



COMPETITION COMMITTEE

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS
IN POLAND**

2003

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Executive Summary

1. From the perspective of the Office for Competition and Consumers' Protection ('OCCP', 'Office') the 2003 was the year of extensive preparations for the membership in the European Competition Network ('ECN'). In 2003 the experts in the OCCP's Department for Legal Affairs and European Jurisprudence elaborated draft of an amendment to the Act of 15th December 2000 on competition and consumers' protection ('2000 Act', 'Act on competition and consumers' protection'). The Act in question provides the legal bases for the enforcement of the competition policy in Poland. The discussed amendment secured its full compliance with the requirements of the EC regulation 1/2003. In order to further develop the OCCP's capacity in the area of competition policy enforcement, the numerous training schemes covering the ECN-related issues have been launched for the OCCP functionaries, as well as for the judges, who as of May 1st 2004 will be responsible for the enforcement of the European competition law.

2. The abovementioned preparations were executed without prejudice to the regular enforcement activities of the Office, associated with the implementation of the policies within the scope of its competences. As regards its responsibilities in the area of competition protection, in 2003 the Office carried-out numerous proceedings in cases concerning anticompetitive practices as defined in the 2000 Act. Besides its enforcement activities, the Office was also very active in the field of intra-governmental relations aimed at advocating the principles of competition policy to other ministries. The experts of the Office contributed to the works of various governmental and parliamentary working groups and committees dealing with competition policy issues. The President of the OCCP participated in the meetings of the Council of Ministers, whenever competition policy was on its agenda. The enormous work has been also done in the area of promoting the competition policy via the legislative consultations. In order to illustrate the scale of those activities, it could be said that last year the Office issued 2446 opinions to the legal acts on issues concerning any of the policies it enforces.

3. As in all previous years of the OCCP's existence, also in 2003 its activities helped to strengthen market mechanisms, enhance competitive business environment, eliminate monopolistic behaviours and limit infringements of consumer rights.

1. Changes to competition law and policies proposed and adopted

1.1 *Summary of new legal provisions of competition law and related legislation and government proposals for new legislation*

4. By virtue of the Article 26.8 of the Act on competition and consumers' protection the scope of competences of the OCCP's President encompasses *elaboration and submission to the Council of Ministers of the draft legal acts concerning competition restricting practices, development of the competition or conditions for its emergence as well as protection of consumer interests*. Roughly speaking, the adoption of the legal drafts elaborated by the OCCP is a two-stage process. First, these Acts are circulated among the ministries in the process of intra-governmental consultations, then they are passed on to the Council of Ministers for their final enactment. In 2003, drafts of the following legal acts have been elaborated by the OCCP.

1.1.1 *Draft of the Act amending the Act on Competition and Consumers' Protection.*

5. The *raison d'être* for the preparation of the amendment to the 2000 Act was the need for bringing the Polish competition law in line with the provisions of the EC Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. In this regard the changes imposed by the amendment were of following sort:

- designation of the OCCP's President with a duty of enforcing the Articles 81 and 82 in Poland;
- amendments to the procedures regulating the conduct of the dawn rides (the possibility of carrying out a dawn ride on behalf of the European Commission or on behalf of competition authority of another EU member state has been added to the scope of competences of the President of the OCCP);
- the leniency programme has been introduced.

6. The amendment of the 2000 Act provided also useful opportunity for inclusion of some additional provisions stemming from the three years of enforcing the aforementioned Act. The changes imposed covered the following material as well as procedural provisions:

- the non-exhaustive catalogue of the competition-restrictive practices has been expanded (bid rigging involving both the bidding parties as well as **bid caller** has been added to the list);
- the scope for applying the *de minimis* rule has been significantly narrowed;
- in the area of the control of concentration the *dominance test* used as criterion for the assessment of the concentration has been replaced with the *significant restriction of the competition test*;
- in line with the OECD recommendations the 20% market share threshold above which the merger notification obligation existed to the companies, has been abolished;
- in case of takeovers, the exemption from the merger notification procedure based on the presumption of the low market share of the passive party has been removed.

