



COUNTRY STUDIES

Poland - The Role of Competition Policy in Regulatory Reform 2002

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in Poland. This report was principally prepared by Mr. Michael Wise for the OECD.

Overview

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Publié en français sous le titre :

LE ROLE DE LA POLITIQUE DE LA CONCURRENCE DANS LA RÉFORME DE LA RÉGLEMENTATION

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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Poland. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Poland* published in July 2002. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as electricity and telecommunications, and on the domestic macroeconomic context.

This report was principally prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Poland. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary General.

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Executive Summary

Background Report on the Role of Competition Policy in Regulatory Reform

Is competition policy sufficiently integrated into the general policy framework for regulation? Competition policy is central to regulatory reform, because (as Chapter 2 shows) its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition. Moreover, as regulatory reform stimulates structural change, vigorous enforcement of competition policy is needed to prevent private market abuses from reversing the benefits of reform. A complement to competition enforcement is competition advocacy, the promotion of competitive, market principles in policy and regulatory processes.

Poland has clearly recognised the need for competition policy in a market-based economy, adopting a general competition law in its first wave of basic reforms in 1990. The major goal of its competition policy has been to create the conditions for market-based development, though restructuring, privatisation, trade liberalisation, and oversight of traditional monopolies. Most enforcement of competition rules has concentrated on problems of dominance, and thus it has typically involved the conduct of larger firms, especially infrastructure providers and successors to state monopolies. The newest responsibility, for monitoring anti-competitive state aid, is a high-priority function which continues this theme. These conceptions of the role of competition policy in the process of reforming the Polish economy and administration have been generally supported through changes in government.

The institutional role and status of the Office of Competition and Consumer Protection (OCCP)¹ are ambivalent. Its decisional independence has not been questioned, but that independence is not clearly guaranteed by the institutional design. Its President has been responsible to the Prime Minister, although in the future the President's appointment and tenure will be more protected. Maintaining those protections will be important to preserving the integrity of competition law enforcement. At the same time, though, holding a position close to the government probably increases the OCCP's effectiveness as a policy advocate. The OCCP has participated in major structural and sectoral reform programs. It has developed and overseen a series of government programs to promote competition, most recently updated at the end of 2000. And it has served on and often led interdepartmental task forces to design and implement major reforms. This means of promoting and supporting pro-competitive policies within the government decision-making process appears to have worked well. It could work even better, if the OCCP's participation in deliberations about matters with competition policy implications could be more formalised. And there remains a need for a public "advocacy" voice for competition policy.

The substantive laws about competition policy now conform to familiar European models. Poland has given its enforcers new, stronger procedures for applying those rules. (There are a few ambiguities about the application of these new rules, which must be tested and resolved in court. The law's merger section retains a market share test for notification that may not work as intended to simplify reporting obligations. In addition, a proposal to enact special rules, outside the competition law, to control commercial relationships with large firms that are not dominant could impair vigorous competition unless designed carefully). In enforcement matters, the OCCP has been moving into a role more like that of a prosecutor, and a principal responsibility for deciding important cases is exercised by the independent Antimonopoly Court. This Court also plays an important role in ensuring consistency of approach among the OCCP and the new sectoral regulators. Expanding the Court's jurisdiction and the increasing rate of appeal from OCCP decisions have caused a backlog, and the Court needs more resources to clear it. The OCCP, too, needs enough resources to perform its new functions and to pay well enough to retain its younger staff. Like other parts of the Polish administration, the OCCP may need to make a clearer commitment to public consultation and explanation about its reasoning and policies.

Box 1. Competition policy's roles in regulatory reform

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.
- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different outcomes.
- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

1. Competition policy foundations

Poland has used competition policy as a tool for re-building its market-based economy in the 1990s. Restructuring is still an important priority, even as the policy framework has been adapted to the goal of EU accession.

1.1. Context and history

During the period of central planning, some institutions of a market economy had persisted. A substantial amount of privately-controlled productive capacity, principally in agriculture, co-existed with collective or state-owned enterprises. The 1936 Commercial Code survived to become the basis for a revived market economy. Competition laws adopted in the inter-war years also lay dormant in the statute books, to be updated and replaced during the wave of reform that began in the 1980s.

Several important steps were taken toward decentralising the economy and creating the possibility of market competition in the early 1980s. Much of this reform package was inspired by the example of Hungary's market-oriented reforms in a socialist framework. The Socio-Economic Planning Act of 1982 set procedures of contracting and market controls so plans could be implemented through enterprises. The Prices Act supported steps toward market-style exchange by defining three categories: fixed prices for consumer goods, controlled prices for industrial products, and contract prices between commercial partners. Prices that had been frozen for years were increased sharply – but not allowed to

float freely. And the Enterprise Act, passed in the autumn of 1981, reformed the structure of management of state enterprises, introducing the possibility of decentralised decision-making in response to economic incentives. No longer under direct state control, these enterprises were to become self-financing, self-governing, and independent. As separate legal entities, responsible for their assets and transacting on their own account, they were charged with acting in a more economically efficient manner. They could initiate activities other than those primarily assigned to them, create affiliates and subsidiaries and delegate to them some of their activities through “agency contracts”, and combine with other state enterprises, co-operatives, or foreign entities. The state was not responsible for their obligations and they were not responsible for the obligations of the state. The self-governance law called for new managing bodies, not subject to state decision-making control. These included the director, solely responsible for management, and an employees’ council that acted as a supervisory board. State enterprise registers, which had previously been kept by the government, were passed to the courts. But central planning was hardly abolished, and the government had broad rights to control the enterprises’ activities.

Changes in rules about taxes, employment, and administration also relaxed the planning system and expanded the private sector. New rules permitted some expansion of the private, non-socialised part of the economy, of co-operatives and non-socialised companies and crafts. Scope for establishing small companies was expanded, and partnerships with foreign entities were allowed. Despite limitations on their permitted activities, many foreign-share companies were created, which acted on their own behalf and on their own account. Areas where the law permitted greater freedom of enterprise (subject to obtaining a permit from the government) included internal trade, tourist services, food service, and crafts. Associations were created, which all private entrepreneurs were required to join as a means to control their activities. Rules about pay and employment gave enterprises more freedom to decide about staff and salary, but the government still set pay scales and ceilings.

In 1988, a new law on economic activity further freed the private sector by eliminating the system of permits for particular kinds of private economic activity (although a broad system of permits and licences still survived until January 2000). Revisions to the law about foreign companies permitted greater foreign capital in the market. The new Solidarity government’s program included the “shock therapy” of liberalised prices and other measures introduced in January 1990. Market competition was a theme of the Balcerowicz reforms, and one element was a new competition law.

To be sure, Poland already had laws to protect market competition against abusive behaviour. A law against cartels had been adopted in 1933, to support a government anti-cartel program. A law about unfair competition had been adopted in 1926. Neither of these laws was actually applied after 1945, but neither was repealed, either (OCCP, 2001; Fingleton, 1996, p. 50).

In 1987, Poland adopted a law to control monopolistic practices,² whose terms were functionally the same as those of a standard general competition law. The “monopolistic practices” it prohibited were similar to practices that are usually described as abuse of dominance, such as imposing onerous contract conditions, tying, or exclusivity obligations, or charging excessive prices. The law also dealt with cutting production to raise prices, practices leading to market division, production or sales limits, and boycotts. Agreements among enterprises could be prohibited if they might lead to substantial restriction of competition but did not produce economic benefits such as lower costs, higher quality, greater output, or innovation. Mergers had to be reported in advance and could be disapproved if they could lead to substantial restriction of competition. Enforcement was by fines, and the enforcement body, the Ministry of Finance, also had the power to dissolve repeat offenders. But a major means of fulfilling its responsibility for countering monopolistic practices was by addressing other levels of government about their regulatory actions and their economic activities. The law’s scope was subject to significant exemptions. It did not reach the conduct of enterprises that were under the authority of the Ministers of Finance, National Defence, Justice, or Internal and Foreign Affairs, or of the President of the Polish

National Bank. Some of the law's prohibitions, about "abusive" contract terms, were not dependent on a firm holding a dominant position (OCCP, 2001). To this extent, the law's goal was not to establish competition policy in a microeconomic sense, but was rather to assign default positions in contract relationships, correct for unequal bargaining power, and control unfair competition.

Poland was the first Central European country to enact a competition law³ and establish an enforcement agency after the regime changes in 1989 and 1990. The 1990 law generally followed standard European competition concepts, but included features that were designed to address the need to transform the economic structure and establish competitive market conditions. Poland's original law still prohibited some abuses, such as onerous contract terms, whether or not the firm was dominant. It presumed dominance at a market share of 30%, and it required the enforcement agency to maintain a register of firms with market shares over 80%. It distinguished "monopolistic" practices from "abusive" ones and authorised the enforcement agency to control the prices of monopolistic firms (Fingleton, 1996, pp. 72-73).

The institutional structure set up in 1990 is still in place. The 1990 Act established the Antimonopoly Office ("AMO") to implement it. The AMO was to be an independent decision-maker, and its decisions could be appealed to the independent Antimonopoly Court. The President of the AMO was appointed by the Prime Minister. Though not a member of the Council of Ministers, the President took part in government work about economic issues (OCCP, 2001). Unlike the other countries in the region, Poland did not staff its new competition body from the previous price-control office in the central planning office; instead, the new AMO was the successor of the anti-monopoly unit of the ministry of finance. (Fingleton, 1996, pp. 48, 92 n.5). The AMO was transformed into the Office of Competition and Consumer Protection ("OCCP") when it was given consumer protection responsibilities in October 1996 (OCCP, 2001).

Other changes in the course of the 1990s affected most sections of the law, moving it toward harmonisation with EU rules. The most important changes applied to merger review. Coverage was expanded, to include acquisitions of assets and shares and assumption of management control as well as formal mergers, and new standards were applied to banking combinations. To focus review on significant transactions, thresholds were introduced based on combined sales. Along with its new responsibilities for consumer policies, the OCCP gained the power to supervise the State Trade Inspectorate and appoint its Chief Inspector and deputies. In 1999, merger thresholds were raised substantially.

And in 1998 the OCCP began preparing a revised law to incorporate fully the competition policy of the EU *acquis communautaire*, by introducing block exemptions, conforming the "rule of reason" approach to the EU's Art. 81 model, and incorporating a *de minimis* rule. The revisions also increased merger reporting thresholds again and substantially revised the OCCP's powers and procedures. The new law⁴ became effective 1 April 2001.

1.2. Policy goals

The overall "strategic objective" of Poland's competition policy is to create conditions for sustainable social and economic development and to meet consumers' economic aspirations. What this means in practice is suggested by the competition policy program adopted by the government in 1998 (OCCP, 2001). The main economic objective is greater "efficiency", which is taken to include:

- Making businesses more adaptable and more responsive to market signals;
- Improving the competitiveness of Polish firms, that is, reducing their costs;

- Eliminating monopolies in sectors that had not faced competition;
- Rationalising production and distribution costs; and
- Improving product quality.

The main social objective of this program is improving social welfare generally, including reinforcing consumers' bargaining power and protecting their rights. More particularly, the goals include:

- Improving consumer health and economic security;
- Expanding consumer choice;
- Dealing with the social costs of consumption, that is, the externalities of the market process; and
- Strengthening confidence in public institutions by improving consumer redress.

Consumer and competition policy goals are related, of course. Consumer protection is promoted by competitive pressure, and buyers are protected by eliminating monopoly where it is not justified and by controlling monopolistic practices in sectors where some monopoly may still be economically inevitable. The OCCP recognises the long run consistency and complementarity between competition policy and consumer interests. But this recognition does not lead to analysis or enforcement priorities based on conventional microeconomic notions about maximising consumer surplus. And the AMO was initially reluctant to have consumer protection power, fearing that it would have diverted too many resources away from the higher-priority tasks of de-monopolisation and restructuring.

