

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**ROUNDTABLE ON THE STANDARD FOR MERGER REVIEW, WITH A PARTICULAR EMPHASIS  
ON COUNTRY EXPERIENCE WITH THE CHANGE OF MERGER REVIEW STANDARD FROM  
THE DOMINANCE TEST TO THE SLC/SIEC TEST**

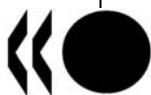
**-- Poland --**

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## 1. The substantive test for merger review

1. In compliance with the Act of 16 February 2007 on Competition and Consumer Protection the concentration test is included in art. 18. Pursuant to this provision: *“The President of the Office shall, by way of decision, issue consent to implement a concentration, which shall not result in significant impediments to competition in the market, in particular by the creation or strengthening of a dominant position in the market”*. Upon analyzing this provision it is possible to conclude that it is the test of significant impediment to competition. It is a two-step test. In the first step the influence of concentration on the market is analyzed. The Office analyzes the extent of the impediment to competition by the merger. In the second step it is examined whether an entrepreneur will achieve a dominant position or whether it will be strengthened. The introduction of the SIEC test constitutes an important process change in the merger analysis. It is no longer necessary to prove the dominant position for the purpose of possible blocking of concentration. In the new test the whole market environment of the entrepreneur and also influence on competitors, contractors and consumers is being analyzed to a much greater extent. In the dominance test, the central point was the entrepreneur and the aim of the analysis was to prove his dominant position. In the course of the examination of the merger the Polish competition authority analyses possible efficiencies connected with the studied concentration. In concentration cases hitherto entrepreneurs very rarely resorted to efficiency defence. The policy of the Polish competition authority within the scope of accepting the existence of such efficiencies is very cautious.

2. Analysis of judicial decisions provides arguments that for the purpose of interpretation of the concept of significant impediment competition test the following circumstances are taken into consideration (the list is not exhaustive):

- Market structure – market shares of an entrepreneur and his competitors, changes of market shares over time,
- Concentration of suppliers, the existence of significant purchasing power on the part of the contractors,
- Entrance and exit barriers, possible new entrances and exits of the market,
- The value and changes of market concentration ratio and HHI,
- Market maturity, the role of innovativeness and market transparency,
- Symmetry between competitors,
- Homogeneity of the sold goods and services,
- Links between competitors and other mechanisms conducive to cooperation (collusion).

3. The evidence of growing economization of the SIEC test is the acceptance and regulation of the specific efficiency defence problems. Apart from the usual analysis of the effects of concentration and possible related efficiencies, the Polish competition authority may take into consideration some special effects of the qualified efficiency gains of entrepreneurs. Pursuant to art. 20 section 2 point 1 even when concentration leads to the significant impediment to competition it may be implemented (cleared) *if it contributes to economic development or technical progress*. Therefore during merger review a party may try to prove the existence of these special efficiencies. The burden of proof lies upon the entrepreneur. The standard of proof in such a case is exceptionally high and is connected with the need to prove beyond any

doubt the increase of consumer welfare. Obviously efficiencies of this type will only relate to special markets while the achieved benefits should relate to the widest possible group of consumers. It is justifiable to assume that possible significant impediment to competition should be of temporary nature and the entrepreneur should prove the existence of possible conditions for the market to come back to the equilibrium in the future. Despite the fact that this provision has been in force for many years it has never been the basis for examining a single case.

4. Furthermore, it is worthwhile to point out that the significant impediment competition test is supplemented by the public interest test. Pursuant to art. 20 section 2 point 2 of the Competition Act: *“The President of the Office shall issue, by way of a decision, consent for the implementation of the concentration as a result of which competition in the market will be significantly impeded, in particular by the creation or strengthening of a dominant position, in any case that the desistance from banning concentration is justifiable, and in particular it may exert a positive impact on the national economy”*. It is necessary to stress however that this test is extremely rarely used. Not even one case has been examined on the basis of this test in the years 2008 and 2009. In the previous period the total number of cases did not exceed 5<sup>1</sup>. With the public interest test the burden of proof rests entirely on the entrepreneur while the standard of proof is exceptionally high.

5. The test used at present is fully adequate to the needs of counteracting anticompetitive concentrations of entrepreneurs and for achieving goals of the Competition Act. It comprises both the situation when concentration results in unilateral and coordinated effects. It means that there is a possibility of counteracting the creation of both single and collective dominant position. It is worthwhile to stress at this point that in any of the cases examined so far, the possibility of creating a collective dominant position as a result of the implementation of the concentration and the existence of coordinated effects has not been established. Therefore, in Polish competition law, the concept of a collective dominant position is still a theoretical concept and there is no case law in that scope. Similarly no guidelines related to how this concept might be understood by the Polish competition authority have been issued.

