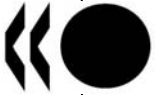


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Global Forum on Competition

ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

Contribution from Poland

-- Session I --

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ROUNDTABLE ON BRINGING COMPETITION INTO REGULATED SECTORS

1. Introduction

1. Due to the dynamics of the transformation process in Poland the reform of the sectors which we call regulated were undertaken after macroeconomic stabilisation of the whole economy. That is why the liberalisation of the network monopolies started up in the mid-90-ties and the essential elements of the reform such as privatisation or deregulation are still being continued. There is a wide-spread awareness in Poland as to the necessity of the farther liberalisation and its significance for the development of competition in these sectors. One should also mention that liberalisation of the markets that were state monopolies in the past is one of the main objectives of the Lisbon Agenda and Poland being a member of the EU takes part in the its realisation.

2. Network monopolies in Poland are regulated by sectoral acts but in parallel they come under the antimonopoly legislation. Due to the market power of the former monopolists which is still significant and anticompetitive practices they adapt the antimonopoly office often intervenes in these sectors. Creation of the separate sector regulators for telecommunication, energy and rail transport has not changed the fact that the Office for Competition and Consumer Protection (OCCP) is the only administrative body responsible for realisation of antimonopoly legislation (which means it counteracts the abusing of dominant position and anticompetitive agreements as well as possible anticompetitive mergers).

3. Procompetitive changes in regulated sectors are necessary – despite the reforms incumbent companies in telecom, energy or rail transport sectors are still dominant and own most of the infrastructure due to which their market power and potential anticompetitive behaviour are threat to the development of the competition on the market.

4. Engagement of the OCCP in bringing competition into regulated sectors takes place through:

- a) counteracting anticompetitive practices on the markets,
- b) giving opinions on the drafts of legal acts concerning the regulated sectors with the aim of including solutions fostering competition,
- c) strengthening cooperation between the OCCP and sector regulators.

2. Cooperation between OCCP and regulators

5. There are a few institutions in Poland now that act as regulators. Scope of their powers is restricted to one or several sectors of the economy that used to be state monopolies. The abovementioned institutions are: The Energy Regulatory Office, Office of Telecommunications and Post Regulation, The Civil Aviation Office and the Office of Rail Transport Regulation. The OCCP standing is that strengthening cooperation with regulators will favour effective fighting infringements of competition on the markets concerned.

6. Regulators have substantial impact on creating competition on the markets they regulate. That is why it is so important for competition policy to better coordinate activities of the OCCP and regulators.

Having that in mind Office for Competition and Consumer Protection is going to make agreements precisising the details and rules of that cooperation. The subjects of the agreements would be first of all:

- organisational aspects of concurrence in situations envisaged in the sectoral acts,
- procedures of cooperation in concrete cases,
- principles of exchange of information and using of data collected.

3. Examples of cases dealt by the OCCP

3.1 Abuse of dominant position, energy sector

7. The proceedings concerned a local monopoly supplier of electric energy – ZE Kraków. It has been determined that in relations with its customers it used a contract form containing provisions imposing onerous conditions on individual customers. The rights and obligations of the parties concerning the mode and terms of settlement were regulated by a tariff, which was not provided to the customers, and whose change did not require any amendments to the energy supply contract. Moreover, ZE Kraków did not comply with requirements pertaining to quality, reliability and continuity of supplying and receiving energy, as well as responsibility of the parties for breaching a contract. Those requirements are unequivocally set out in legal provisions regulating activities of electric energy providers.

8. Conduct of ZE Kraków was considered anti-competitive and a prohibition decision was issued by the President of the Office. It is noteworthy, that the undertaking amended contested provisions of the contract and put them into practice even before the decision.

3.2 Abuse of dominant position, telecommunication sector

9. The proceedings concerned Telekomunikacja Polska SA (TP SA), a national incumbent, holding a dominant position on a number of telecommunication services markets. Following numerous complaints by TP SA's customers, explanatory proceedings concerning unilateral introduction of changes to conditions regulating provision of ISDN services by TP SA were initiated by the Office.

10. The aforementioned changes included withdrawing some tariff plans and moving their users to other, less favourable ones. The company also misinformed its customers, as in a document announcing changes to conditions of contract, it mentioned neither legal basis for its action, nor possibility of terminating the contract, creating thus an impression, that its actions cannot be lawfully contested, as they are in accordance with the provisions of the contract.

11. The proceedings showed a clear dominance of TP SA on the Polish ISDN services market, mainly being a result of the fact, that the undertakings enjoys monopoly over direct access do customers, being the only last mile operator in Poland. Its competitors are thus unable to provide ISDN services directly to their customers.

12. President of the Office decided that TP SA, inserting into a contract provisions stating that a change to services' prices does not constitute a change to the contract and does not require the consent of the other party, imposed unfair and unlawful condition on its customers, abusing thus its dominant position on the Polish ISDN services market. In consequence, a prohibition decision with a 7 million PLN (ca. 1,7 EUR) fine was issued.

3.3 *Abuse of dominant position, rail transport.*

13. On 30th June 2003 the President of the OCCP launched an investigation against the PKP Cargo S.A. ('PKP Cargo') – the dominant undertaking on the Polish market of rail freight transport. The case has been initiated upon the complaint from Sped Pro S.A. ('Sped Pro') –forwarding company operating on the market of rail freight transport. In its complaint Sped Pro claimed that the PKP Cargo abused the dominant position it has on the aforementioned market, by applying a system of discriminatory rebates, in its relations with forwarders.

14. The relevant market in the aforementioned investigation has been identified as the market for the services of freight transport by rail in Poland. Other means of transport has been excluded from the scope of the relevant market definition as no substitution has been observed between them and the rail transport. The PKP Cargo possessed a 70% of the relevant market, therefore it was considered as an entrepreneur with a dominant position.

15. In due course of the investigation the charges brought up by the Sped Pro have been confirmed.

16. In the long term contracts it signed with the forwarders, PKP Cargo applied different rates of rebates to *similar* undertakings (turnover and the amount of freight transported were analysed in order to determine the degree of *similarity* between the undertakings). In addition, PKP Cargo differentiated the conditions under which it was possible for the forwarders to change the declared¹ amount of freight to be transported via PKP Cargo in a given quarter or year. Finally, in its contracts with the forwarders the PKP Cargo, excluded certain railway stations and certain receivers from the list of destinations available to the forwarders.

17. On 31st December 2004 the President of the OCCP issued a decision in which he has found all above mentioned practices to be in breach with act of 15th December 2000 on competition and consumer protection. The President issued a cease and desist order and imposed a fine of EUR 5.000.000 on the PKP Cargo.

NOTE

1. In their contracts with PKP Cargo the forwarders obliged themselves to provide the PKP Cargo with a defined volume of freight to be transported during a given period (usually a quarter or the year) The change in the declared quota was possible only after fulfillment by the forwarder of some conditions. Those conditions were set differently by PKP Cargo in case of similar undertakings