Constitutional prescriptions about free markets and consumer interests support legislation, but they have not been applied independently. The Constitution states that the nation's economic system is based on a market economy, freedom of economic activity, and private ownership.⁵ Restrictions on the freedom of economic activity can be imposed only by law and only when justified by an important public interest.⁶ This provision seems to imply a presumption in favour of competition, putting a burden on the government to justify anti-competitive measures. But it is not clear that the burden is very heavy, and no court decision has applied this constitutional principle to require that the government must achieve its purposes by means that are least restrictive of competition. Another section⁷ establishes a consumer protection responsibility, by obligating public officials to protect consumers against conduct that may adversely affect health, privacy, and safety, and against unfair marketing practices (OCCP, 2001).

Conceiving the purpose of competition policy as creating the market conditions for sustainable development emphasises its origins and continued role in the transition process. From the outset, the AMO was concerned principally with de-monopolisation of industry, larger scale structural issues, control of natural monopolies, trade liberalisation, and investment and privatisation. Dealing with restrictive agreements was, and remains, a lower priority.

1.3. Competition policy in reform

Since the early 1990s, Polish governments have adopted a series of formal programs for developing competitive markets. The 1991-93 program for de-monopolisation, privatisation, and import liberalisation put a priority on competition policy.

The AMO was quite active during the privatisations of the first stage of reform. The AMO assessed which markets were most monopolised and argued against efforts to revitalise non-competitive industries. Between 1991 and 1995, it issued 1500 opinions about privatisation actions. One of the AMO's priorities was to prevent the privatisation of agro-industries into monopolies. Interactions between the AMO and the privatisation agency were non-public (Fingleton, 1996, pp. 154-55). The AMO claimed that its objections were usually heeded, even though its opinions had no binding effect. One reason for respect may have been that the AMO had the separate power to order divestiture of a firm that demonstrated persistent abuse of its dominant position. And its views did not prevail in every privatisation decision. Early on, the AMO recommended that the gas industry be split up; that still has not been done. One deal involving auto production, which the AMO analysed in terms of EU state aid rules, went through despite its concerns.

The OCCP's participation in privatisation decisions remains on an informal, non-public basis, at least until the transactions become "concentrations" that are subject to the usual merger review process. OCCP has signed a "preliminary agreement" with the Treasury ministry, under which the OCCP has an opportunity to opine about the competitive significance of accepting a bid. It is unclear whether firms may obtain advice from the OCCP about whether they might encounter problems if they bid for the assets. The OCCP's opinion is delivered after bids are presented. This timing could put the competition agency in the awkward position of recommending that the Treasury not accept the highest bid. The risk can be avoided to some extent, if the OCCP can help design the privatisation plan for an industry to avoid the most obviously problematic combinations. Industries in which major privatisation transactions may come up soon include petroleum, vodka, steel, and coal. Many of the OCCP's merger cases are still privatisation transactions.

Poland made profound pro-competitive structural reforms in the 1990s (OCCP, 2001):

- Removal of legal restrictions on undertaking economic activity;
- Elimination of state commercial monopolies;
- Introduction of competition in trade and services;
- Abolition of the state monopoly on domestic trade in products such as alcohol, fuel, coal, steel, and pharmaceuticals;
- Abolition of state monopolies in banking, insurance, radio, and television;
- De-monopolisation of economic sectors not previously subject to competition, such as agricultural machinery, coal, steel products, construction materials, seeds, agricultural commodities and processing, trucking, bus transport, and timber;
- Abolition of the state monopoly in foreign trade, leading to development of distribution networks for foreign firms and stronger intra- and inter-brand competition;
- Removal of legal barriers to the development of competition in sectors that were previously exempted by law, such as energy, railways, media, telecommunications, and postal services;
- Privatisation of many sectors and businesses, with the participation of both Polish and foreign investors;

- Development of banking and financial services, with currency exchangeability and relatively stable exchange rate;
- Allowing foreign firms to transfer or re-invest profits and abolishing many administrative permit requirements for doing business;
- Adoption of policies to encourage small and medium sized enterprises; and
- Introduction of modern statutes about competition, consumer protection, unfair competition, and intellectual property.

The scope of actions taken, and of those still needed, is set out in the 1998 government program, *Counteracting Monopolies and Strengthening Competition*, which was prepared by OCCP. This program defined specific tasks and assigned responsibilities for fulfilling them to ministries, which reported quarterly on their progress in achieving those goals (OCCP, 2001). When that program appeared, the principal successes appeared to be in wholesale and retail trade, catering and tourism, housing renovation and construction, asset management, leasing, publishing, information technology services, and the food, clothing, furniture, household equipment, computer hardware, printing, and automotive industries. Two typically thorny areas, broadcasting and agricultural co-operatives, had been de-monopolised. And decisions implementing the competition law introduced competition for municipal services such as waste disposal and funeral services (OCCP, 2001).

The 1998 program also identified some sectors where, despite the end of state-owned monopoly and the introduction of some market mechanisms, competition was still incomplete. These included coal, rail, buses, and sugar. The program concentrated its action plans on traditionally monopolised sectors that might become competitive through technological or regulatory change: electric power, gas, telecoms, rail freight, postal services, and petroleum (OCCP, 2001). Most of the tasks in the 1998 program were implemented by 2000 (although several are, realistically, described as continuing indefinitely). The last quarterly report in 2000 focused on actions needed in telecoms, electric power, hard coal, transport, and postal services. One immediate result was a government decision eliminating fuel transport permits.

The OCCP has completed the major task, of harmonising Poland's substantive competition rules with those of the EU. Much of its time and attention since 1998 has been occupied by preparing this legislation. The principal reform challenges in the near future include making one aspect of that harmonisation, the rules about anti-competitive state aids, operational. The European Commission's November 2000 accession report, although generally positive about the contestability and openness of Poland's markets to competition, calls attention to continuing distortions from subsidies that are "pervasive in both private and state-owned firms," and to the lack of hard budget constraints on some state-owned firms (EC, 2000, p. 29).

Another challenge will be to achieve the transition in competition policy priorities, as Poland completes the transformation of its economic system, from ensuring conditions for competitive markets to ensuring that market actors are obeying the rules that govern those markets. The 2000 Act has increased the OCCP's investigative powers and created some new procedures. Meanwhile, the Antimonopoly Court has become increasingly active, while some aspects of its jurisdiction and role will need to be clarified by experience and perhaps by further court rulings. Enforcement of competition law is shifting from a process of application and administrative decision toward a model of investigation and prosecution in court.

2. Substantive issues: content of the competition law

If regulatory reform is to yield its full benefits, the competition law must be effective in protecting the public interest in markets where regulatory reform enhances the scope for competition. Poland's general competition law sets out substantive rules that are short and familiar, following the EU model as Poland complies with its accession obligations. By contrast, the provisions about procedures and institutions in the 2000 Act are extensive and novel.

The 2000 Act integrates its substantive rules through a general definition of "relevant market" as the "market of products, which by reason of their intended use, price and characteristics, including quality, are regarded by the buyers as substitutes, and are offered on the area in which, by reason of their nature and characteristics, existence of market access barriers, consumer preferences, significant differences in prices and transport costs, the conditions of competition are sufficiently homogeneous" (Art. 4(8)). This single concise definition includes product and geographic aspects. It is sensitive to economic factors of demand, as it may depend on actual consumer behaviour and permits distinctions based on quality.⁸

Box 2. The competition policy toolkit

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same – that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

2.1. Horizontal agreements

The 2000 Act prohibits agreements that have the objective or effect of eliminating or restricting competition in a relevant market (Art. 5.1). Particular types of agreement that are listed and prohibited include fixing prices or sales conditions, limiting production or technology, market division, discrimination, tying, boycotts, and bid rigging. The statute's list of types of prohibited conduct is not exclusive, and the principle can be expanded to cover types of agreements that are not identified specifically. For example, the explicit ban on collusive tendering is added in the 2000 Act, but bid rigging had already been covered by the general prohibition of the 1990 Act. Like nearly all OECD Member competition laws, the text of the statute makes few distinctions between horizontal agreements among competitors who occupy the same position in the market and vertical agreements among enterprises in supplier-customer relationships.

This distinction is drawn, though, in the *de minimis* exemption. Horizontal agreements are permitted among firms with a collective market share below 5% (Art. 6(1)), but vertical agreements are treated more tolerantly, with a market share threshold for exemption of 10%. Parties may enjoy the benefit of the *de minimis* exemption without any notification or approval. Still, they may find it prudent to determine their market shares before entering an agreement, or else be willing to bear the risk that their shares exceed the threshold (OCCP, 2001).

Generally applicable "block" exemptions may be authorised, by regulation of the Council of Ministers, according to the same standards as the EC applies. Agreements may be exempted if they contribute to production, distribution, or technical or economic progress, ensure buyers a fair share of the benefits, do not impose unnecessary restrictions, and do not permit the parties to eliminate competition for a substantial part of the market (Art. 7). A series of such block exemption regulations, specifying conditions for obtaining the exemptions, permitted and forbidden terms, and duration, is expected now that the 2000 Act is in force. The same substantive standards for exemption may be applied in individual cases, where the decision to grant the exemption would be made by the OCCP (Art. 11(2)). The scope of such individual exemptions is not unlimited. In particular, no special rule or principle would permit "crisis" cartels (although one might be authorised in response to an application for individual exemption) (OCCP, 2001). The process under the 2000 Act corrects a problem encountered under the previous system of *ex post* applications, under which parties had to enter their agreement before applying to determine whether it would be prohibited or exempted (OCCP, 2001).

The prohibition against restrictive agreements may be interpreted and applied broadly. Applying the similar provisions of the 1990 Act, the Antimonopoly Court has found that an “agreement” can be demonstrated by circumstantial evidence, such as parallel activity that has no better explanation than prior understanding. The Court has even supported a “per se” interpretation, that liability for a price-fixing agreement may not be avoided by showing that the agreement was not carried out or that it had no actual effect (Fingleton, 1996, p. 121).

But relatively few OCCP actions have targeted horizontal agreements. One early, exemplary decision was an order against a cartel among 32 sugar producing plants, whose identical prices were found to be the result of collusion. Another was in insurance, as 14 large companies, accounting together for 80% of the market, set the same maximum commissions for intermediaries and minimum rates for some kinds of coverage. And producers of ammonium nitrite were found to have reached an unwritten agreement to set identical base prices (OCCP, 2001). Many cases, including these ones dating from the early years of enforcement, have been typical of transitions to new rules, involving formal agreements among parties who did not realise that their conduct violated the law, or at least did not believe that the law would actually be applied to them.

Actions taken by an association, such as adopting or applying “private regulations” that impair competition, may be treated as a prohibited agreement among the association’s members or constituents (OCCP, 2001). Thus, a resolution of the pharmacists’ association, to control entry based on economic criteria (such as population served or distance from competing pharmacies) rather than professional standards, was rejected. The OCCP has struck down an agreement among incumbent cable TV operators to restrict access by others and eliminate competition, and an agreement by trucking companies, through their association, PKS, to fix their fares (OECD CLP, 2000, p. 6).

Box 3. The EU competition law toolkit

The law of Poland follows closely the basic elements of competition law that have developed under the Treaty of Rome (now the Treaty of Amsterdam):

- **Agreements:** Article 81 (formerly Article 85) prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term “agreement” is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 81’s coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private “fair trade practice” rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.
- **Exemptions:** An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable “block” exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the “white lists” and “black lists”). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.

- **Abuse of dominance:** Article 82 (formerly Article 86) prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50%, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.
- **Reforms in administration:** Recent and proposed reforms of EU competition policy reduce the scope of the prohibition against vertical agreements and would eliminate the process of applying for exemptions for particular agreements. Instead, exemption criteria would apply directly in decisions applying the law, and these decisions would increasingly become the responsibility of national competition authorities.