## 2. Legislative changes

6. The history of antimonopoly law in Poland is relatively short. The first antimonopoly act adjusted to the principles of free market economy was the Act of 24 February 1990 on counteracting monopolistic practices<sup>2</sup>. The Act is an example of an initial stage of development of competition legislation. Even its name suggested that the main focus was shifted on counteracting the anti-competitive practices of entrepreneurs and in a lesser degree on the full protection of competition. It was confirmed in the preamble to the Act, where it was indicated that *it had been passed for the purpose of ensuring the development of competition, protection of business entities exposed to the use of monopolistic practices and the protection of consumer interest*. It meant that the basic function of the Act was *to counteract monopolistic practices of business entities and their unions* (art. 1). Despite that in the Act there were some provisions related to merger control. Chapter 3 of the Act which regulated the administrative influence on the creation of organizational structures of business entities was devoted to this problem. The key provision was art. 11 section 1, which provided that *the intention to merge and restructure business entities is subject to notification of the Antimonopoly Office. The intention to establish a business entity is subject to notification in the case this entity could achieve a dominant position on the market or one of the parties constituting the new entity holds such a position*. The structure of this provision is interesting because alongside the introduction of the concentration test it simultaneously determined the scope of obligation related to concentration notification.

<sup>1</sup> These cases concerned exclusively state-owned enterprises from the sectors having strict links with national security, i.e. energy, fuel and military.

<sup>2</sup> Journal of Laws No. 14, item 88.

7. The concentration test included in art. 11 was a dominance test. What is important this test consisted of only one part and did not contain any additional provisions. In its shape it reflected the state of antimonopoly law development of the time. It principally concentrated on the market structure focusing on the premise of dominance. Simultaneously it is necessary to emphasize that the Act had its own definition of a dominant position and its qualified form - the monopolistic position. Pursuant to art. 2 point 7 the Act adopted that *an entrepreneur has a dominant position if this entity has no essential competitors on the domestic or local markets; it is assumed that a business entity has a dominant position if its market share exceeds 30%*. It has a monopolistic position when an entrepreneur *has no competitors on the domestic or local markets*<sup>2</sup>. Discussing the dominance test in the Act of 1990 it is necessary to remember about the social and economic environment. At that period Poland was undergoing an economic transformation from monopolized to free market economy. In that situation the main task of the antimonopoly office was to demonopolize the economy and change its structure. And in these circumstances adopting a simple dominance test and concentrating in the analysis on ensuring competitive market structure is not surprising.

8. It is worthwhile to point out that the dominance test was not the only test used in the Competition Act. The act contained also the special significant impediment competition test. In compliance with the adopted solution some forms of entrepreneur concentration were treated as monopolistic practices. Pursuant to art. 4 section 1 point 3 of the Competition Act *the acquisition of shares in companies or assets of business entities was deemed monopolistic practice if such acquisition could result in significant weakening of competition*. What is more the act also prohibited certain so called personal concentrations specifying that *performing by the same person a function of a director, member of management board, supervisory board or audit committee in competing business entities of which at least one has market share of over 10%* (art. 4 section 1 point 4) was a prohibited monopolistic practice. These provisions were amended in 1995 and all entrepreneur concentration activities were evaluated under the provisions concerning the control of concentration.

9. In spite of the changes introduced in 1995 the concentration assessment tests have remained dualistic. In compliance with the new provision of the Competition Act, i.e. art. 11a section 4 the Polish competition authority could give a decision:

1. *prohibiting mergers of business entities if as a result of such mergers the entities would obtain or strengthen a dominant position on the market,*
2. *prohibiting the assuming by the same person of the functions enumerated in art. 11 section 2 point 5 if it were to result in significant weakening of competition; it is assumed that significant weakening of competition takes place if combined market share of these entities exceeds 10.*

10. Nevertheless, despite this dualism the basic concentration test used in the practice was the dominance test.

11. Another change took place together with the passing of another act on competition and consumer protection, i.e. the Act of 15 December 2000 on competition and consumer protection<sup>3</sup>. Pursuant to art. 17 of this Act *the President of the Office shall, by way of decision, issue consent to implement a concentration, which shall not result in the creation or strengthening of a dominant position in the market and which shall not result in significant impediments to competition in the market*. Formulating the test in this way meant its modification. It was no longer a simple dominance test but became a two-step dominance test patterned on the solutions included in the Regulation 4064/89. It was a consequence of the desire to make the test more flexible and create place for the extended economic analysis based on the

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<sup>2</sup> Both presumptions were rebuttable.

<sup>3</sup> Journal of Laws No. 122, item 1319.

effect based approach. What is important, due to the fact that the Act was passed in the pre-accession period an important argument in favour of changing the test was the tendency towards the unification of concentration assessment tests in Poland and the European Union.