7. As of 31st December 2003 the draft has been at the final stage of intra-governmental consultations.

1.1.2 Council of Ministers' Regulation on block exempting the certain categories of agreements in the automotive sector from the prohibition of anticompetitive conduct

8. By virtue of the discussed regulation certain types of agreements between the car suppliers and the distributors are to be block-exempted from the scope of general prohibition of anticompetitive practices. The discussed regulation additionally names those agreements, which are explicitly forbidden.

9. In 2003 the aforementioned regulation has been amended in order to exclude from the scope of the block exemption the agreements concerning the motorcycle market. In addition, the discussed amendment postponed till 1st May 2004, the date of entering of the amended regulation into force. The abovementioned has been adopted by the Council of Ministers in January 2003.

1.1.3 Draft of the Act on procedures in State aid control cases

10. With the day of Poland's accession to the EU the significant changes will occur in the area of State aid control. Since all State aid issued in Poland will have to be assessed against its compliance with the rules of the EU internal market, the competences in regard of the discussed policy will be shifted from the OCCP to the European Commission. The new law shall establish the procedures for cooperation between the donors, beneficiaries, OCCP and the European Commission.

1.1.4 Regulation of the Council of Ministers of 29th February 2003 on the reporting procedures concerning the State aid

11. The regulation in question lays down the reporting obligations of the State aid beneficiaries. The discussed regulation is meant to provide the body responsible for the State aid control with an efficient tool for the *ex-post* monitoring of the State aid granted, thus contributing to the raising of its overall effectiveness. The scope of the information required from the entrepreneur allows additionally for the precise assessment of the impact of the granted aid has on the competition.

1.1.5 Regulation of the Council of Ministers of 3rd February 2003 on effectiveness of the State aid granted

12. The discussed regulation obliges the bodies granting the State aid to measure the effectiveness of granted aid. The mechanism introduced by virtue of the regulation is meant to streamline the use of the public funds in Poland, by allowing benefactors to take their decisions on the more sound bases.

1.2 Other relevant measure , including new guidelines

13. The Article 27.3 of the Act on competition and consumers' protection equips the President of the Office with an authority to issue the guidelines for the entrepreneurs with an aim to explain the most complex notions of the Polish competition law, thus providing the President of the Office with an extremely effective tool for conducting the advocacy policy. In 2003 the set two guidelines of the OCCP President has been published, those were:

- guidelines of the OCCP's President on requirements to be fulfilled by the entrepreneurs notifying merger;
- guidelines of the OCCP's President on merger control procedure.

14. Publication of new guidelines is currently under discussion in the OCCP.

15. In addition, it ought to be mentioned, that the Department for Legal Affairs and European Jurisprudence on daily bases provided explanations to the queries of the entrepreneurs concerning the interpretation of the provisions of competition law. Most of the queries concerned provisions on the obligation to notify the intention of concentration, and in particular whether enterprises forming one capital group should notify the OCCP when intending to merge within that group.