2.2. *Vertical agreements*

The statutory prohibition applies to vertical as well as horizontal agreements (Art. 5). The list of prohibited agreements includes several that typically have a vertical character, such as restricting sale or purchase markets, tying contracts, and boycotts (OCCP, 2001). The new block exemption authority is likely to be used to develop rules to regulate and permit common kinds of agreements, for exclusive sale and purchase, franchising, and selective distribution (OCCP, 2001).

Recognising that vertical agreements may often be efficient and thus require less enforcement oversight, the 2000 Act treats vertical agreements more leniently. The *de minimis* rule sets a higher tolerance threshold for a vertical agreement, by exempting agreements whose parties have a combined market share of 10% (Art. 6(2); OCCP, 2001). If it is a “distribution” agreement, between firms at different stages purchasing for resale (Art. 4(5)), the shares of all the customers or suppliers are aggregated to determine whether the threshold is reached.

Most decisions about vertical agreements appear to have involved enterprises in dominant positions or at least with significant market power. A recent decision found that the dominant petroleum producer, PKN-Orlen, had imposed a vertical price “squeeze” between the price it charged for a raw material, ethylene glycol, and the price for the end product, anti-freeze; the decision and substantial fine, of PLN 40 million is still pending appeal. Several decisions have involved local or municipal services. A co-operative managing 40% of the housing in a city entered an exclusive agreement with a cable TV firm, which limited access to the market by other cable firms. A municipality created a local monopoly by granting only one waste collection firm the right to use the municipal landfill, forcing the other firm with a collection permit to incur greater costs. A funeral service provider was given a contract to manage the municipal cemetery, putting other providers at a competitive disadvantage and depriving customers of choice (OCCP, 2001). Decisions such as these demonstrate the importance of competition policy oversight to prevent anti-competitive regulations or decisions at the level of local government.

2.3. *Abuse of dominance*

The 2000 Act adopts a characterisation of dominance that follows EU precedents: that is, it is a position which enables the firm to prevent efficient competition on the relevant market by creating the opportunity to operate substantially independently from competitors, contractors, and consumers. Dominance is presumed at a market share of 40%, a level that is unchanged from the 1990 Act. A firm may try to rebut that presumption, and the OCCP may try to show actual dominance at a lower share. Thus, the market share threshold is not intended to be a “safe harbour” (OCCP, 2001).⁹ The OCCP has

found dominance at a slightly lower share (38%, in the beer industry), and it has declined to find dominance at a higher share (in the cable TV market) (OCCP, 2001*a*). The statute's non-exclusive listing of particular kinds of abuse includes charging prices that are too high, and prices that are too low, as well as imposing burdensome terms, restricting output, limiting technology, discrimination, tying, unjust enrichment through burdensome contract terms, "onerous conditions for consumer redress," and "preventing development of conditions necessary for the emergence or development of competition" (OCCP, 2001). The last, general category, which is retained from the 1990 Act, restates the main purpose and goal of Poland's competition policy.

An abuse of dominance may not be exempted on the grounds that other policy considerations outweigh the harm to competition or customers. There is no longer any provision for block or individual exemption from the abuse of dominance prohibition. The 1990 Act had provided for individual exemptions, in the same language, from all of its prohibitions.¹⁰ The 2000 Act eliminated the "rule of reason" from the jurisprudence about abuse of dominance. In doing so, Poland brought its law in line with that of the EU. With the possibility of assessing net effects in particular cases no longer available, it will be very important that the analysis and assessment of dominance be sensitive to competitive realities, and not rely formulaically on market share presumptions.

Dominant firms could be broken up under the 1990 Act; however, the divestiture power appears to have been removed from the 2000 Act. Enterprises holding a dominant market position (including state enterprises, co-operatives, or private companies) could be ordered divided or dissolved "if they permanently restrict competition or the conditions for its emergence" (1990 Act, Art. 12.1). For state enterprises or single-shareholder state firms, the OCCP would have to obtain an opinion from the "founding body" or the Treasury first. This remedy was applied only a few times. The AMO used this power in restructuring grain elevators and lumber firms. To undo a concentration in the natural gas sector, the network monopolist, PGNiG, was ordered to divest production and distribution operations (OCCP, 2001, II.10.9). But under the 2000 Act, the only remedies for abuse of dominance now appear to be a fine and an order to cease the abusive practices (rather than an order to eliminate structurally the position of dominance). The law no longer gives the OCCP President the power to order firms to lower their prices.

Where industries remain highly concentrated, these prohibitions have been used to protect downstream customers. Most major industries have been restructured, but there is still a dominant domestic supplier of petroleum products, PKN-Orlen. Several decisions responded to claims of abuse in this sector. OCCP imposed a fine of PLN 5 million for discrimination, in refusing to offer a functional discount to wholesalers; the Antimonopoly Court reversed, and OCCP has appealed further. Other decisions have reviewed claims about the terms of service station contracts and constraints on distribution of other products through these channels.

Most cases have foreshadowed or supplemented structural reform, by targeting abuses by network infrastructure monopolies. In the electric power sector, power companies have tried to impose tying requirements for contracting and installation services or set up territorially exclusive arrangements with installation contractors, after the Energy Law made utilities responsible for connecting consumers and financing related costs. The traditional telecom monopoly, TPSA, has been subject to several orders, and sometimes fines, for refusing to contract for joint billing, excessive lease charges, obstructing connection and cutting off operators to force them to take better terms or eliminate competitors, targeting new entrants' customers with special terms, tying and unjustified charges (such as requiring a new customer to pay the old bills at the location), and anti-competitive cross-subsidised tariff structures, in which some services are provided below cost while fees for others are excessive.

2.4. Mergers

Large acquisitions and mergers must be approved by the OCCP in advance. The substantive standard for approval is ambiguous. The basic test appears to be whether the transaction will create or strengthen a dominant position. The statute links dominance to a more general “competitive effects” test, in providing that the OCCP is to approve transactions that do not create or strengthen a dominant position and that therefore will not significantly restrict competition (Art. 17). The OCCP defines relevant markets “narrowly”, in terms of product, geography, and time, and the degree of likely concentration and competition post-merger is assessed, to some extent by simulation (OCCP, 2001). The OCCP may impose conditions, including divestiture of assets being acquired, abandonment of control over others (by divestiture or otherwise), or compulsory licensing (Art. 18). A decision approving a concentration expires if the concentration is not completed within 3 years; this new rule is intended to ensure that concentration decisions and their results are based on current market conditions (OCCP, 2001; Art. 21).

Industrial or other policy considerations may be invoked in the OCCP’s merger decisions. A concentration that creates or strengthens a dominant position may nonetheless be authorised if it will contribute to economic development or technical progress or may otherwise have a favourable impact on the national economy, such as by improving product quality or distribution (OCCP, 2001; Art. 19). This broad discretion to recognise claimed benefits is new in the 2000 Act. The likelihood that most mergers in Poland, which represent privatisations or the introduction of foreign investment and management, are likely to improve efficiency probably explains why the OCCP has approved virtually all of the mergers it has examined, even when approval was subject to a seemingly inflexible market-share dominance standard.

These rules about mergers apply only to the transactions that must be notified in advance. Notification is required if the firms’ combined annual turnover exceeds EUR 50 million (Art. 12(1)). If a firm does not have significant sales in Poland (less than EUR 10 million annually over a two year period), the acquisition of it need not be notified; however, a merger or the formation of a joint venture involving such a firm would still have to be notified (Art. 13(1)). For transactions that fall below these thresholds, the OCCP believes that *ex ante* control would be burdensome, and that any problems that result from local market power could be addressed by regulating post-merger behaviour (OCCP, 2001).

The merger law applies to combinations of interests short of full merger or acquisition. “Merger” control also applies to acquisitions leading to indirect control, to establishing a new joint enterprise, to acquiring 25% or more of an entity’s voting shares, to holding management or director positions at competing enterprises, or to exercising rights in shares that had been obtained without the notification requirement (OCCP, 2001). A natural person must now notify an acquisition that meets the threshold tests, and a parent entity must notify acquisitions that are effected through subsidiary entities (OCCP, 2001).¹¹ Notification is not required when shares are acquired to secure a liability or for resale by a financial institution (as long as the shares’ voting rights are not exercised), or for concentrations among entities that are already under common control within a single “capital group”. The reasons for this wide coverage are not clear. Structural relationships more subtle than full mergers or acquisitions could in principle impair competition. But some experts in Poland believe the principal reason for wide coverage is to use the notification process to gather information about investments and market conditions.

In addition to the size of the firms, their market share also determines whether they must notify their transactions. Notification is not required if the firms’ combined market share is below 20% (Art. 13(2)). The rule is no doubt intended to reduce the compliance and enforcement burden. But making the notification obligation depend on market share, even as an exemption, may introduce complication and uncertainty. The market share level for this exemption was deliberately set to be one-half of the level at which dominance is presumed, in order to leave some room for error or misjudgement. To be safe, firms

whose shares of a plausible market might be over 20% would be well advised to file a notification. Because firms would have to err by factor of 2 in estimating their market shares, the OCCP believes important transactions would not qualify for this exemption. In this, the OCCP may be too sanguine. In other jurisdictions, firms that want to avoid close scrutiny have been known to define “markets” creatively, diluting their ostensible market shares by factors much greater than 2, in order to avoid control and even notification. Moreover, the market share exemption might be claimed without consulting the OCCP. The law instructs the Registry Court to make the necessary entries to effect the transaction if the firms show that their plans are not subject to the notification requirement (Art. 23). This suggests that the parties may try to persuade the Registry Court that they qualify for exemption based on low market shares. To avoid being hoodwinked, the Registry Court may need to consult first with the OCCP about the market definition, and some Polish experts believe that this provision implies some obligation on the Registry Court judge to determine whether the applicants have really met their burden to show they deserve the exemption.

Transactions resulting from bankruptcy proceedings need not be notified unless the acquiring firm is a competitor (OCCP, 2001; Art. 13(5)). This exemption presents some risk of evasion, if a firm could deny that it competes with the non-operational debtor. That loophole is closed by defining “competitor” to include potential competitors and those that have temporarily suspended operation because of financial trouble.

The review process is straightforward. Notification is required within 7 days of reaching the merger agreement or other action leading to the concentration. A decision from the OCCP is required within 2 months (14 days for open-market securities acquisitions). These decision deadlines are tolled pending notification by other participants, where that is required, and pending obtaining complete information or fulfilling conditions imposed by the President of OCCP (OCCP, 2001). To enforce the reporting requirements, the OCCP can order parties, in a conditional decision, to take structural measures if they proceed without notifying the OCCP, submit incorrect information, or fail to comply with conditions. There is a condition of “repose”: such enforcement measures must be taken within 5 years (Art. 20). Information on merger filings is published in the official journal of the OCCP.

Some sectoral regulators also have responsibilities to review proposed mergers and acquisitions. These powers could be complementary to competition policy review, although the grounds for regulatory action do not explicitly include competition issues. In banking, insurance, and investment and pension funds, merging firms must obtain regulatory consent in advance. The Banking Supervision Commission must approve bank share acquisitions at 7 thresholds between 10% and 75% (cumulative). The Minister of Finance exercises analogous powers over acquisitions in insurance, at 3 thresholds between 25% and 75%, and reasons for refusal may include “a threat to important interests of the state.” And the Securities and Stock Exchange Commission must approve acquisitions of shares in public companies at the 25%, 33%, and 50% thresholds, and may disapprove if the holding or acquisition were to result in the infringement of the law or pose a threat to an important interest of the state or the national economy.¹² Some sector-specific laws contain merger rules to be applied by the OCCP, notably the antimonopoly chapters of the laws about investment funds and pension funds (OCCP, 2001).

Some distortions of competition may result from restructuring transactions that are mandated by statutory programs. Because of the statutory authorisation, these transactions would be exempt from the usual notification and approval requirements. An example is the 1994 law mandating consolidation of the sugar industry into 4 holding companies. In these situations, the only opportunity for competition policy input is in drafting the statutory program (OCCP, 2001).

