abovementioned lines. In response, the TP S.A. justified the high price of the leased line with the extra costs it had to bear in relation to upgrading the network infrastructure. As the investigation drew to its end the OCCP established that rise in the fees was an abuse of the incumbent's dominant position as the increase in the fees was much higher than the rise of the extra costs incurred.

24. In addition it ought to be underlined, that in both cases, upon the appellation from the TP S.A. the Court of Competition and Consumers' Protection sustained the decision of the OCCP.

25. One of the most recent OCCP cases dealt with the discriminatory practices of the TP S.A. in its relation with independent internet service providers (ISPs) providing their services via the commuted telephone lines belonging to the TP S.A. In order to offer their services the ISPs have to sign with the incumbent contracts covering the issues of financial transfers associated with usage of incumbent's lines. The first ISPs approached the TP S.A. on that issue already in 1996 however from that time on the TP S.A. consequently refused to sign any contracts with those undertakings. Therefore, the ISPs were not able to receive payments for its services. In December 2003 the OCCP closed the investigation, finding the practice to be competition-restrictive and imposed on TP S.A. a fine of EUR 5.000.000

26. Without any doubt, it can be stated that remedies applied in those cases by the OCCP increased the levels of competition between the undertakings operating on the relevant markets. In the longer term the aforementioned strengthening of competition manifested itself in the telephone and internet services of better quality, better price, and better availability. The telephone, as well as internet services, may be considered as an integral component of the infrastructure necessary for the effective performance of business activities in any given economy. Therefore, improvements achieved in regard to the three features of those services enumerated above, must translate into the increase of the overall effectiveness of business

activities.² This in turn amounts to the improvements in the *tempo* and the quality of the economic development.

3. Conclusions

27. Based on the exemplary cases presented in the herby paper its quite clear that the positive impact of competition policy enforcement manifests itself two ways. Firstly, the remedies applied by the OCCP in the majority of cases led to enhancement of the consumers' economic welfare. The important point to be made here is the fact that, this enhancement has been possible via increases in the levels of aggregated disposable income available to those consumers (lower prices on telecomm services meant that more money has been available to the consumers for purchases of other goods and services). Therefore, enhancement of the consumers' welfare (as defined above), produces certain economic stimulus in the form of increases in consumers' spending and investments. This stimulus in turn translates itself into improvements in the quality and the dynamics of economic development.

28. Secondly, the enforcement of the competition law in the telecommunications' sector also benefits the undertakings themselves. Directly the competition enforcement affects the performance of the undertakings providing telecomm services, by levelling the playing field on which both the incumbent and its competitors operate. Indirect influence takes place due to the fact that telecomm services are an indispensable part of the infrastructure necessary for development of the economy as a whole.

NOTES

1. Further on, by implementing such system of interest calculation the TP S.A. has breached even its own contractual terms regulating its relations with the subscribers.
2. In light of the above it could be observed, that the competition related effectiveness gains in just one sector (telecomms) may amount to the increase of effectiveness in all other sectors of economy