This note is submitted by the Delegation of Poland to the Working Party No. 2 FOR INFORMATION at its next meeting on 27 October 2000.
EXPERIENCE WITH VERTICAL SEPARATION IN REGULATED INDUSTRIES

Poland

1. The provisions of the Polish Act on counteracting monopolistic practices and protection of consumer interests provides for a decision, to be issued by the Office President, ordering the separation of a dominant enterprise if it persistently impairs competition or conditions for the creation of competition. However, separation decisions has been infrequent in the Office’s practice to date. In early 1990s, the Office issued several decisions ordering separation of agriculture-related companies engaging in the purchase, storage and processing of grain (grain elevators and mills) and seed trading, as well as wood production and processing enterprises (saw-mills). In addition, one decision referring to the gas sector monopolist, the Polish Oil & Gas Company, will be discussed later in the text.

2. In Poland, decisions concerning the separation of companies in regulated industries have been recently made under respective industry restructuring programmes adopted by the Polish Government and are reflected, to the extent necessary, in draft act sent to the lower house of the Polish Parliament.

3. Below will follow examples of separation decisions and basic assumptions for liberalisation of regulated industries in Poland, based on the so-called "best practice" developed in countries with extensive experience in restructuring and liberalisation of regulated industries, and consistent with the basic competition regulations and policy, including:

   - Restructuring Programme for the Polish Railway Operator;
   - Restructuring Programme for the Polish Oil & Gas Company;
   - Energy Law, liberalisation of the power sector;
   - Draft Act on Post Law as an example of intermediate approach consisting in the accounting separation; and
   - Draft Act on Telecommunication Law as another step of liberalisation of the telecommunication sector began in 1990.

4. Since the above projects are, in general, at initial stage of implementation, the below information are hence limited to answers to the first group of questions included in the "Questions for Countries Responses" prepared by the Secretariat.

Rail Transport

5. The first step toward creation of a separate rail transport services market was introduction by the Act on Rail Transport Law of 1997 the legal grounds for the free activity of independent rail operators.

6. Pursuant to the above provision, the licensing authority grants a license on the basis of application filed by business entities that fulfills the statutory requirements for a license, authorising them to pursue business activity consisting in railway track management and provision of rail transport services.

7. In addition, local authorities are empowered to order transport services or arrange for them in their own capacity on railway track taken over from rail management, including PKP (as independent operators). The target figure of ca. 6,000 km of rail tracks that are not cost-effective when goods and
passenger transport is carried by PKP, may be subject to the procedure of transfer to local governments for independent arrangement of passenger transport there.

8. The licensing authority (as per the existing version of the Act) is the Minister of Transport and Maritime Economy in case of licenses covering more than one voivodship, or the voivod (local manager) when the license is confined to the territory of a single voivodship.

9. The basic document setting out the guidelines for the transport market reform is the document approved by the Government on 7 October 1999 and sent to the lower house of the Polish Parliament, called the draft Act on Commercialisation, Restructuring and Privatisation of the Polish Rail Operator, State Enterprise. The draft Act provides for the following:

1. Commercialisation of PKP, i.e., the transformation of the state enterprise into PKP S.A., a joint stock company wholly owned by the State Treasury, operating on the basis of the Polish Commercial Code and regulations contemplated in the draft Act;

2. Separation of the infrastructure operation function from the transport function between independent business entities as the key of anti-monopoly solutions;

3. Organisational change by establishing new business entities on the basis of PKP S.A. structures, i.e., the railway management (Polish Railway Lines), companies serving as passenger and goods carriers (the number and scope of business of such companies will depend on the privatisation strategy that is being prepared now) and business entities whose existence turns out to be necessary for railway continuity or improvement of financials of the aforesaid companies; and

4. Definition and separation of areas of rail transport where:
   - supply of services is exclusively set by market mechanisms; and
   - supply of services is regulated by way of adaptation to the social and economic objectives set and financed by the state.

10. The draft Act providing for the establishment of separate entities to serve the transport services market on the basis of the existing PKP, with equal access to infrastructure, state grants and subsidies, creates sufficient legal environment for prevention of monopolistic practices.

11. Corresponding arrangements in the implementing provisions to the aforesaid draft Act and monitoring of PKP’s restructuring and privatisation process should guarantee that no operator that would dominate the transport market, will be admitted to that market, likewise any solutions that would be discriminatory against any of such operators. In this matter, it is extremely important to specify clear and express obligations of the state as the transport market regulator (before PKP’s passenger business is divided into separate companies). Such obligations entail in particular, provision of equal access for all operators active on the market, as well as transparent and stable forms of subsidising the passenger transport services.