Nearly all mergers have been approved without conditions. At least one OCCP challenge was rejected in court. The OCCP refused to authorise an acquisition that reduced the number of firms in the Warsaw cable TV market from 3 to 2; the Antimonopoly Court reversed. On a few occasions, mergers have been approved subject to conditions – suggested by the parties themselves – that are not directly related to competition policy, such as requiring a firm to buy a minimum percentage of its inputs from a local producer and to make commitments about the level of investment. Most notified transactions are acquisitions by foreign firms. And most merger enforcement is directed to the notification requirements, rather than the competitive merits of the transactions notified. In 2000, the OCCP issued 1060 permits for mergers and imposed 52 fines for non-compliance with notification (OCCP, 2001). The small number of formal OCCP decisions, and lack of detail in other statements approving mergers, showing how it deals with such important issues as market definition are probably the basis for a concern expressed by the private bar about a lack of transparency in the OCCP's decision standards.

2.5. State aids

Government action through subsidies and preferences can distort free competition just as inappropriate regulations can. Poland's new law about state aids, which generally adopts the concepts and rules of the EU about state aids, and adapts them to domestic situations, became effective 1 January 2001. In principle, the law prohibits aid that may significantly distort competition or substantially hinder the development of competition, unless the anti-competitive effect is limited in time and the aid is part of a regional policy or restructuring program.¹³ In practice, the regulation, like the system for controlling state aids by the EC, relies on technical and formal classifications and rules, more than on direct assessment of actual effects in particular market circumstances. The OCCP administers this law, pursuant to a 1998 government decision to transfer state aid responsibility out of the Ministry of Economy. The OCCP set up a unit about state aids in 1999 to help draft the statute, and this unit was expanded and upgraded to a separate department when the statute became effective. Experience applying the law is still limited.

Competition in public procurement is administered by the Public Procurement Office. The law on public contracts applies where the estimated value is over EUR 3000, but simplified procedures may be applied if the value is under EUR 30 000. Advertisements and results must be published, bidders must be treated equally and fairly, the scope of the contract must be defined objectively and its conditions must not disturb fair competition. Bids that amount to unfair competition are to be rejected, and "unreliable" bidders must be excluded. The law was amended in June 2001 to bring the procurement rules into conformity with EU standards, and particularly to eliminate national preferences and provide non-discriminatory market access by the end of the transition period (31 January 2004) under Poland's Europe Agreement (OCCP, 2001).

2.6. Unfair competition

The law of unfair competition can protect markets and the competitive process, or it can protect competitors in ways that make markets work less well. Poland's law about unfair competition¹⁴ is based on the same constitutional guarantees of economic freedom that support the competition act. Its general clause¹⁵ defines "unfair competition" as action by an entrepreneur that is "reprehensible" because it threatens or violates the interest of another entrepreneur or a customer. Typical problems are deception and mislabelling about origin, misuse of trade secrets, inducement of breach of contract, passing off, and disparagement (and "unfair praise"). An amendment in 2000 permits comparative advertising according to the standards that apply in the EU. Some kinds of unfair competition that prevent access to the market could also be treated as violations of the competition act. The rules about unfair competition are enforced by private civil suits, brought by one business against another. Penal sanctions are available in theory, but rarely used.

Some consistency between the private law of unfair competition and public concerns about the competitive process is ensured by giving public bodies the right to appear in these private cases. These bodies include the district or municipal consumer advocates, national or regional business or consumer organisations, and the President of the OCCP. The OCCP can also bring court actions *ex officio* under the unfair competition law. These actions are usually based on information obtained from regional offices or from the investigations of the Trade Inspectorate, or from individual complaints (OCCP, 2001). The OCCP may ask the court to order the party to make a corrective statement in the media, or in the case of deliberate violation, to make a payment to a social cause supporting Polish culture or protecting the national heritage (OCCP, 2001). Most of these cases are resolved by negotiation.

Poland does not have a law prohibiting so-called “abuse of economic dependence”, that is, the exercise of unequal bargaining power by a firm that does not hold a dominant position in a relevant market. The typical problem is a complaint about how large integrated chain retailers deal with suppliers, such as forcing extended payment dates and demanding promotional support for products (OCCP, 2001). More problematic are complaints about “aggressive pricing”, which is more likely to benefit consumers than to impair competition, especially if the firm does not have market power. Consideration is being given to putting this issue into the framework of unfair competition, rather than the competition law, in a statute that would also prohibit some other unfair marketing practices such as pyramid sales.

2.7. *Consumer protection*

Consumer policy is integrated with competition policy by giving both responsibilities to the OCCP. The OCCP’s consumer protection powers include educating businesses and consumers about consumer rights, dealing with other state administrative bodies on the same subject, overseeing product safety, co-operating with local governments and international organisations, supervising product testing by consumer organisations, and publications and educational programs (Art. 26(11), (12)). The Trade Inspectorate reports to the OCCP President (Art. 30).

The benefits of combining responsibilities for these policies, both of them concerned with the effects of market interactions on consumers, can come at the cost of serving as a “hot line” to field innumerable small complaints. Some of that pressure has been relieved by the recent establishment of the office of consumer ombudsman. There are about 200 of these “consumer advocates”, appointed and funded by local governments, who deal directly with consumer complaints. They provide information, represent consumers to equalise their bargaining power in resolving disputes, and if necessary bring actions in court, by joining in private cases or prosecuting misdemeanours (Art. 37). If a pattern of complaints shows an abuse of dominance, the consumer advocates may refer them to the OCCP. In the other direction, the Energy Regulatory Authority is forwarding consumer complaints about contract terms to the ombudsmen.

Consultation with consumer interests about regulation and reform is limited. Government bodies, and self-regulating bodies too, are required to seek the views of consumer organisations about their actions aimed at protecting consumer interests. Consumer organisations are reasonably sophisticated about policy matters, but they are small and they lack secure funding and support. Because of resource constraints, these groups have had to target their action on issues with a direct consumer effect, such as consumer rights in transactions, advertising, deceptive or unfair marketing practices, product defects, and alternative dispute resolution. Of the dozens of working parties dealing with product standardisation, the consumer groups can only participate in some of the ones dealing with food products. Consumer representation is provided for advisory councils about insurance, electric power, and telecoms, but the experience with these councils is uneven. The 2000 Act for the first time regularises the consumer organisations’ status, provides for some funding, and requires consultation with them (OCCP, 2001). In addition to the required consultation about consumer issues, the OCCP may ask consumer groups for comment *ad hoc* on other proposals.

3. Institutional issues: enforcement structures and practices

The office responsible for developing policy and enforcing the law body is subject to oversight and potentially to control by the government. A position close to the government strengthens its role in policy discussion. In enforcement, the OCCP has a history of decision-making independence but as the enforcement process is evolving toward a prosecutor-court model, the most important decisions will be made by the independent judiciary.

3.1. Competition policy institutions

Competition policy and enforcement are the responsibility of the Office for Competition and Consumer Protection. It is a separate institution, not within a ministry, and its legal powers reside formally in the OCCP President, who is considered “a central body of government administration” (OCCP, 2001). The President’s explicit powers are to ensure compliance with the laws about competition and consumer protection, to monitor the effect of state aid effect on competition, to oversee the protection of consumer rights (in co-operation with local government bodies), to develop or comment on draft regulations about competition and consumer rights (including ones dealing with “development of competition or conditions for its emergence”), to prepare the government’s policies about developing competition and protecting consumers, and to co-operate and exchange information with foreign and international officials and organisations (OCCP, 2001). The OCCP headquarters is in Warsaw. In addition, about a third of its staff are in 9 regional offices, which have performed the same kinds of investigation and enforcement functions as the headquarters staff (Fingleton, 1996, p. 99).

The OCCP is the successor of the Antimonopoly Office, established in 1990, which had a similar structure and position. The President is appointed by the Prime Minister (as are the OCCP’s Vice-Presidents, on recommendation of the President). Incoming Prime Ministers have on occasion selected a new President. There have been three Presidents since 1990. The President is not a member of the Council of Ministers and does not have ministerial rank; nonetheless, the President has taken part in developing government policies about economic issues (OCCP, 2001).

The AMO and OCCP have been able to demonstrate considerable substantive independence even without formal guarantees of independent status (Fingleton, 1996, p. 164). The President of OCCP reports directly to the Prime Minister, who may subject the President to binding guidelines and instructions and thus influence his actions, but not instruct about decisions in individual cases.¹⁶ From the outset, the AMO and OCCP have taken enforcement actions that appeared to be contrary to the interests of politically prominent entities, including decisions about telecoms, newspaper distribution, motor vehicle pricing, and dairy co-ops.

Provisions in the 2000 Act are designed to secure independence more formally. The OCCP President will still be appointed by and responsible to the Prime Minister, which will still “supervise” the President. Art. 24(1). The President’s term of office is fixed at 5 years. This tenure will be protected to some extent, in that the Prime Minister may not recall the President except for specified causes, including accepting other employment, undertaking business activity or board membership, criminal conviction, “flagrant infringement of responsibilities”, or resignation (Art. 24(5)). In the future, the selection for appointment is to be made by contest, and candidates will be screened by a contest board. This board, to be appointed by the Prime Minister, must not include parties with obvious interests, such as recent officials or representatives of firms with dominant positions (Art. 24(4)). The candidate must have a university degree, preferably in law, economics or management, and must demonstrate knowledge and experience in the areas of the OCCP’s responsibilities (OCCP, 2001) The President’s new appointment process became effective 1 July 2001 (Art. 110). This delay appears to be designed to ensure that the outgoing government can fill the office for a five year term before the election.

Reporting directly to the Prime Minister may have aided the OCCP's participation in policy-making. The President participates in the legislative process on the same terms as members of the Council of Ministers (OCCP, 2001),¹⁷ including meetings of the Council of Ministers, on his own initiative or on invitation, when the Council is considering competition-related issues. The policy-related powers of the OCCP include economic studies of concentration and firm behaviour, developing the government's policy programs and legislation for competition and consumer protection, and providing opinions about the competition and consumer impact of other draft legislation (Art. 26(3), (4), (8), and (9)). Some other laws authorise or require the President to comment on drafts or proposals. In international trade actions involving dumping and other claims about excessive imports and applying the textile trade rules, the Minister of Economy must get an opinion from the President before imposing a remedy (OCCP, 2001).

In explaining its policies to the larger public, the OCCP has been moderately successful. In the early years, the AMO organised conferences and seminars for public education about the new policies, and sometimes even made public its views about restructuring programs. The amount of public attention to the OCCP's work may have declined as the OCCP has done less of this kind of public education and as the institutions have become more familiar. The OCCP publishes its formal decisions, but it has made little use of guidelines or other less formal means of explaining its policies and actions. The 2000 Act now requires the OCCP to publish a regular official journal, to include not only its own decisions but also those of the Antimonopoly Court, and those of the Supreme Court in competition cases, as well as other announcements and information about competition policy activities (OCCP, 2001). Additional resources to perform this function have not been provided, though. The OCCP evidently feels that the larger, more sophisticated businesses with which it is most concerned can afford to hire expert legal assistance to understand the laws and explain them to management. But greater attention to public information and consultation could make the OCCP more effective. Implementing the 2000 Act requires secondary legislation, such as the block exemptions. An organised process for exchanging views about the issues involved in these drafts with the public, including the business community and consumer groups, could make the resulting rules more enforceable, by tailoring them to real problems and by educating businesses in advance about their rights and obligations.

3.2. Competition law enforcement

The 2000 Act substantially modifies the enforcement process. Before, OCCP proceedings generally followed the Code of Administrative Procedure and referred to the Code of Civil Procedure about some issues such as costs and evidence. The new rules, specifically designed for competition cases, are intended both to simplify proceedings and to facilitate investigations.

