

Unclassified

CCNM/GF/COMP/WD(2004)32



Organisation de Coopération et de Développement Economiques  
Organisation for Economic Co-operation and Development

09-Feb-2004

English - Or. English

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS  
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

CCNM/GF/COMP/WD(2004)32  
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## **OECD Global Forum on Competition**

### **CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION**

**Contribution from Poland**

-- Session II --

*This contribution is submitted by Poland under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.*

**JT00157976**

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## **CHALLENGES AND OBSTACLES FACED BY THE COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION**

### **Introduction**

1. During the past thirteen years of the Polish economic transformation, the sole existence of the competition culture has never been endangered. This is due to the fact that competition policy itself was always ranked as one of the top priorities in the governmental economic policy, since it was perceived as an indispensable pillar of the Polish transition from the central-planning economy to the system based on the principle of the free market.

2. The utter importance of both competition policy and competition culture has been confirmed by the relevant Articles of the Constitution of the Republic of Poland, which has been enacted in 1997. The Article 20 of the aforementioned Act introduces an economic model, which among others assigns a prominent role to the competition culture. The Article in question states that “*social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland*”. Further on, the role of competition policy in the Polish economic life has been explicitly safeguarded by virtue of the Article 76 of the Constitution of the RP, saying, that “*the public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute*”.

3. The aim of this note is to analyze the past and present challenges and obstacles faced by the Office for Competition and Consumers’ Protection (‘OCCP’, ‘Office’) in performance of its duties, in order to answer the following questions:

- What factors contribute to the establishment of the successful competition culture?
- What challenges or obstacles are associated with those factors, and how they can be solved?

### **1. Economic transformation in Poland and the enforcement of competition policy**

4. Economic transformation of the early 1990s, along changing the ownership structure of the Polish economy, introduced new types of business organisation and increased awareness of market players, thus enhancing market competition in Poland. The reformatory “Balcerowicz Plan”<sup>1</sup> implied, among others, the creation of competitive economy. With regard to competition policy, the reforms, while closely following European standards, were still tailored to the specific conditions of a country under transformation.

5. The processes of liberalisation, privatisation and restructuring bore various challenges and obstacles. Many of the former State monopolies, which have undergone the process of liberalisation tended to retain their significant market power, after the privatisation (e.g. telecommunications’ sector). Under the Polish law, the significant or even dominant position wielded by the undertaking on the market is not considered *per se* as an anticompetitive behavior. Nevertheless, the undertakings holding such position have far greater capacity to abuse the competition on their respective markets, than the undertakings operating in the fully competitive environment.

6. During the thirteen years of its activities, the OCCP utilised two approaches for protecting the competition in the sectors described above.

7. The effective enforcement of competition policy is one of the most efficient tools of influencing the process of forming the proper competitive relations in the privatised sphere of the Polish economy. This has been achieved by counteraction of any anticompetitive behaviors of the aforementioned former state monopolies, as well as by the effective control of concentration level of the Polish economy.

8. Additionally, in order to prevent the transformation of state monopolies into the private ones, in sectors structurally competitive, the OCCP actively influenced the process of privatisation of State assets. This was possible due to the broad consultative competences available to the Office from the very beginning of its existence. The crucial role in the process of promoting the principles of competition in the process of privatisation played the OCCP's power to opine, on *ex-ante* bases, every privatisation transaction. This tool has been very effectively used by the Office in the first half of the nineties, when the privatisation of the State assets was at its peak. Between 1990 and 1995, the OCCP issued 1500 opinions in the discussed area, which usually were taken into account by the Treasury Ministry (i.e. the Ministry relevant for supervising the privatisation process).

9. Summarising, the activities of the OCCP in this respect allowed for introduction of competition in many sectors, which at the beginning of the transformation process were deemed as structurally uncompetitive.

## **2. Polish economic transformation and the implementation of the legal framework of competition policy**

10. The process of economic transformation implied certain challenges also in the area of developing the necessary legislative framework. The rapid liberalisation of the Polish economy required the adoption of entirely new legal setup, more responsive to the changing needs of both the undertakings and the consumers. In addition, the transformation of the legal environment has been further enhanced by the incorporation into the Polish legal system of the provisions of the EU *acquis communautaire*, stemming from the Poland's preparation for accession to the European Union.