2. Enforcement of competition laws and policies

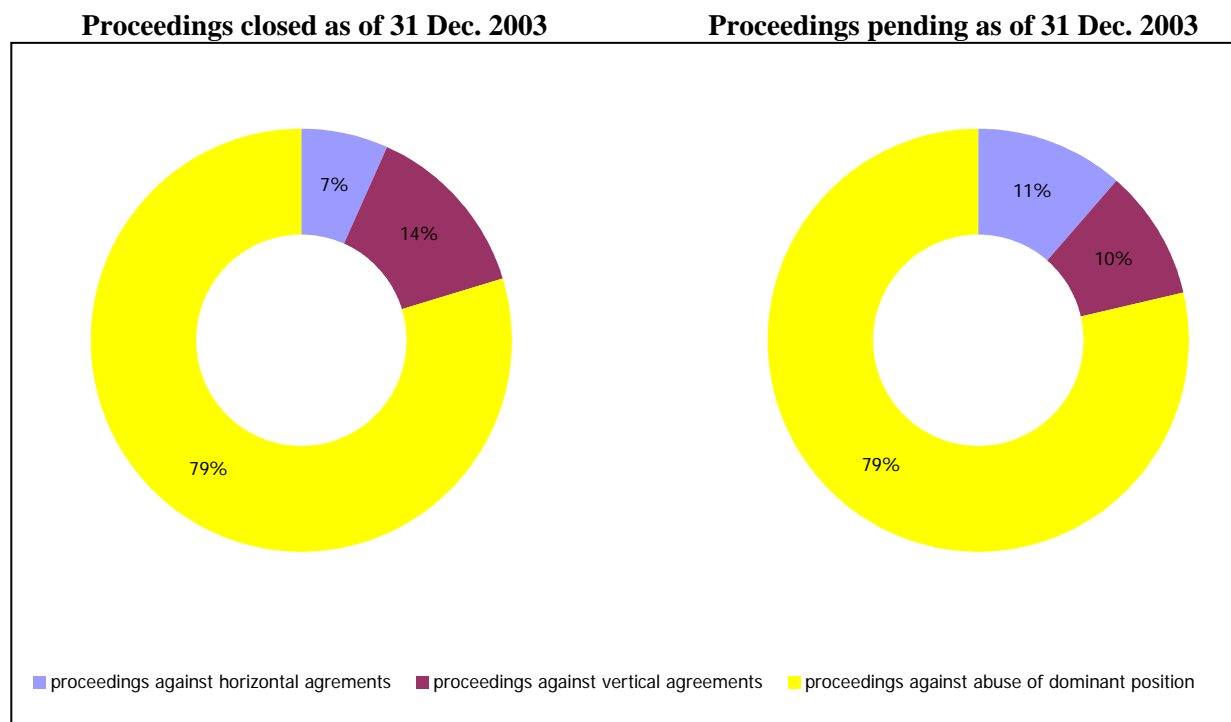
2.1 Action against anticompetitive practices, including agreements and abuses of dominant position

2.1.1 Summary of activities of:

Office for Competition and Consumers' Protection

16. In 2003 the OCCP launched 289 proceedings in the cases concerning anticompetitive practices. As of 31st December 2003:

- 148 proceedings have been closed;
- 141 proceedings were still pending.



17. As a result of the aforementioned proceedings, in 2003 the President of the Office issued 188 decisions concerning the anticompetitive conduct. The below table shows the detailed break-down of the President's decisions issued in cases concerning the three categories of the anticompetitive conduct i.e. the vertical agreements, the horizontal agreements and the abuse of dominant position.

Structure of the decisions issued by the President of the OCCP in 2003

Type of decisions type of practice	decisions finding the practice to be in breach with the competition law	decisions finding the practice to be in compliance with the competition law	decisions refusing the initiation of the competition proceedings	decisions discontinuing the antimonopoly investigation	decisions finding the practice to be desist
horizontal agreements	5	2	1	5	2
vertical agreements	15	3	5	0	0
abuse of dominant position	51	31	39	12	17

Court for Competition and Consumers' Protection¹

18. In 2003 the Court for Competition and Consumers' Protection ('CCCP') issued a total of 123 judgments concerning the appeals from the decisions of the OCCP's President. In 93 cases the President's decision has been sustained, and in 30 cases the court overruled or changed the decision of the President

Supreme Court:

19. In 2003 the Supreme Court issued total of 21 judgments in respect of the competition cases. In 14 cases the Supreme Court upheld the decision of the OCCP's President. In 7 cases the decision of the President has been overruled.