12. The draft Act, which is under discussion at present, proposes that the Chief Rail Inspector should fulfil the function of the rail market regulator; its responsibility would be to solve problems arising out of the arrangement - natural monopoly – private company – in furtherance of social interest.

13. For the sake of smooth restructuring of PKP, both the Ministry of Transport and Maritime Economy and PKP began preparatory work for implementation of future statutory solutions. It covers PKP restructuring efforts in the following areas:
- finances;
- property;
- employment; and
- organisation.

14. The ongoing changes in the organisational structure are of material importance from the point of view of preventing any dominance on the rail transport services markets. These changes comprise activities that are to facilitate transformation of the existing divisional structure into a holding structure:

15. These activities include:

1. continuation of the restructuring efforts began in 1998 that led to the establishment of sector – vertical structure in place of territorial structure;

2. liquidation of non-profitable units that have no chance to function independently, and separation from PKP’s structures of units that are both able to fulfil the market requirements and expectations of prospective customers; and

3. establishment and preparation to establish commercial law companies to which PKP made or intends to make in-kind contributions consisting of its fixed assets. It is assumed that, in the future, these entities will become subsidiaries of PKP S.A. in the holding structure.

16. The Polish Railway Lines will manage the rail track infrastructure of PKP. This arrangement does not preclude the management of certain rail lines by local authorities, provided that there are proper conditions for it, or sale of rail lines.

17. The concentration of railway management in hands of one entity does not contradict the rule of preventing monopolist practices and also reduces the operating costs of rail infrastructure and facilitates the execution of regulatory functions by the state agencies.

**Gas Sector**

18. The main social and economic objectives of Poland’s energy policy are set out in the guidelines for the energy policy of the state by year 2002, as approved by the Polish Government. Their attainment can be furthered by the Act on Energy Law adopted in 1997. They cover the creation of conditions for sustainable development of the country, secure the energy security, reasonable use of fuels and energy and their savings, promotion of competition, remedying negative effects of natural monopolies, taking into account the environmental requirements, obligations arising out of international agreements and interests of consumers, and cost reductions.

19. The Act on Energy Law additionally defines the authorities responsible for fuel and energy management, namely: State Treasury Ministry (fulfilling owner’s functions), Ministry of Economy (responsible for formulation of energy policy), Office for Energy Regulation (regulatory functions and promotion of competition) and the Ministry of Environmental Protection.

20. As far as the gas sector is concerned, the goals of the energy policy of the state will be implemented, among other things, by means of intensifying efforts toward geographical diversification of gas supply, efficient use of gas deposits in the country, construction of underground storages, decentralisation of the gas system in terms of organisation and technology, liberalisation of the gas market understood as its restructuring and then privatisation, liberalisation of prices, introduction of cost-effective
methods of management and improvement of competitiveness of gas companies, and enforcement of the TPA rule in gaseous fuels.

21. The Polish Oil & Gas Company is the major company active in the gas sector in Poland.

22. POGC has been the joint stock company wholly owned by the state treasury since 30 October 1996. POGC carries business activity within the whole area of Poland. The POGC Group consists of divisions, subsidiaries and associates, grouped by technological function, engaging in the following areas of activity:

- geological works and prospecting;
- exploration of deposits, extraction of oil and gas;
- production, transmission and distribution of gas;
- design, construction and production of oil and gas equipment and other specialised equipment; and
- purchase of imported gas and gas from domestic supplies, gaseous fuels balancing and capacity dispatch from transmission system.

23. The Programme of Organisation Restructuring of the Polish Oil & Gas Company was approved by the Council of Ministers on 2 April 1996 and provided for the phased restructuring of POGC in compliance with the POGC separation decision issued by the President of the Antimonopoly Office (now the Office for Competition and Consumers Protection) on 12 April 1993.

24. This decision was issued following the gas and oil market analysis and antimonopoly proceedings carried by the antimonopoly authority and provided for the separation of POGC by means of establishing independent business entities building on the units then existing within the structures of POGC. The decision ordered the restructuring of the company so as the technical services, geophysical research and oil and gas prospecting services function as independent business entities.

25. The Office issued the aforesaid decision considering that the restructuring would contribute to the establishment of business entities capable of functioning in the market conditions and facing competition. It meant that not all elements of the company’s organisation had to be present in the companies created as a result of separation. The enforcement of the Office’s decision provided for elimination of ineffective assets from newly created companies.