11. In the area of competition policy the above translated into enactment by Poland of the competition law in 1990<sup>2</sup> ('1990 Act'). The abovementioned Act contained all core elements of the modern competition policy. It defined the anticompetitive practices and abuse of dominant position. It has also set-up the merger control system, introduced legal exclusions and relevant sanctions. However, the discussed law contained certain exceptional provisions addressing the specific needs of Polish economy, which by then was in its early years of transition.

12. In the second half of the nineties, as the Polish markets became more mature, and the timetable for EU enlargement became clearer, the need for the new competition law has arisen. The main idea behind the new competition act was to align the Polish competition policy with the requirements of EU *acquis communautaire*. Additionally, the works on the new law provided an excellent opportunity for enhancement of various procedural and substantial provisions based on the operational experiences in implementation of the 1990 Act gained by the policy enforcers in the past years. Due to the above, on 15<sup>th</sup> December 2000, the Polish Parliament adopted the Act on Competition and Consumers' Protection, which from that time on, provides legal framework for the enforcement of the competition policy in Poland.

13. Summarising, in Poland, the process of implementing the legal framework relevant for enforcement of the competition policy could be roughly divided into two stages. Firstly, at the very beginning of the transformation period, the competition law has been enacted. The law in question, on one

hand followed the generally accepted standards of the modern competition policy, while on the other took into account the special needs of the economy in transition. During the second stage, which lasted throughout the nineties, all those special measures aiming at facilitating the economic transformation have been gradually eradicated (as the economic transition progressed). This allowed for evolutionary implementation of the competition law, without compromising on its core elements.

### **3. Enhancing the competition culture via the advocacy activities**

14. The lack of social and political support to the cause of free and unrestrained competition is generally perceived as a significant setback to its effective implementation. Therefore, the advocacy activities of the OCCP are exercised in two dimensions, i.e. relations between the OCCP and other public administration bodies; and activities aiming at rising the public awareness of the benefits deriving from the implementation of competition policy.

15. In regard to the former of the dimensions mentioned, the Office has a broad range of consultative powers, which it actively employs in order to promote the principles of competition policy among the policy-makers. Among others, those are: the right of the OCCP's President to attend all meetings of the Council of Ministers having competition policy issues on their agenda (even though the President himself is not the member of the cabinet); OCCP's power to opine drafts of legal acts prepared by other governmental bodies; Office's right to participate in the activities of various governmental and parliamentary working groups and committees etc.

16. In case of the second of the aforementioned advocacy priorities, the OCCP aims at increasing the awareness of economic units and the whole society in regard to the benefits stemming from competition. From a broader perspective, competition advocacy serves as a means to prepare Polish society for the participation in the Single Market of the European Union, both in terms of exercising consumer rights and fair competition rules. To intensify activities advocating competition, in March 2002, the President of the OCCP established the Department of Information and Communication,<sup>3</sup> whose tasks include coordination of educational and information activities at the central and regional level. To this end, the Office employs various methods, e.g., trainings, mass media relations and publications. Recent information campaigns dealt with financial and telecommunications issues, advertising, electronic trade and education of young consumers. The Office elaborates also the guidelines for the entrepreneurs, concerning various aspects of the policies implemented by the Office.

17. In addition, the OCCP enhances the competition culture via the activities of Council for Competition and Consumers' Protection, which has been set up by the Office, as consultative and advisory body.<sup>4</sup> The aim of the Council is to intensify co-operation between parties representing consumers and entrepreneurs. The initiative responds to the present trends of integrating business environments and non-governmental organisations in the face of social and economic problems and challenges.

18. One of the Council's initiatives is preparing codes of good practice voluntarily adopted by entrepreneurs in selected industries or sectors of economy. It proves particularly efficient in sectors of economy which are difficult to supervise, e.g., the construction sector, sales of used cars, travel agencies, real estate agencies and direct marketing. Codes stand a good chance of becoming a foundation of proper relations between consumers and entrepreneurs which should help reduce negative market phenomena.