2.1.2 Description of significant cases:

Vertical agreements

20. One of the most interesting proceedings against the vertical agreements, which was carried out by the OCCP in 2003 dealt with the fuel sector. The discussed case has been initiated by the President of the OCCP on *ex-officio* bases against *Rafineria Gdanska S.A* – one of the major Polish fuel refineries, and twelve of the distribution companies, it cooperated with.

21. The scope of an investigation covered the distribution agreement among the aforementioned companies, which indirectly fixed prices and other conditions attached to the transactions between those firms, as well as provided grounds for the potential market allocation.

22. In due course of the investigation the following has been established:

- By virtue of the cooperation agreement the companies in question set the maximum amount of rebates from the producers' prices, which the distributor could give to its clients. Embedding such clause in the contract amounted to the prohibited resale prices maintenance.
- The discussed agreement *de facto* allocated the market, by limiting the wholesalers' active sales only to their assigned territory (though they were not prohibited from selling passively outside of it).

23. The investigation illustrated above has been concluded by issuing the cease and desist order by the President of the OCCP. No fine was imposed due to the fact that the agreement has been terminated prior to the conclusion of the investigation.

24. Another interesting investigation has been carried out in relation to the vertical agreement concerning the distribution of Husqvarna chainsaws. The agreement in question has been signed by the *Electrolux Polska sp. z. o. o.* ('Electrolux'), and its five regional dealers.

25. In due process of the investigation the following competition-restrictive clauses have been found in the agreement:

- agreement prohibited the distributors from selling the chainsaws of other producers than Husqvarna (*exclusive dealing clause*)
- according to the agreement the distributors were obliged to apply for the Husqvarna chainsaws, only the retail prices set by the Electrolux (*RPM mechanism*);

26. In light of the above the President of the OCCP issued a cease and desist order and imposed a fine of EUR 43.000.²

Horizontal agreements

27. One of the most interesting investigations launched in 2003 concerned the competition-restrictive horizontal agreement on the market for taxi services. The agreement has materialized in the form of understanding between the major cab companies operating in one of the Polish cities. The discussed undertakings agreed to apply uniform price for their services.

28. In due process of the investigation it has been established, that the discussed practice violated the antitrust provisions of the Act on competition and consumers' protection. In his decision the President of the OCCP found, that the aforementioned companies discontinued applying the discussed practice, therefore no financial fine has been applied.

29. Another interested investigation dealing with the horizontal agreement has been launched by the President of the OCCP in relation to the presumed bid-rigging practice. One of the Polish cities in the region of Silesia issued a call for tender with an aim to designate the company who would take over the city's responsibilities in regard to controlling the tickets in the public transportation. During the investigation the existence of the bid-rigging practice has been confirmed, and the cease and desist order has been issued accompanied by the financial fine.

Abuse of dominant position

30. One of the most significant cases dealing with an abuse of dominant position, launched in 2003, has been the investigation into the alleged monopolistic practices of the *Telekomunikacja Polska S.A.* ('TP.S.A.') – the formerly state-owned incumbent in the telecommunications sector. The investigation focused on contractual terms of the ISDN services offered by the incumbent, and it was launched upon the numerous complaints from the TP S.A.'s customers.

31. The abuse of the dominant position in the discussed case manifested itself in the unilateral amendment of the contractual provisions in the agreements, TP S.A. has signed with the ISDN subscribers. The TP S.A. removed from its offer some tariff plans, while shifting their subscribers to other, more expensive ones. It ought to be mentioned that the subscribers were moved to the new plans without their consent. In due course of the investigation the existence of the aforementioned practices has been confirmed. The President of the OCCP issued a cease and desist order as well as imposed a fine of EUR 1.514.396 on the *Telekomunikacja Polska S.A.*

32. Another interesting abuse-of-dominant-position investigation has been launched in 2003 in the area of postal services. The case has been initiated upon the complaint from the board of one of the *poviat's*³, and was brought-up against the Polish state-owned post – *Poczta Polska* ('PP').