26. The Office issued the above decision being aware that the imposed separation did not eliminate all conditions of Art. 12 of the Antimonopoly Law ("state-owned enterprises and co-operatives and commercial law companies holding a dominant position on the market may be separated or dissolved if they permanently constrain competition or the conditions for creation of competition.") suggesting further separation. Such a separation should primarily consist of the establishment, on the basis of parts of property of district gas distribution companies, of an independent company engaging in the purchase of gas from domestic producers and importers, and gas transmission. Such a company would hold a monopolistic position (natural monopoly) and thus would have to be subject to special supervision in respect of the protection of consumers’ interests against anticompetitive behaviour.
27. The final Programme of Organisational Restructuring of the Polish Oil & Gas Company was approved by the Government and amended in 2000, and provides for more advanced solutions based on the separation of commercial law companies from POGC in line with the functional criterion.

28. The proposed restructuring of POGC includes:

1. Separation of adequate parts of POGC’s business into five new companies: one prospecting & manufacturing company and four distribution companies; these companies will be established by POGC, stock company, who will be their owner.

2. The State Treasury will remain to be POGC shareholder on the basis of the remaining assets and other rights and obligations (including international gas supply contracts), while POGC will carry such activities as the management of existing contracts for importation, transmission and storage of gas.

3. On the day of establishment, new companies will subrogate the existing rights and obligations of POGC.

29. Immediately following the organisational restructuring of POGC and registration of companies that are wholly owned by POGC on the basis of the Programme (however not later than by the end of 2000), the State Treasury Minister will submit to the Council of Minister draft assumptions for privation of the sector and requisite legislation.

30. At the same time, it is assumed that the transmission company (POGC) will be excluded from privatisation for at least five years as of registration of companies separated from its enterprise. After that period, the decision of privatisation, if any, of the transmission company will be made by the Council of Ministers.

31. The present status of implementation of the "Programme of Organisational Restructuring of POGC" is as follows:

- The first stage at which POGC was transformed into a company wholly owned by the State Treasury (commercialisation) was completed on 30 October 1996;

- At the second stage, which has been pursued on the basis of the Antimonopoly Office decision, mostly during 1998, technical services, auxiliary production, geophysics and prospecting businesses were separated on the basis of POGC assets. They established 16 companies by contributing to them assets with the book value of ca. 500 million USD and transferring ca. 13,500 members of staff.

**Power Sector**

32. The energy reform is one of the key elements of the state restructuring process covering economic, social, and political areas, which began in Poland in 1989. The basis for carrying out the energy reform is the enactment of the Act on Energy Law by the Polish Parliament on 4 December 1997.

33. The principal objectives of creating the energy market in Poland are:

- to develop competition with the aim to increase efficiency of entities operating in the energy sector and consequently to minimise prices for final consumers;
– to provide the energy sector entities with incomes necessary for return payment and development of technical and business infrastructure; and
– to assure the energy security of the state.

34. The basis for promotion of competition in the energy market will be the effective regulation of enterprises described as natural monopolies, which take part in transmission and distribution of the electric energy, and application of the Third Party Access principle.

35. The Act on Energy Law provides for careful and gradual introduction of the TPA principle, under condition that the necessary reliability of supply and quality of fuels and energy be maintained. The provisions of the Act make it clear that this principle is limited to the fuels extracted in Poland and the energy produced from them.

36. The Energy Regulatory Authority (ERA), established with the aim to stimulate business efficiency in the energy transmission market, characterised by natural monopoly, regulates the energy enterprises with the objective to secure final consumers’ interests, and at the same time to provide the energy enterprises with incomes necessary to maintain the stable position in the market. This is particularly important considering the ongoing privatisation of the Polish energy sector.

37. The following groups of entities operate on the domestic energy market:
– power generation plants (power plants);
– system power plants connected directly to the power transmission grid;
– local power plants and thermal power plants connected to the distribution network;
– entities operating the transmission grid (at the tension of 220 kV and 400 kV) - PSE S.A. (Polish Power Grid Company), acting as a System Operator;
– entities operating the distribution network (at the tension of 110 kV and below); and
– entities dealing with energy trade.


39. The process of sector privatisation is being carried on parallel with the process of developing the ultimate structure of the electric energy market. According to the Programme and conditions for energy sector privatisation, privatisation has been carried out individually beginning from 1998. The privatisation process is expected to be completed in the year 2002.