19. Summarising, the lack of effective competition advocacy may result in the absence of social and political support to the cause of unrestrained competition, thus inhibiting its effective implementation, and negatively affecting the economic development. On one hand, the advocacy policy has to address different target groups (i.e. policy makers, consumers, undertakings), while on the other, it has to safeguard coherence of activities carried out with respect to each one of those groups.

#### **4. International cooperation and the competition culture**

20. As the international economic interactions intensify, new obstacles or challenges arise in the local and international markets. This necessitates international co-operation of governments engaged in the development of competition policy and consumer protection, in order to counteract possible problems. In case of the OCCP, active participation in the regional and multilateral debate on competition and consumer protection facilitates the formulation, adoption and implementation of fully-fledged competition and consumer protection policies.

21. The international cooperation either within the EU accession preparations, or along the transformation process, namely the assistance of the OECD and other international organisations, contribute to further enhancement of the competition culture in Poland.

22. Monitoring of the economic developments in Poland by the OECD helped to pinpoint areas requiring further efforts and preparations in order to comply with the international standards and to improve the effectiveness of competition protection. The recommendations of the OECD in the area of competition led to improvement of the policy enforcement and decisional status of the Office. Among others, in order to enhance the methodology of the competition cases, the OCCP established Market Analyses Department, which supports the enforcement departments in performance of their tasks. Other improvements in competition enforcement concern the human and procedural aspects in functioning of the Court for Competition and Consumer Protection (e.g. trainings and seminars for judges).

23. The European Commission recommendations have also great impact on the development of the competition culture in Poland. In the last Commission's report on the preparations of Poland for the EU membership (5<sup>th</sup> November, 2003), it is stated that Poland has adopted legislation containing the main principles of the Community antitrust rules and state aid. According to that report, the emphasis shall be put on the law enforcement and correct application. The most important challenge ahead of the OCCP is linked with the participation in the European Competition Network due to its legislative and institutional requirements. Successful cooperation within the ECN will path the way towards more active and decisive enforcement of the policy in Poland.

24. Summarising, the international cooperation plays vital role in the process of enhancing the competition culture. In case of Poland, the international cooperation by stimulating the exchange of expertise and ideas enhanced the Office's capacity to deal with various obstacles faced in the process of competition policy enforcement, as well as developing the indispensable competition culture. On more general level, by allowing in certain situations for joint enforcement, the international cooperation generates significant economies of scale in the effectiveness of the competition policy in the cooperating countries (e.g. ECN).

#### **5. Conclusions**

25. During the nineties, the nature of the challenges and obstacles faced by OCCP in its competition enforcement activities changed in correlation with the progress of the economic transformation. The relevant institutional and legal framework has been established already at the beginning of the transformation process (i.e. 1990). This provided firm bases for the elaboration of sound competition culture. The main obstacles faced by the Office in the early nineties stemmed directly from the process of economic transformation, i.e. the Office had to prevent the transformation of state-owned monopolies into the private ones in sectors structurally competitive. The Office successfully overcame those obstacles by effectively enforcing competition policy, as well as by applying its broad consultative powers.

26. From the very beginning of its existence, the Office relays on extensive advocacy activities as an avenue for promoting the competition culture and maintaining the public support to the principles of competition policy. The main target groups addressed by the OCCP are: the policy makers and the society. Additionally, based on its previous experiences, the Office would like to underline the importance of foreign cooperation as a tool for enhancing the capacity of competition policy enforcers to deal with obstacles and to face the challenges stemming from the enforcement of competition policy.

**NOTES**

1. “Balcerowicz Plan” was a programme containing a set of measures which were to rapidly transform Polish economy into the system based on the principle of free and competitive market, elaborated by one of the leading Polish economists, and then Finance Minister – Mr. Leszek Balcerowicz.
2. The Act of 24th December 1990, on combating of the anti-monopolistic practices.
3. At present, the Department of International Relations and Communication.
4. The Council consists of business representatives, NGOs, and distinguished experts in the area of competition and consumer protection.