33. The PP offers to its institutional clients a possibility of Credited Bulk Mailing i.e. the mail is sent without the need to affix the stamp, and all of the charges for postal services are billed directly to the clients' account ('CBE'). In the case in question, the PP signed the CBE agreements only with those customers (including the aforementioned poviat), who obliged themselves to cover also some other costs stemming from the execution of the PP's internal procedures regulating the document flow.

34. In due process of the investigation it has been established that PP's behavior as illustrated above amounted to the abuse of dominant position, as the additional fees in question were not related to the subject matter of the CBE agreements. The President of the OCCP issued a cease and desist order. The

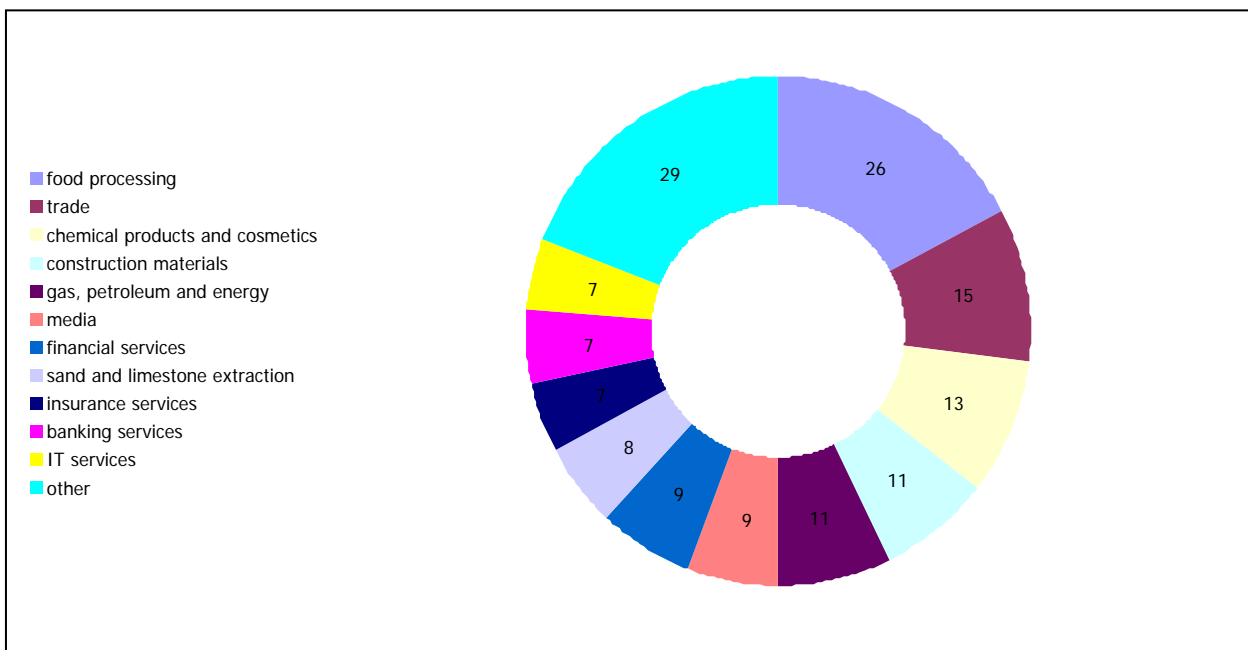
decision has not been appealed, and the PP has changed the internal regulations, which were subject of the investigation.

2.2 Mergers and acquisitions

2.2.1 Statistics on number size and type of mergers notified and/or controlled under competition laws

35. In 2003 the President of the OCCP issued a total of 152 concentration decisions. In 149 cases the President approved the concentration. In case of 2 acquisitions the conditional approval has been issued. In 2003 no concentrations have been forbidden by the President of the OCCP.