Complaints may be filed by firms or associations with an interest, local governments, state inspectorates, or consumer advocates or organisations (Art. 84(1)). An individual consumer evidently cannot file a complaint to demand action, but the OCCP can pursue such a complaint *ex officio*. A fee is normally required from a party bringing a complaint to the OCCP (Art. 77). The fee, of EUR 1 000, may be waived in cases of particular policy importance, and especially if the complainant is not a firm but a sole proprietor. The complaint must state a facially plausible theory of violation (Art. 84(2)), and the President can dismiss a complaint if it is insufficient on its face, if the complainant fails to provide information requested to determine its sufficiency, or if the complainant lacks standing (Art. 85). The parties to a proceeding are normally the complainant and the firm charged with the violation (Art. 86). In addition, other firms harmed by the conduct at issue, other parties to the agreement being challenged, or any other entity that proves a legal interest may be made a party by decision of the President. That decision, including a refusal to admit a party, can be reviewed by a court (Art. 87). But these third parties may not seek appeal or review of the final decision on the merits.

An “explanatory” investigation may be commenced on the President’s initiative, to make a preliminary assessment about the possibility of a violation and the market conditions. It should be wrapped up in 30 days (Art. 43). A formal “antimonopoly investigation,” which may follow an explanatory investigation, and which may lead to fines, may be initiated *ex officio* by the President or in response to a formal complaint (Art. 44). The principal issue in the preliminary explanatory proceeding appears to be market definition and concentration, to determine whether the potential respondent has a dominant position (OCCP, 2001). The OCCP also uses the explanatory process to screen complaints, to determine whether there is a public interest at stake or whether the controversy is purely a private matter. There were a tremendous number of preliminary proceedings under the pre-2000 Act procedures: in 1999, there were 949 preliminary proceedings open, most of them new, and 834 were closed.

Practice in deciding matters combines elements of administrative and civil procedures. Proceedings are based principally on documents. There may be hearings (which must be open, except where confidential information would be revealed), and evidence can include testimony of witnesses and opinions of experts (OCCP, 2001). Unless the competition statute provides otherwise, rules about evidence are taken from the code of civil procedure (Art. 82) and the code of administrative procedure applies to OCCP proceedings (Art. 80). The general rules about review of administrative decisions do not apply to the OCCP President’s decisions (Art. 79); instead, the 2000 Act sets out special rules for this purpose.

Parties may reach a negotiated settlement, as long as that is in the public interest (Art. 88). And consent-order settlement is possible in some cases of minor importance. That is, the President may find that the violation is obvious, the respondent may agree, and the case may be terminated with an order to cease and desist (Art. 89). Fines may not be imposed. But this method is not available for cases involving restrictive agreements between competitors, dominant firms with a market share over 80%, or recidivists, that is, firms that have been found to have infringed the Competition Act in the previous 3 years (Art. 89). This “consent settlement” procedure is new and is intended to shorten proceedings in obvious cases. (OCCP, 2001).

Powers of investigation are extensive. In a formal investigation, firms or associations are obliged to provide information requested, and when requesting information the OCCP “should” indicate the scope of the information and relevant time period, the objective of the request, the deadline for compliance, and the sanctions for non-compliance (Art. 45). The OCCP may summon witnesses for oral testimony (Art. 47-48). And it may call on expert witnesses. Hearings are public, unless confidential information is being examined (Art. 55). The OCCP may call on regional courts to take evidence for OCCP proceedings (Art. 56). Inspectors (from the staff of the OCCP or the Trade Inspectorate), who are specifically authorised for particular investigations, are empowered to enter premises, inspect files and records and make copies and extracts, and request individuals to provide necessary explanations in connection with the process (Art. 57). Further search requires court authorisation, which is sought through the OCCP President (on an *ex parte* basis, without notice to the party to be searched) and issued by the Antimonopoly Court within 48 hours after the application (Art. 58). The inspector may also take physical custody of evidence (Art. 60).

Assistance or authorisation from the courts must be sought in some cases: from the Antimonopoly Court for search warrants, and from district courts for hearings or expert opinions of witnesses. Other bodies of public administration are obliged to make relevant files and information available to OCCP proceedings and to explain and clarify matters relevant matters within their competence (OCCP, 2001). The 2000 law makes possible searches of private domiciles, by the police, on request of the OCCP and the approval of the Antimonopoly Court (OCCP, 2001; Art. 91). A party may appeal the seizure of evidence to the Antimonopoly Court, but that appeal does not suspend the seizure (OCCP, 2001). The new “dawn raid” power is not available in merger investigations (OCCP, 2001).

Losing complainants must pay the target's costs of mounting a legal defence, including the costs of having a lawyer appear before the OCCP (Art. 69). This provision is not open-ended. The respondent cannot force the complainant to reimburse extravagant expenses. The OCCP itself is not subject to the rule that prevails in other administrative and court settings in Poland, that the losing party pays at least some of the other party's costs. Evidently to encourage settlement, the 2000 Act seems to permit recovery of expenses by a firm or association that is found liable, as long as it admits liability at the outset and puts up no resistance (Art. 71). Targets of *ex officio* investigations that are found to have violated the law can be required to pay the OCCP's expenses for such items as expert consultants (Art. 72).

Deadlines could tend to encourage timely response to complaints. The full "antimonopoly" proceedings, including cartel investigations, are to be completed within 4 months after they are launched (Art. 92). This deadline may be extended pursuant to the generally applicable provisions of Poland's administrative law. Merger proceedings are to be completed within 2 months (14 days for tender offers and open market purchases, and for bank mergers), not including time spent completing notifications, completing and correcting information, and negotiating about conditions (Art. 97). If no decision is reached within this period, the parties may complete their planned transaction without an order from the OCCP authorising it (Art. 98). The deadline period does not include delays resulting from the fault of the party or other reasons beyond the OCCP's control (OCCP, 2001).

The basic enforcement sanction is an order to cease and desist, backed up by fines for non-compliance (Art. 9). If the President finds the law has not been violated, a decision to that effect is to be issued, too (Art. 11(1)). The President can apply the exemption conditions in individual cases to permit restrictive agreements that would otherwise be prohibited (Art. 11(2)).

Price-control powers, which were provided explicitly in the 1990 Act (Art. 8.1.3), are no longer included in the 2000 Act. In appropriate cases, an OCCP order might have the same effect, though. A new remedy provision is based on market share. If the parties demonstrate a "permanent decrease of their market share" below the level that would support a finding of violation, the President is to issue a decision to that effect, finding a violation but not imposing any order (Art. 10). This section presumably is meant to be applied with reference to the *de minimis* rule for agreements and to the 40% market share presumption for dominance. The previous law included an analogous power to order a business to cut back its activity. That power was never used in practice. This remedy could tend to over-deter and inhibit vigorous competition, if it means that firms will undertake to keep their market shares below these relatively low thresholds.

In merger cases, divestiture or other corrective remedies may be ordered if the parties submit incomplete or misleading information, fail to comply with the conditions that the OCCP imposed, or flout their notification obligations. So far, these remedies have rarely been used.

Fines may be imposed, by the OCCP, for substantive violations, ranging up to EUR 50 million (but not over 10% of a firm's annual income) (Art. 101(2)). An association with no income may be fined up to 50 times the average salary (Art. 101(3)). To enforce compliance with investigative process and notification requirements, the OCCP may impose fines of from EUR 200 to EUR 5 000, even for unintentional violations. Violation of the merger reporting rules will result in a fine from EUR 1 000 to EUR 50 000 (Art. 101); some fine is mandatory in these cases, but the President can determine the amount. Continued failure to comply with an order can incur cumulating fines at a rate of from EUR 10 to EUR 1 000 per day (Art. 102). Compliance with orders is also enforced by financial penalties against individuals. Managers and members of the managing body of a firm or association that fails to comply with an order, decision, or judgement may be fined up to 10 times the average salary (Art. 103). These individual penalties may also apply to refusal to provide information. Fines go to the state treasury, not to the OCCP's budget, and must be paid out of after-tax income or resources (Art. 105). The OCCP monitors

compliance with fines and may issue an execution order for the Tax Office to collect unpaid fines (OCCP, 2001). In determining the amount of the penalty, the President takes into account the duration, degree, and circumstances of the violation. He may also postpone payment or agree to payment in instalments (OCCP, 2001).

The President may issue a complete or partial decision that is effective immediately, if necessary to protect competition or important consumer interests (Art. 90). Generally, decisions are effective when the time for appeal has expired (OCCP, 2001).

Appeals of OCCP decisions and actions are taken to the Antimonopoly Court in Warsaw. The appeal is forwarded through the President of the OCCP, who can modify his original decision in response; the modified decision may also be appealed. And the President can order further investigation to clarify claims made in the appeal. The Antimonopoly Court can reach its own *de novo* decision on the merits of the case. A further appeal is possible to the Supreme Court, to review claims of error of law or procedural defect by the Antimonopoly Court. The Supreme Court too may reach a *de novo* decision if it finds there was substantive error below. If the errors were procedural, it will return the case for further proceedings (OCCP, 2001). Provisions for appealing OCCP actions are *sui generis*; the general appeal provisions of the Administrative Procedure Code do not apply (Art. 79).

3.3. *Other enforcement institutions and methods*

The Antimonopoly Court, which was established along with the original AMO in 1990, has played an increasingly important role. It is an independent, judicial check on the state administration. And it has become a force in the development of policy as well. One reason to establish a specialist court, within the judicial system, was to shift away from the formalist approach that is usually encountered in administrative courts. Early on, the Antimonopoly Court demonstrated a willingness to explore policy more widely. It often relies explicitly on principles and ideas from EU competition decisions, for example. The judges are civil law experts, with ten or more years of experience in business law. The Antimonopoly Court now has 3 judges. The third position was added in 2000, at the Court's request, because of its increasing caseload.

The Court's work load increased in part because its jurisdiction was expanded to include sectoral regulators. This broader jurisdiction promises to ensure that policies are applied consistently in competition cases and in sectoral regulation. Originally, the Court only reviewed AMO decisions. In 1997, it was given the power to hear appeals from the new Energy Regulatory Authority. The telecoms regulator was added in 2000, and the railway regulator in 2001 (Art. 108). The Antimonopoly Court also has jurisdiction over consumer contracts of adhesion. Some of its recent rulings about energy regulation have broad importance. For example, in a decision about tariff policy, the court explained the relationship between economic and social considerations, holding that if costs justify a tariff, then social considerations cannot be used as a reason to reduce it.

A significant proportion of the OCCP's decisions are now followed by resort to the Antimonopoly Court, and the Court often intervenes to change or reverse the decision. In 1999, about one-third of the OCCP's decisions were appealed (87 appeals out of 240 decisions). In about half of those appeals, the Court disagreed in whole or in part: 43 decisions were affirmed entirely, and 7 were affirmed in part; 37 were overturned (OECD CLP, 2000, p. 5).

The process of appeal from OCCP decisions is evolving into a procedure that looks more like a first-instance trial in the Antimonopoly Court. In adjudicating appeals from administrative orders and providing guidance about the interpretation of the law, it looks like a second-instance court of appeal. But

it may do more than determine whether there was an error in the principles followed by the OCCP. The Supreme Court has decided that the Antimonopoly Court may act in effect as a court of first instance, issuing its own decision *de novo* and accepting and reviewing evidence – even evidence that was not presented to the OCCP – in order to reach that decision. In doing so, the Antimonopoly Court applies procedures normally used by a court of first instance. Because OCCP decisions do not become effective until the end of the “appeal,” the practical result may be that the Court’s decision is the one that really matters. This first-instance role has been clear since about 1998.

The increasing number and complexity of cases is leading to delays. When it was first set up in 1990, the Court decided 12 cases, and the year after only 18. By 1999, the number of decisions reached 164, and in 2000, 232. Until 1996-97, cases would be closed and a ruling given after the first session in the Court, and its proceedings typically took about 3-4 months. But as parties are increasingly represented by professional counsel and the Court is taking evidence directly, multiple hearings are becoming common and cases are taking much longer – up to a year – to decide. A further appeal to the Supreme Court can take another 2 years. To reduce these delays, it will be necessary to add more judges and perhaps to use more streamlined proceedings, where the rules permit.