Post Sector

40. Due to the specifics of post services and special role of these services in social and economic life, state monopolies used to be the prevailing way of post services market organisation by the end of 1980s. However later, as a result of general tendencies toward de-monopolisation and liberalisation of the
economy, this market was also affected by transformation, though the dynamics and rate of its transformation has been much slower than in related areas such as telecommunications.

41. The first step toward de-monopolisation of the post services market in Poland was the introduction under the Act on Telecommunications Law of 23 November 1990, of the option to carry licensed post activity consisting of paid transportation and delivery of domestic correspondence in a written form. The next step toward liberalisation of the post market was the option, introduced by the Act on the Amendments to the Act on Telecommunications Law and Certain Other Acts of 12 May 1995, to provide courier services and certain general post services, also on the basis of a license.

42. The draft Act on Post Law, which is presently discussed by the lower house of the Polish Parliament, provides for further gradual de-monopolisation and liberalisation of the post market in Poland by means of considerable reduction of legal monopoly enjoyed by the public operator in the area of certain post services, and waiver of now applicable administrative constrains in engaging in post business (licensing).

43. The core objective of the draft Act is to create conditions of development of post services and also to improve access to universal post services and enhance their quality, at the same time taking into account the protection of interest of users of post services.

44. The draft Act defines post services as profit-making collection, transportation and delivery of letters and printed matter and also other kinds of deliveries that are collected, transported and delivered by the public operator. Post services also include processing of money orders sent by mail. Contrary to the existing Act on Telecommunication Law, the draft Act does not separate courier services as they assumed that the principles of provision of post services should remain the same irrespective of the manner or time of their delivery.

45. The basic assumption of the draft Act is the freedom of engaging in and carrying business activity in the area of post, provided it is lawful. It will abolish the existing obligation to obtain a license to provide courier services and universal post services where the weight of delivery exceeds 2,000 g, nevertheless a permit will be required to carry post activity. The requirement to obtain a permit to carry post activity is supposed to provide the Post Regulator with the ability of effective control with regard to compliance of operators’ activity with the law, in particular as regards observance and protection of the secrecy of communication, to which the users have a constitutional right, and also the monitoring of the post services market.

46. The conditions of issue, refusal to issue and revocation of permits are laid down in the draft Act. The permit can be only refused when it is found that the issue of a permit would result in a threat to the state defence and security or the security and public order, or in breach of international treaties signed by the Republic of Poland.

47. Under the draft Act, the public operator is obligated to provide universal services which are subject to strict regulations, concerning among other things the conditions of their provision, required quality or calculation of fees. As a consequence of imposing the obligation to provide general services by the public operator, it will have to maintain an appropriate post network (including post offices, sorting centres, means of transport, necessary employment) covering the whole country, irrespective of its profitability.

48. In order to provide for cost-effective conditions for fulfilment of obligations in the area of universal services, the draft Act, likewise the existing Act on Telecommunications Law, reserves certain post services for exclusive provision by the public operator. However, the extent of exclusive service is
considerably reduced when compared to the existing situation, both in terms of type of service and weight of delivery.

49. It is proposed that the exclusive domestic services should solely cover the collection, transportation and delivery of mail containing correspondence and addressed printed advertisements with the weight of up to 350 g (at present, the public operator has the exclusive right to render post services consisting in the collection, transportation and delivery of domestic and foreign letters, excluding non-addressed printed matter and questionnaires, with the weight up to 2,000 g and letters of value with the weight up to 2,000 g). In parallel to the existing situation, the service of processing domestic money orders by mail will remain reserved for the public operator. As regards foreign mail, the type of services reserved for the public operator remains unchanged and is to refer to the whole foreign mail, however the upper limit of weight of mail subject to exclusivity is reduced down to 350 g.

50. The weight limits suggested here and types of mail in the reserved area comply with the border limit allowed under the Directive 97/67/EC of the European Parliament and the Council of 15 December 1997 on the common rules of development of the Community internal post services market and the improvement of quality of such services.

51. As a part of liberalisation of the post services market, it is also suggested that other operators should be provided with an opportunity to render services reserved for the public operator, however on condition that the fee for such a service would not be less than the bottom fee set out in the price list of the public operator as the fee for collection, transportation and delivery of the fastest mail, multiplied by five. Thus, the fee for any service will be a clear criterion enabling to detect cases of unauthorised provision of exclusive services.