Concentration cases closed in 2003 (by sector)



2.2.2 Description of significant cases, including those with international implications

36. One of the most interesting concentrations assessed by the Office on 2003 was the takeover of *Getranke Beteiligungs AG* ('Getranke') by the *Heineken International B.V.* ('Heineken'). The discussed take-over was extraterritorial in its nature as both merging parties were located outside of Poland. Nonetheless both of the companies have been present on the Polish market via their dependant companies.

37. During investigation it has been established that the relevant market in this case was the Polish national beer market. The market share of both merging parties has been assessed at 37%. However, due to the nature of the relevant market (i.e. numerous and strong competitors, Poland's entrance to the EU internal market, as well trend to concentrate, which at that time was highly visible among the European breweries) no relevant position has been found, and the acquisition was allowed to go ahead.

38. As it has been mentioned before in 2003 the President of the OCCP conditionally approved two concentrations. One of those acquisitions occurred in the area of waste processing. On 6th March 2003, the President of the OCCP issued a decision conditionally approving the acquisition of 19 companies belonging to the *Lobe Group* ('Lobe') by the *Rethman Recycling Sp. z.o.o.* ('Rethman').

39. During the investigation the relevant market has been identified as local market for waste processing, covering the area of one city. Further on, it has been established, that, if approved, the discussed concentration would result in expanding the Rethamn's share of the market to 53%. This, given the nature of the market, would amount to creation of the dominant position.

40. As the necessary precondition for approving the take-over, the President obliged Rethman to sell-out *Zakład Robot Budowlanych* – one of its dependant companies. The deadline for adhering to the condition has been set at the 31st December 2004. Further on, Rethman has been obliged to report to the Office on the implementation of the aforementioned condition.

3. The role of competition authorities in formulation and implementation of other policies e.g. regulatory reform, trade and industrial policies

41. The activities carried out by the OCCP with an aim of influencing other policies, might be roughly divided into two categories i.e. Office's opining activities in regard of drafts of the legal acts prepared by other ministries and participation of the OCCP's employees in the activities of various governmental as well as parliamentary working groups and committees.

42. The procedural mechanisms for drafting legal acts by the Polish governmental institutions provide for an obligation to consult all drafts with any other governmental agency, which activities might be affected by the would-be law. In 2003 total of 2446 drafts of legal acts have been opined by the OCCP. When making its comments the OCCP puts an emphasis on consistency of those acts with competition law, including the state aid law, as well as issues related to protection of consumers' interests. Among others, the opinions were issued in case of:

- draft of the act on the court fees in civil cases;
- draft of the act on freedom of economic activity;
- draft of the act on securing the financial liabilities;
- draft of the act on supervision of the professional self-governments over the public trust Professions;
- draft of the act amending the postal law;
- draft of the act amending the banking law;

- draft of the law on restructuring the coal and steel sector;
- draft of the law on universal services;
- draft of the law amending the law on public trading in securities.

43. As a way of illustration, in reference to the draft of the act on securing the financial liabilities, the OCCP issued negative opinion in regard to the provision of the discussed act, which, if adopted, would effectively exclude from the scope of the Polish competition law the acquisition of debtor's company (in whole or in part) by its creditor, carried out as a result of securing the liabilities.

44. In case of the draft of the act on universal services the President of the OCCP expressed his doubts in regard to the lack telecommunication services in the catalogue of universal services, which has been written into the discussed act. The President of the OCCP provided also a detailed specimen of information, which in view of the Office should be provided by the telecomm operator to the recipients of the universal telecommunication services. The OCCP's opinion has been largely taken into consideration.

45. During the 2003 the staff members of the OCCP participated in all meetings of the Lower-House on Competition and Consumers' Protection. They also took part in the meetings of parliamentary committees where various policies and strategies in which competition is the prime concern were discussed and formulated. Those were:

- Lower-House Parliamentary Committee on Economy.
- Lower-House Parliamentary Committee on Infrastructure.
- Upper-House Parliamentary Committee on Environmental Protection.
- Upper-House Parliamentary Committee on Public Finances.
- Upper-House Parliamentary Committee on Economy.
- Sub-committee on the Amendment of the Act on Combating the Unfair Competition (Lower-House Parliamentary Committee on Economy).