As the Antimonopoly Court becomes a principal first-instance decision-maker, it may be necessary to clarify ambiguities and inconsistencies about applicable procedures, either by new legislation or by inquiry to the Constitutional Court. The 2000 Act seems to provide for different scope of review, depending on whether the appeal is from the OCCP or from a sectoral regulator. The Antimonopoly Court may not have the option of remanding a matter to the OCCP for further proceedings. If that is the case, then the Court’s role as principal decision-maker becomes even more important. Moreover, it may be a concern that the scope of the Court’s power is limited to the parameters of the OCCP’s decision. If the Court finds that other or additional sanctions should be applied, or that other parties should be involved, it may lack the power to reach that result or to return the matter to the OCCP to reach it.

Because OCCP actions are typically contested proceedings in response to complaint, there is little need for a separate avenue to decide privately-filed complaints. The OCCP is obliged to issue a decision in every case, including those in which it finds there was no violation. Firms that claim to be harmed and consumer or social organisations representing consumer interests have the legal power to demand a hearing at the OCCP. Complainants, like respondents, must comply with the OCCP’s demands for information. The President may decline to open a proceeding if the motion and information show there is no basis for a finding of violation. The President notifies the complainant of this decision and the justification for it. If the complainant does not accept this decision, though, the proceeding must be opened (OCCP, 2001). The disappointed complainant then may take an appeal of the OCCP’s action denying its claim to the Antimonopoly Court.

To obtain damages, parties could file suit under the Civil Code’s general rules for contract or tort liability. A decision on the merits by the OCCP would have some presumptive significance in such a proceeding, but it would not necessarily dictate the court’s outcome. The court can reach its own decision about whether the practices violated the competition act, particularly where there is no relevant OCCP decision in force (for example, because it has expired).

3.4. *International trade issues in competition policy and enforcement*

Poland appears to assert extraterritorial jurisdiction, over conduct abroad that has anti-competitive effects in Poland. Like most other national laws, Poland’s competition law is not concerned about export cartels, that is, conduct in Poland whose only anti-competitive effects are felt elsewhere (OCCP, 2001). Despite this claim of jurisdiction, Poland has found it difficult to address an international

market-division problem that also affects its neighbours. It appears that firms bidding in privatisation proceedings in different countries in the region are declining to compete against each other. The result is lower bids for the privatised firms and no competition through trade from the privatised companies in the neighbouring countries. (International trade is not encouraged, of course, by requirements in privatisation agreements that firms source from local suppliers).

The OCCP has a role in international trade regulation, to submit an opinion to the Minister of Economy in proceedings about alleged dumping or excessive imports (OCCP, 2001). The President of OCCP provides an opinion about the order from the Minister of Economy, considering whether the measure stimulates efficiency enough to offset the possible anti-competitive effects (OCCP, 2001). Orders or actions limiting imports have included a quota on coal from the Russian Federation, a regulation requiring “automatic registration of turnover” for CFCs, gelatine, and certain oil products, and regulation of imports of second-hand clothing and other items. The OCCP has generally supported these actions.

Foreign firms have the same rights and obligations as domestic firms in proceedings at the OCCP. Poland wants to attract foreign investment, so the OCCP’s treatment of foreign firms in merger matters has been understanding. There has been one case in which national identity appeared to play a role, when the OCCP refused to permit a Dutch firm to take over a Polish magazine, but the Antimonopoly Court found that the product market was broader and overruled the OCCP. Obtaining information from foreign firms in merger cases has not been a problem, largely because those firms have an interest in co-operation with the authorities in order to do business in Poland (OCCP, 2001). In general foreign firms that are under investigation must notify the OCCP of any foreign actions or judgements brought against them for competition law violations (Art. 82).

The OCCP has entered bilateral agreements with competition authorities in France (1994), Russia (1994), Lithuania (1996), and Ukraine (1997). Most of the agreements provide for mutual consultations and advice. The agreement with Lithuania, which is also a candidate for EU admission, provides for the greatest amount of exchange of information about particular cases (OCCP, 2001). The OCCP’s ability to assist and co-operate with other enforcement bodies may be limited by its statutory obligation to protect the confidentiality of evidence. Information the OCCP obtains in its investigations “cannot be used for other proceedings” under other laws (Art. 65). There is an exception for “penal proceedings conducted under public complaint procedures”, but that probably means enforcement of other Polish criminal laws, rather than enforcement of competition laws of other jurisdictions.

3.5. Agency resources, actions, and implied priorities

Personnel resource support appears adequate, although the OCCP does face the common problem of attracting and retaining junior staff in competition with the higher-paying private sector and with other regulators or ministries that can pay higher salaries. Over the period 1996-2000, staff levels increased 17.6%, as sections were added for consumer protection and state aids. Appropriations increased by 87.3%. Some of the budget increase represents pay raises to bring pay levels in line with other central administration bodies, some of it represents the costs of computerisation, and much of it represents inflation. In real terms, expenditure per employee increased 4.9% over the period. The proportion of professionals (lawyers and economists) increased from 57% to 64%. Most of the staff are veterans: as of the end of 1999, only a quarter of the staff had less than 5 years of service with the organisation (OCCP, 2001).

Resources for purposes other than personnel are constrained. It is difficult for the OCCP to hire experts or to conduct or buy market research. Sometimes the OCCP can rely on other government institutions for these data. Most often, though, market research must be done in-house. The 2000 Act

permits the OCCP to charge the costs of outside experts to the complainant (or to the respondent in an *ex officio* proceeding). Although this power could compensate for the shortage of budget funds, requiring complainants to pay these costs tends to put the OCCP in the position of adjudicating private disputes and complaints, rather than vindicating public policy concerns.

Table 1. Trends in Competition Policy Resources

	Person-years	Budget (PLN)
2000	188	11 657 000
1999	185	9 650 000
1998	180	8 667 000
1997	173	7 520 000
1996	160	6 225 000

Source: OCCP, 2001.

The OCCP's focus on large-firm problems is borne out by the distribution of its cases. The overwhelming majority are about abuse of dominance and mergers. By comparison, few resources or attention are devoted to problems of restrictive agreements, as the OCCP believes there are comparatively few of them in Poland. As of 1999, more than half of the OCCP's findings of violation concerned firms in the "municipal services" sector, 15% in energy, 11% in water and sewer service – leaving 25% in all the rest of industry, agriculture, trade, and services (OECD CLP, 2000, p. 5). Raising the merger notification threshold reduced the number of merger matters somewhat after 1998. Fines against restrictive agreements were imposed several times in the early years, but not again until 1999 and 2000. Sanctions against abuse of dominance and merger filing violations were generally stable over the period, the major exception being a single huge fine against the telecoms monopolist listed in the 1999 data. The number of cases about unfair competition, which first appeared in 1996, is increasing rapidly (OCCP, 2001).

Table 2. Trends in competition policy actions

	horizontal agreements	vertical agreements	abuse of dominance	mergers	unfair competition
2000: matters opened	19	9	274	972	235 ²
sanctions or orders by OCCP ¹	4	0	56	64	19
total sanctions (PLN)	47 667	0	1 483 210	268 455	0
1999: matters opened	17	3	245	882	138 ²
sanctions or orders by OCCP ¹	3	0	118	84	10
total sanctions (PLN)	277 200	0	48 276 792	132 600	0
1998: matters opened	10	8	189	1410	91 ²
sanctions or orders by OCCP ¹	1	2	65	177	10
total sanctions (PLN)	0	0	3 223 087	889 668	0
1997: matters opened	12	1	203	1191	22 ²
sanctions or orders by OCCP ¹	4	1	72	243	1
total sanctions (PLN)	0	0	1 903 777	2 189 475	0

	horizontal agreements	vertical agreements	abuse of dominance	mergers	unfair competition
1996: matters opened	3	4	158	456	0
sanctions or orders by OCCP ¹	0	1	62	16	0
total sanctions (PLN)	0	0	2 181 285	11 800	0

1. Data indicates orders and sanctions pursuant to decisions of the President of the OCCP. Outcomes after action by the Antimonopoly Court would differ significantly from these data.

2. Includes interventions in private litigation.

Source: OCCP, 2001, II.7.15.

4. Limits of competition policy: exemptions and special regulatory regimes

4.1. Economy-wide exemptions or special treatments

Whether competition policy can provide a suitable framework for broad-based regulatory reform is partly determined by the extent and justification for general exemptions or special treatment for types of enterprises or actions. The competition act itself establishes virtually no exemptions. It does not apply to collective labour agreements. Although its prohibitions do not prejudice rights based on intellectual property, it does apply to the anti-competitive effects of intellectual property licensing agreements (Art. 2).

Restrictions on competition that would be inconsistent with the competition act's requirements may nonetheless be authorised. The 2000 Act now states explicitly that it does not apply to restrictions on competition that are "exempted by virtue of separate legal acts" (Art. 3). In this context, "legal acts" apparently means statutes. It is unclear whether the other statute must state explicitly that the restrictions are exempted, or whether the exemption would apply *de facto* if the other statute authorised conduct that the competition act would otherwise prohibit. There is only one explicit statutory exemption, for the state monopoly on running a lottery (OCCP, 2001).

The general competition law applies to undertakings of all kinds, regardless of form of ownership, as well as to associations of entrepreneurs (OCCP, 2001). The national network monopolies, which are still owned by the Treasury, have been a principal enforcement target. These include (OCCP, 2001):

- Telekomunikacja Polska S.A., (telecoms) a joint-stock company in which the Treasury holds 35% of shares and voting rights;
- Polskie Górnictwo Naftowe i Gazownictwo S.A. (Polish Oil and Gas Company), a company wholly-owned by the Treasury;
- Polskie Koleje Państwowe (Polish National Railways), formerly a state-owned enterprise, since 1 January 2001 a joint stock company in which the Treasury owns 100% of the shares;
- Polskie Sieci Elektroenergetyczne S.A. (Polish Electro Energy Grids), the monopolist in high-voltage energy transmission, a joint-stock company in which the Treasury owns 100% of the shares; and
- Poczta Polska (postal service), a state-owned enterprise.

Actions by local governments may be controlled under the competition law. The President of the OCCP has frequently ordered local officials to cease anti-competitive practices in water, sewer, and trash services. The practices at issue often appear to be efforts to impose unbalanced charges and force one class of customers to subsidise others. An example is a decision, upheld by the Antimonopoly Court, against charging businesses double for water and sewer services and then using the proceeds to improve the infrastructure. The fact that the action followed a local government resolution did not excuse it. Analogously, the OCCP rejected a scheme to set prices for water and sewer services below cost and then make up the difference by a charge imposed on businesses (OCCP, 2001).

No special treatment is granted to small or medium sized businesses. In enforcement policy, though, the OCCP appears to devote most of its attention to large firms. And smaller firms are likely to be principal beneficiaries of the *de minimis* rule exempting some restrictive agreements (horizontal agreements involving less than 5% of the market, or vertical agreements involving less than 10%), and of the merger notification thresholds that concentrate attention, and notification requirements, on larger transactions.

4.2. Sector-specific exclusions, rules and exemptions

Overt controls on entry imposed by licensing requirements, which could impair competition, have been significantly reduced. The new law on economic activity reduces the number of areas where licences are required from several dozen to a handful. Most of the lines of business in which a licence is still required involve public safety, resource exploitation, or infrastructure services. These include production and trading in explosives, firearms, munitions, and military and law enforcement products, protective services, petroleum exploration, air transport, railway management and transport, and broadcasting. Licences are still required for some industries in which competitive entry would be efficient, though, notably air transport and the manufacture and distribution of petroleum products.