52. At the same time, this solution will not hinder the development of courier services since fees payable for courier deliveries, even low in weight, are positively higher than those subject to the price threshold.

53. In addition, the draft Act provides for the option to reduce, by the Council of Ministers, of the weight limit and price ratios for reserved services, and also the option to waive exclusive right to render any post service.

54. As a result of reserving certain post services for the exclusive provision by the public operator, such an operator is obligated to calculate costs on a separate basis for each post service. This solution was adopted in order to eliminate the option to finance the provision of other services with subsidies received for the delivery of services in the reserved area. However, it is suggested that this provision should enter into force two years after the Act is enacted in order to adapt the accounting system of the Polish Post to a different than the existing cost calculation and to develop methodology of their calculation, and also to proceed with the necessary computerisation of the company.

55. An important change in the existing legal framework, which will ultimately lead, in a longer term, to actual de-monopolisation of the post market, is the provision of the draft Act saying that post collection boxes installed after the entrance into force of the Act, also by the public operator, should be accessible to all operators.

Telecommunication Sector

56. Until 2000, the main legislation regulating telecommunication activity in Poland had been the Act on Telecommunication Law of 23 November of 1990; this Act provided the foothold for building a competitive telecommunications market in Poland. Although quite modern at the time of adoption, the Act
proved to be insufficient to bring real competition onto the Polish telecommunications market, despite the legal abolition of monopoly.

57. The commercial activity in telecommunication sector is carried by:
   - Telekomunikacja Polska S.A. (Polish Telecom); and
   - Entities that were granted licenses or permit.

58. At the end of 1999, 45 independent operators were active on local market in addition to the Polish Telecom. Three long-distance operators are to commence activity soon.

59. The mobile market is served by three operators doing business on the basis of licenses:
   - PTK Centertel sp. z o.o., cellular operator at frequency 450 MHz (analogue network NMT 450) and 1800 MHz (digital network DCS 1800);
   - Polkomtel S.A. cellular operator at frequency 900 MHz (Plus GSM); and
   - Polska Telefonia Cyfrowa Sp. z o.o. cellular operator at frequency 900 MHz (Era GSM).

60. The supreme goal of the development of telecommunication in Poland is to make the development of that market more dynamic. This goal can be attained as a result of de-monopolisation and liberalisation of the telecommunications sector and privatisation of the Polish Telecom which dominates the fixed telephony market. The removal of market access constraints proceeds as follows:
   - award of local telecommunication license within administrative limits of voivodships which is to lead, in consequence, to at least duopoly in each numbering zone (in voivodship);
   - access to long-distance market of the incumbent operator; and
   - opening of the market of international network and public telephony services should take place by 1 January 2003.

61. As regards the provision of non universal services such as Internet access or data transmission, the market is open to all entities. Under the existing Act on Telecommunications Law, licenses were freely granted to all applicants and served the sole purpose of registering service providers.

62. On 12 May 2000, the Polish Parliament approved the new Act on Telecommunications Law which will enter into force as of 1 January 2001.

63. The new Act provides that the telecommunications activity will be carried on the basis of registration and telecommunications permit to carry such activity will be only required in cases provided for in the Act. The permit requirement is a necessary one in view of the special requirements regarding, in particular, the obligation to provide universal services, terms of using the numbering resources, frequency or orbit position, ensuring network security, integration and integrity of the net, procedures to be followed in special dangers, secrecy of telecommunication, fulfilment of certain obligations relating to the defence and security of the state as well as safety and public order, etc. Permits are to be issued to each applicant provided it fulfils the conditions laid down in the Act.

64. Furthermore, the new Act on Telecommunications Law provides for the establishment of an independent regulatory authority in the area of telecommunication, namely the President of the
Telecommunications Regulation Authority, and equipping him with strong instruments of influencing entities active on that market.

65. The new Act defines the general services differently to the existing provisions on general services, by references to definitions contained in the UE directives. The general services are defined as the minimum set ("package") of telecommunication services that should be rendered at specified quality and accessibility to all users, at affordable price, irrespective of the place of residence or business, within the whole territory of Poland.

66. In accordance with the European Union guidelines, it is assumed that the prices of telecommunication services should be set on the basis of actual costs of their provision. No services may be subsidised with receipts from high-yield telecommunication services. The corresponding solution of this issue is provided in the new Act on Telecommunications Law introducing the requirement of reliable cost accounting by individual types of services to be kept by telecommunication operators.