46. By virtue of the Act of 27th July 2002, on conditions for admissibility and supervising of state aid for entrepreneurs the OCCP is responsible for supervision of granting the state aid. As the enforcer of the discussed policy the Office carries-out the following duties:

- cooperation with other governmental agencies on drafting new legislation, whenever it has state aid control policy in its scope;
- elaboration of yearly report on the enforcement of the discussed policy in Poland;
- maintaining the national registry of state aid grants;
- assessment of state aid effectiveness;
- assessment of the state aid influence on the national economy.

47. In 2003 the OCCP issued 853 approvals out of which 166 dealt with the state aid schemes. In addition, the Office actively participated in establishment of the national state aid monitoring system.

48. The OCCP was also giving its opinions to Ministry of Economy concerning motions of Polish enterprises, which related to excessive importation of various goods to the Polish customs territory and to importation of goods at dumping prices.

49. The Office has also taken part in the works of Governmental Working Group on Electricity Sector and Gas Trading. In 2003 the President of the Office has held a seat in the Telecommunication Council as well as Postal Services Council.

4. Resources of competition authorities

4.1 Annual budget

Annual budget of the OCCP between 1999 and 2003 (figures in EUR)

	1999	2000	2001	2002	2003
Office for Competition and Consumers' Protection	3.163.000	3.830.000	4.561.000	4.790.000	6.517.000
of which:					
OCCP	2.042.000	2.507.000	2.798.000	2.837.000	4.355.000
Trade Inspection	634.000	850.000	1.194.000	1.545.000	1.689.000
Allocation for NGOs	487.000	480.000	569.000	409.000	473.000

4.2 Number of employees

Employment in the OCCP between 2001-2003 (as of 31st Dec. 2003)

	2001		2002		2003	
	Absolute Val.	Percentage Val.	Absolute Val.	Percentage Val.	Absolute Val.	Percentage Val.
Total	220	100,0%	237	100,0%	259	100,0%
Economists	65	29,5%	64	27,0%	63	24,3%
Lawyers	94	42,7%	119	50,2%	124	47,9%
Other professions	61	27,7%	54	22,8%	73	28,2%

5. Summaries of and references to new reports and studies on competition policy issues

50. In 2003 for the first time in the history of the OCCP a hardcopy version of the Report on the activities of the Office for Competition and Consumers' Protection has been published by the Department of International Relations and Communication (so far the reports from the activities of the OCCP have been prepared only in the electronic form).

51. By the end of 2002 the OCCP Market Analysis Department elaborated complex report on Polish telecommunication sector in light of the OCCP competition policy enforcement. The discussed report contains analysis of the most common as well as most egregious anticompetitive practices which have so far occurred in the discussed sector and were subject to the OCCP's investigation. The report contains also estimations for the future trends in regard of the above subject. In January 2003 the report in question has been translated to English, and published in both hardcopy and electronic form (it is available for download on the OCCP website - www.uokik.gov.pl).

52. Finally, in 2003 the OCCP elaborated and published a set of two explanatory brochures on the certain aspects of the competition policy. Those were:

- *Abuse of dominant position in the light of legal provisions and case law of the European Communities*
- *Control of concentration in the financial institution sector in the light of laws and rulings of the EU and with reference to the Polish Law*

NOTES

1. The Court for Competition and Consumers' Protection hears the appeals from the decisions of the President of the OCCP, as well as those issued by the sectoral regulators.
2. All financial figures in the herby report have been converted to EUR, using the official EUR rate published by the National Bank of Poland on 1.06.2004 (1 EUR = 4.6507).
3. In accordance to Poland's administrative division, the *poviats* are the upper layer of the local self-government (with the lower being formed by *gminas* i.e. the municipalities)