Where a sector is subject to the oversight of a separate regulatory body, the competition law still applies. There are few formal rules or procedures to govern the relationship between the OCCP and the increasing number of sectoral regulators. Co-ordination is achieved through informal relationships and consultation, whose foundation is often the OCCP's participation in the process of developing the sectoral regulatory structures. There has been little actual experience with the co-ordination process, except with the Energy Regulatory Authority, because the other sectoral bodies are quite new.

*Electric power*¹⁸

Restructuring this sector has been a prominent goal of the government's general competition and restructuring programs for many years. In the early 1990s, plans were laid for vertical divestiture, price re-balancing, and market commercialisation, as a step toward privatisation.

The possibility of overlap – as well as the text of the Energy Act – requires some co-operation between the Energy Regulatory Authority and OCCP. The ERA has the power to settle disputes about issues that are likely to have important competitive effects, such as terms and conditions of power transmission, refusal to connect, refusal to enter sales contracts, and unwarranted suspension of supply. The courts have found that the competition law could also apply to these disputes. And the OCCP continues to deal with some complaints about allegedly monopolistic practices by the transmission grid operator. It is difficult for the OCCP to address claims about denial of access to services, because its principal remedial tool is an order to cease and desist. Complaints about the level of tariffs are not normally matters for the OCCP. If the regulator approves a tariff, the OCCP will not assert jurisdiction

over a complaint about it, but instead will send the complainants to the ERA. The ERA determines whether a market is competitive for the purpose of requiring tariff approval. It is not required to consult with the OCCP in making that determination. The OCCP determines whether the market is competitive, for the purpose of approving mergers; in doing so, it will normally consult with the Ministry of Economy, which has policy oversight over the energy industry.

Possible overlaps of decision-making authority have appeared rarely. OCCP and ERA have established a pattern of formal co-operation as required by law. Informal contacts range from regular annual meetings at the policy-making level to day-to-day interactions among the regional offices of the two authorities. Both authorities are also represented at the energy sector co-ordinating group, established by the economic committee of the council of ministers and chaired by the OCCP President.

*Telecommunications*¹⁹

Efforts to control monopoly and protect emerging competition in the telecoms sector occupied much of the OCCP's enforcement attention, at least until a new sectoral regulator was set up in 2001. The largest single fine under the competition act, PLN 54 million, was imposed in 1999 in a case about TPSA's tariff structure. As the regulator begins operation, there may be some points about their relative jurisdictions that need to be worked out, as there were with the ERA. For example, OCCP is still receiving complaints about TPSA's tariffs.

The telecoms law is somewhat more explicit than the energy law in specifying areas where co-operation between the regulator and OCCP is required. In identifying firms with dominant positions or significant market power calling for regulatory oversight, the telecoms regulator is to consult with OCCP before reaching its decision. The OCCP has decision power about mergers in the telecoms sector, and it is not required to consult with the regulator before reaching a decision. The regulator may thus learn of an acquisition when the parties report the change in share ownership.

Transport

Entry into airline services is not yet permitted, but a timetable for liberalisation, at least with respect to the EU, has been set. The target date is 2004 for other European airlines to offer services freely to Poland and establish Polish subsidiaries. Poland will also conform its rules about protecting passenger rights, and the national airline, Lot, plans to improve its services and operations in anticipation of the greater competition.

In road transport, reform began in 1990, when 4 state-owned firms were divided into 233 new enterprises, most of them involved principally in inter-city bus service. Permits are now issued under 1997 legislation, which was adopted as the first stage in approximating Poland's rules to EU norms in this area. Applicants must meet qualitative criteria, and foreign permits are subject to quotas. There are some 26 000 international road transport permits in use in Poland. New legislation is being prepared which will set conditions both for access to the commercial market and for private carriage. What are now still treated as "concessions" and other kinds of authorisation would be replaced by operating licences, which would act more like permits, in that the regulator would have no discretion to deny a permit to a qualified applicant. Entry into passenger bus service has been liberalised, as part of the general reduction in licence requirements. In the face of increasing competition in bus service, firms tried to control or prevent it, and the OCCP has taken enforcement actions to counter those efforts. These have included orders against price fixing among incumbents (the successors to the previous state monopoly) and against pre-emptive scheduling to prevent entry by new firms.

A restructuring program for the rail sector is underway, as one element of the current government competition and restructuring programme. Legislation adopted in 2000²⁰ incorporates some concepts promoted by the OCCP, including dividing the incumbent operator, PKP, into smaller firms, separating infrastructure from operation, and separating freight and passenger operations to avoid cross-subsidisation distortions (OCCP, 2001). Management of “lines of national significance” is entrusted to a state-owned joint-stock corporation. As of 1997, freight transport operation has been open, but subject to a licence requirement. So far, the Minister has granted freight and transport licences to the state-owned Polish Railways, and freight licences to 21 other entities (OCCP, 2001).

*Petroleum products*²¹

Poland’s domestic petroleum industry is highly concentrated. The dominant firm, accounting for 75% of Polish refinery production in 1999, is Polski Koncern Naftowy ORLEN S.A. (“PKN”). The second-ranking firm, Rafineria Gdanska S.A., accounted for 20%. PKN also has dominant positions in wholesale and retail distribution. The OCCP has advocated strengthening and privatising the second-ranking firm to establish a significant domestic refinery alternative to PKN.²² Imports are necessary to meet demand, and they are controlled by a system of licences, rather than tariffs, issued by the Ministry of Economy (OCCP, 2001). At present, the import licensing power is not being used to restrict supplies, but that is at the discretion of the Ministry of Economy. Restructuring this sector was one of the goals of the 1998 competition policy program.

*Coal*²³

Restructuring the coal industry is a major priority and a major challenge. A restructuring programme adopted by the Council of Ministers plans to reduce the number of firms from 7 to 3 by 2002. Reduction is necessitated by declining production and sales, fewer mines, and lower employment in the sector. It is hoped that better management, about strategic planning, sales, materials, logistics, and environmental protection, will permit more rational use of capacity and reduce costs, and that greater efficiency will make the surviving firms profitable (consistent with fulfilling financial, environmental, and social obligations). The program hopes to create a real competitive playing field by the end of 2002 (OCCP, 2001).

Box 4. Administered pricing

In addition to mine closures and restructuring, another factor in creating fiscal stability in the coal industry appears to be managed pricing.

The Ministry of Economy has been responsible both for managing the coal mines and for supervising the electric power sector, which includes the mines’ principal customers. In 1999, the OCCP submitted an opinion to the Minister of Economy objecting to administrative intervention in coal prices, arguing that it would impede the industry’s adjustment to market economy conditions. Some of these objections were accepted (OECD CLP, 2000, p. 9). But apparently not all of them were.

Although coal prices are said to be set through negotiations between producers and buyers, press reports suggest that the producers have been instructed to quote essentially identical prices,²⁴ and insiders admit that there is as yet no real competitive market for coal production in Poland. But there appears to be no statute or even a formal ministerial order authorising the producers to co-ordinate their pricing, nor have the coal producers applied to the OCCP for an exemption from the prohibition against concerted action.

Controlling prices within these domestic markets may be a short-term necessity in the restructuring process. And the fact that the state-owned mines are under the common control of the Minister of Economy suggests that a claim of “conspiracy” would be inappropriate. But it would be better practice to make this means of stabilisation and implicit subsidy explicit and to do so according to established, generally applicable legal procedures.

Sugar

Sugar processing, like petroleum refining, became a highly concentrated industry under a statutory restructuring program. The AMO found that the industry was trying to co-ordinate its pricing in the early 1990s. Now, competition is controlled by a 1994 law that authorises production quotas and minimum prices, which are set annually by the Council of Ministers, on motion by the Minister of Agriculture. There are three quotas, for the domestic market, for export eligible for subsidy, and for export without subsidy. The subsidies are funded by levies on domestic sales, and the quotas are enforced by penalty payments of 100% of value. The industry is protected against imports. The 1994 law also restructured the industry's ownership, setting up 4 state-owned joint stock companies. Privatisation began in 1999, when the 4 companies controlled 62 plants (OCCP, 2001). The government is trying to design a privatisation program that will be consistent with the competition law by limiting the size of any single firm to the presumptive dominance threshold of a 40% domestic market share.

Professional services

The OCCP has had few cases about this common subject. The 2000 act makes it clear that the law applies to professionals, by expanding the definition of "entrepreneur" to include any "natural person exercising a profession on its own behalf and account or performing activity in the frame of exercising such profession" (Art. 4(1)(b)). If there ever was an actual or implied exemption, it appears to have been terminated.

5. Competition advocacy for regulatory reform

Policy advice and advocacy is delivered principally through internal communications among government agencies, more than in public debate. Although positive results have been achieved, a public advocacy voice would be welcome.

From the outset, commenting on competition-related aspects of legislation has been a major task. The AMO's legal department generated more than 500 such "standpoints" on draft legislation from 1990 to 1995 (Fingleton, 1996, p. 93). That activity continues unabated. In 1999, the OCCP commented on legislative proposals about Special Economic Zones, regional development, air transport, postal services, civil procedure, large retail complexes, toll roads, environmental protection, public administration, tenant protection and municipal and public housing, prices, and the sugar market. It provided opinions about government programs concerning chemical production, SME policy, energy policy, telecoms development in rural areas, transport policy, land use planning, railway restructuring, coke industry restructuring, coal mining adjustment and restructuring, and trade policy (quotas and tariffs). It submitted comments to the Minister of Economy about coal mining reforms and to the Treasury minister about privatising and restructuring the oil industry, and about other privatisation issues, as well as trans-border TV broadcasting, the annual intervention program of the Agricultural Market Agency, and a draft document on "General assumptions for the program of emerging and developing producer groups in Poland" (OECD CLP, 2000, p. 4).

All government proposals must be consulted among all departments, including the OCCP. The time available for a response can range from one hour to three weeks. The OCCP ignores those that are obviously outside its area of concern and sends the drafts it does care about to its legal and relevant substantive departments for review. Despite the absence of formal public comment procedures, producer interests often learn about what is being considered and approach the OCCP about its views.

One common avenue for influencing policy is participation in continuing or *ad hoc* task forces. OCCP representatives served on a team for the “elimination of red tape in the economy,” which developed the new law on economic activity. This law significantly reduced the number of services for which a licence would be required, and thus expanded the scope of services for which entry would be permitted subject only to an authorisation made generally available to anyone who met transparent “classification and technical” requirements (OECD CLP, 1999, pp. 4, 9). An OCCP representative has been a member of the Securities and Stock Exchange Commission, and OCCP representatives are at working party meetings considering draft prospectuses.²⁵ Other bodies on which OCCP representatives have served or participated include the inter-ministerial commission for changes in tariffs and trade regulations (under the Minister of Economy), the council for transfer prices in electric power (an advisory body to the minister of Economy), a team for co-ordinating privatisation in that sector (under the Treasury), and a council concerned with regulatory standards and fees in water and sewer services (appointed by the chair of the Housing and Town Development Office) (OECD CLP, 1999, p. 10).

Bodies like these have been important in sectoral restructuring and regulatory reform. In April 1999, the Economic Committee of the Council of Ministers set up a Permanent Energy Industry Task Force, including under-secretaries of state from the Ministries of Finance, Economy, and Treasury and the President of the Energy Regulatory Agency. The OCCP President chaired this task force, which produced plans for privatisation and rules of operation for the electric power industry (OECD CLP, 2000, p. 11). Another interministerial task force, set up in 1998, has studied ownership changes and concentration in the mass media. The OCCP vice-president chaired this group. Its final report appeared in March 1999, and the OCCP was asked to update the data at the end of 2000 (OECD CLP, 2000, p. 12).

In the still-important tasks of restructuring and privatisation, competition policy plays an advisory role that is nonetheless often effective. The only formal arrangements are a co-operation agreement between OCCP and the Ministry of Treasury, about the choice of entities that can negotiate. This advice precedes consummation of a transaction, but it comes after the bids are submitted. It gives the OCCP some time to examine the implications and ensure that Treasury considers competition issues. More importantly, the OCCP can often influence the privatisation program as it is being developed. In petroleum, for example, the government’s program incorporated a competition-based requirement, prohibiting the dominant domestic firm from acquiring the second-largest refinery.

This within-the-system advocacy may be appropriate and effective in the Polish context, which emphasises formality and insider contacts more than public debate. There is some danger, though, that the process leads to a sense of “ownership” of what may often be a compromise outcome, dampening further efforts by the OCCP to make the situation more competitive. Evidence of this tendency is that the OCCP generally supports the kinds of import relief actions, such as anti-dumping complaints, that other competition agencies often oppose as anti-competitive. A recent example is a regulation to impose extra inspection requirements on imported used vehicles. Few doubt that these requirements are intended to discourage imports and protect the domestic auto manufacturing industry. Other reasons advanced in their support include safety and environmental protection. The OCCP, which participates on a team that is responsible for auto industry issues, has supported this inhibition on imports, while conceding that one of its goals is to sustain Poland’s new car market, on the grounds that that importers of used vehicles can evade compliance with generally applicable safety and emissions standards.

6. Conclusions and policy options

Poland has accomplished most of the necessary pro-competitive restructuring of its basic economic institutions over the last decade. This large-scale project was clearly defined and enjoyed consensus support. Some competitively significant restructuring tasks remain in sensitive sectors such as steel and coal, but the major tasks of establishing a functioning, competitive market economy have been largely completed. The next step in curbing inefficient interference in the market economy, by preventing the anti-competitive abuse of state aids and subsidies, will be more challenging. Not only are the issues new, but domestic consensus supporting reform is likely to be weaker.

Poland has a sound and complete substantive competition law, built on the familiar EU framework. Enforcement so far has concentrated on the conduct of larger firms. The legal framework should be more than adequate to deal with abusive practices now, and to deal in the future with the horizontal co-ordination that is sure to become more problematic as firms become stronger and competition among them intensifies.

The 2000 Act gives the OCCP unusually strong investigative powers. Many of the novel procedures under the 2000 Act remain to be tested. These stronger powers may lead to more information and hence better analysis. But as important decisions are increasingly being made by the Antimonopoly Court, there could be a risk that the OCCP will be less cautious and more aggressive, relying more on the Court to sort out competing claims. The Antimonopoly Court has become an important factor in making and applying policy.

Consensus about the goal of EU accession should support proceeding with reforms that are consistent with that goal. But most accession issues that directly implicate competition policy have been addressed already. As the novelty of the principles fades, competition policy and institutions are receding from public attention. Some observers in Poland find that support for competition policy around the administration is shallower now than it was during the first wave of reforms in the early 1990s. If true, that trend needs to be reversed, or reform may falter.

5.1. Policy options for consideration

- *Ensure the OCCP's decision-making independence.*

It is most important to ensure that the competition policy institutions are positioned with enough independence to justify respect for the principled application of the law, while retaining enough access in deliberations to protect competition in the regulatory process. The status of competition policy within the government structure, and the degree of independence from political control, are still contested. Balancing the independence that is needed for deciding cases and the access that is needed for debating policy is a continuing problem in many OECD Member countries, for which there is no single solution. Some observers in Poland feel that the OCCP has sometimes muted its concerns about issues such as privatisation outcomes, in order to maintain its contact with the policy process. If it is preferred to keep the OCCP close to the government and the policy-making function, then one way to strengthen that tie could be to put the President's participation in Cabinet deliberation on a more regular basis, to ensure that competition policy issues are thoroughly aired before decisions become difficult to reverse.

- ***Make state aid control a high policy priority.***

Solidifying the OCCP's position will help it perform its important new function of monitoring state aids, which can distort competition. Continuing to focus on structural issues, including the effect of government action on market competition, is a sound approach in Poland's current conditions. Thus the new power to monitor and control state aids is an important continuation of the OCCP's historic policy direction. Its importance is magnified by the process of regionalisation, because newly empowered local governments may become an important source of distorting subsidies. The challenge cannot be underestimated. The principle is clear, to prohibit subsidies and favours that distort competition. But the means for applying that principle are highly technical and complex, relying less on applying the principle itself than on formal rules that are proxies for it. Few national competition authorities have much experience yet applying these rules. Those that have recently undertaken this responsibility have usually arranged for technical training for their staffs. The OCCP too intends to take advantage of training opportunities, to be sure that its office of about 15-20 persons has the competence, capacity, willingness, and ability to apply this complex system and to say "no" when necessary.

- ***Provide sufficient resources to retain staff and to perform new functions***

To perform its new function and use its new powers effectively will require resources. The personnel complement has been generally stable, expanding somewhat recently to incorporate the state aids responsibility. Further increases in the number of staff might be justifiable. More importantly, some means to improve pay levels, especially of more junior staffers, could improve effectiveness. Those staff should be at salary parity with the equivalent staff of other regulators, or else the OCCP will constantly lose promising employees just as they have enough experience to be most effective. In addition, more resources may be needed to support the OCCP's now-formalised outreach responsibilities, to edit and publish the regular official journal that the 2000 Act now requires it to produce.

- ***Reduce delays in the courts.***

Equally important is supplementing the resources of the Antimonopoly Court. The Antimonopoly Court is now the key decision-maker in important cases, as a large proportion of OCCP decisions are appealed and the Court can and does act like a court of first instance in handling those appeals. Cases are now taking too long for this initial decision. The Court has recently been expanded, by 1 additional judge. Further expansion should be considered, until the time for decision has been reduced to the acceptable 3-4 months that prevailed before. In addition, or alternatively, the Court might consider measures to streamline its proceedings. The Antimonopoly Court is not the only source of delay, for cassation appeals to the Supreme Court can take much longer still. Those delays may represent a systemic problem, not just a competition policy problem, which will call for a larger-scale remedy.

- ***Support greater consultation with affected groups, including both consumers and businesses, in developing policy.***

There are few full decisions about matters where much is at stake, such as mergers. More transparency is needed about the analytic and decision standards that the OCCP is actually applying. The OCCP has made little use of guidelines to assist businesses in understanding how the law is applied, for example. Its authority to issue explanations and interpretations has now been clarified by the 2000 Act. The OCCP has been willing to offer staff-level informal guidance about particular cases, but whether that guidance reflected general policy has sometimes been unclear. The OCCP too could profit from more open

dialog and consultation with the groups that are affected by its policies. The process would improve the quality of the guides and secondary legislation it must develop. And it could encourage an alternative, public “advocacy” voice by the parties consulted, including consumers as well as businesses, debating the competitive implications of policy choices.

- ***Eliminate market share tests for merger notification.***

The 2000 Act may still make merger notification depend on market share, by defining an exemption in those terms. A market share test is uncertain in administration, because market definition is sometimes unclear and often contested. And making the reporting obligation depend on market share tends to confuse the administrative obligation with the substantive rule. Basing the reporting obligation on market share is not consistent with best practices. It would be better to base it solely on a less contested measure, such as assets or turnover. Using market share to define an exemption, rather than an obligation, may not make much difference in the effect. The market share test may actually complicate firms’ decisions about whether they need to file, and thus it may not meaningfully reduce the filing burden.

- ***Ensure close and consistent co-operation with sectoral regulators.***

Co-operation with sectoral regulators has not yet presented insurmountable problems. Shared authority has not been tested yet by major disagreements or disputes over jurisdiction, and minor uncertainties arising when sectoral programs are first launched appear to have been handled well. But claims about overlapping jurisdiction will certainly recur, as parties search for avenues to challenge rate structures and other actions by infrastructure facilities providers. At some point, a more formal co-ordination process may be necessary. In addition, confusions might be reduced by making practices of cross-consultation consistent in all the sectors. For example, the telecoms regulator now must consult with the OCCP when deciding whether a firm has enough market power to justify regulating it, but the ERA need not consult when making an analogous determination. Both regulators’ decisions could be appealed to the same Antimonopoly Court, so presumably disagreements in approach or principle could be resolved. But it could be more efficient if this cross-consultation occurred in every relevant case at the outset, rather than waiting for court action at the end of the process.

- ***Resist using the concept of “economic dependence” in a way that stifles competition.***

Enactment of a special prohibition against abuse of economic dependence is under consideration in Poland.²⁶ There may be situations in which a firm has relationship-specific market power, which enables it to extort unfair conditions from other firms. One approach to these situations would be to develop a market definition methodology that could identify this problem and address it under the competition law. The OCCP appears to be reluctant to take that approach, though. Providing tools for equalising the bargaining power of smaller firms against much larger ones can be beneficial. But unless applied carefully, rules to regulate “economic dependence” as something *sui generis* could both impair efficiency and undermine the goal of establishing competitive market institutions. In particular, trying to prevent prices that are “too low” discourages the very market behaviour that competition policy should promote.

NOTES

1. The acronym in Polish is UOKiK.
2. Act of 28 January 1987 On counteracting monopolistic practices in the national economy.
3. Act of February 24, 1990, On Counteracting Monopolistic Practices and Protection of Consumers' Interests.
4. Act of 15 December 2000, On Competition and Consumer Protection; referred to here as "2000 Act". Parenthetical citations are to the 2000 Act unless otherwise indicated.
5. Art. 20 of the 1998 Constitution of the Republic of Poland.
6. Art. 22 of the 1998 Constitution of the Republic of Poland.
7. Art. 76 of the 1998 Constitution of the Republic of Poland.
8. Some aspects of these concepts were implied or contained in the previous Act's definition of "competitor". The 2000 Act simplifies that definition, by referring to the definition of "relevant market". A "competitor" as formally defined can occupy either a selling or a buying position.
9. The 1990 Act's definition of "monopoly" position has been dropped. This definition was the predicate for a separate section prohibiting monopolistic firms from cutting production, suppressing sales to raise prices, or charging excessive prices (1990 Act, Art. 7.1).
10. An exemption might have been granted if practices "are necessary for technical, organisational or economic reasons to running business activities and they do not cause any significant reduction of competition" (1990 Act, Art. 6).
11. The 2000 Act includes major investors (natural or legal persons holding more than a 25% interest or exercising actual control) among the "entrepreneurs" that the act covers (Art. 4(1)(c)). A "dominant" entrepreneur is defined, in terms of effective control over another, directly or by agreement, including an agreement about sharing profits (Art. 4(3)(e)). Taking "control" is now defined functionally, rather than formally (Art. 4(13)). A "capital group" is the collection of firms subject, directly or indirectly, to common control (Art. 4(14)).
12. Article 149 of the Act of 21 August 1997 On Public Trading in Securities.
13. Art. 7, Law of 30 June 2000 On the Conditions for Admissibility and Supervision of State Aid to Entrepreneurs.
14. Act of 16 April 1993 On Combating Unfair Competition.
15. Art. 3, Act of 16 April 1993 On Combating Unfair Competition.
16. Act of 4 September 1997 on government administration departments.

17. Consultation about draft documents is authorised by the Act of 8 August 1996 on the organisation and rules of procedure of the Council of Ministers (OJL. of 1999 No. 82, item 929) (OCCP, 2001, item II.6.8).
18. Most issues about this sector are addressed in a separate chapter of this report.
19. Most issues about this sector are addressed in a separate chapter of this report.
20. Act of 8 September 2000 on the commercialisation and privatisation of PKP.
21. Most issues about this sector are addressed in a separate chapter of this report.
22. In autumn 2001, a UK firm, Rotch Energy, in a partnership with US and Japanese firms received preliminary approval to acquire Rafineria Gdanska. Financial Times, 17 September 2001, p. 24.
23. Most issues about this sector are addressed in a separate chapter of this report.
24. *Rzeczpospolita*, 15 January 2001.
25. Under Art. 147 of the law on securities trading, the OCCP analyses competition implications of share listings (OECD CLP, 1999, p. 9).
26. Similar laws have been considered or adopted in several other European countries, while Greece has recently repealed its law on the subject.

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