12. Similar motivation accompanied the change introduced in 2004. As a result of amending the Competition Act the dominance test was replaced with the significant impediment competition test in a version which is obligatory at present. As indicated in the narrative memorandum for the draft of amending act the reason for introducing the SIEC test was the need to reverse the order of the conducted analysis of the assessment of concentration effects. Influence of concentration on competition is to be examined first and only then it is possible to examine if an entrepreneur will achieve a dominant position. Thanks to this method of analysing concentration it is possible to extend the analysis and make it more flexible. As mentioned above an important reason for the introduction of changes was the desire to unify the concentration assessment test in Poland and the European Union.

13. At present there are no plans for the introduction of any other legislative changes within the scope of the concentration assessment test.

### **3. Enforcement issues**

14. Changing the test means more flexible application of provisions governing merger control. On the one hand it is possible to say that the introduction of the SIEC test may make it easier to block concentration because it is no longer necessary to prove full independence of an entrepreneur from competitors and consumers. Still it is rather a theoretical possibility. Empirical data shows that the policy of OCCP has not become stricter and the number of blocked concentrations has not increased and remained at the same low level. On the other hand the introduction of the SIEC test imposes more obligations on the Polish competition authority. Namely because the new test compels to conduct more detailed market analysis as well as an extensive economic analysis in many cases which previously would have been quickly closed.

15. Taking into consideration OCCP practice before 2004 it is possible to draw a conclusion that despite the two-step test in reality only the first part related to dominance was important. Analysing the decisions of the Polish competition authority it is possible to notice that if in the course of the analysis it had been established that an entrepreneur would obtain or strengthen his dominant position other aspects of the case had not been examined. The situation changed only after the introduction of the significant impediment competition test. Having said that it is necessary to point out that this change does not mean that the decision output related to the dominance test has become outdated. On the contrary it has preserved its topicality and is still used. In the case of horizontal mergers, analysis usually leads to the question of dominance. While the influence of the new test is to be seen in such a way that new areas for analysis have been opened for the Polish competition authority which in an essential way supplemented the analysis of the effects of concentration and gave them a new form.

16. What is interesting the adjustment of decisions to the changed test took some time. It is very well visible on the example of two decisions related to mergers between chains of supermarkets. Comparing the decision Ahold/Carefour issued in 2007 and JMD/Plus Discount issued in 2008, each relating to the same market and raising similar competition concerns, the analysis was different. While in the first of the above mentioned decisions the reasoning concentrated on proving the dominant position in the case of the second one the reasoning mainly concentrated on the degree of threats towards competitors on local markets. These cases show that even when adopting the SIEC test a change of practice in giving decisions takes quite a lot of time and that skilful use of the dominance test does not have to bring other effects than the significant impediment competition test.

17. The introduction of the new test has had no special impact on the issuing of conditional decisions and the way of designing remedies. Both before and after 2004 OCCP tried to impose mainly behavioural conditions and only in justified cases it decided to impose structural conditions. It is also possible to indicate that imposing the type of conditions depends rather on the branch than on the test used. For instance in the case of mergers of the chains of supermarkets Carrefour/Ahold or Jeronimo Martins/Plus Discount structural conditions were applied, i.e. the order to sell a certain number of shops. In the case of the merger of vodka manufacturers, CEDC/Polmos Białystok, behavioural conditions were accepted.

#### **4. Policy issues**

18. Changing of the test did not have a significant impact on the formal scope of concentration control in Poland. On the one hand it was possible to eliminate simple issues which did not create any market problems, on the other hand thanks to the new test it was also possible to review new forms of threats which may result from concentrations. In particular it relates to some forms of oligopolies (non-collusive oligopolies). It is possible to observe that from the point of view of the course of antimonopoly proceedings the scope of proceedings to take evidence has been extended. Empirical research and in particular consumer and contractor research is used in a greater scope. It is necessary because of the need to conduct full market analysis and go beyond simple market share. A good example is the concentration of two Polish beer manufacturers Kompania Piwowska/Browar Belgia. In this case the Polish competition authority had to go beyond as it could not focus exclusively on market shares and market structure. The nature of threat lied in the significant strengthening of Kompania Piwowska's market strength in relation to contractors and competitors. Wide-scale market research revealed that the concentration would have mixed effects for the consumers. On the one hand the choice of beer would become smaller in particular as far as the cheapest beer is concerned; on the other hand the availability of the Kompania Piwowska main brands would improve. In the end, the OCCP decided to clear the transaction.

19. However there is no simple correlation between changing the concentration test and the antitrust policy. These issues remain autonomous in relation to each other and it is difficult to indicate in this case any significant dependencies. Similarly it is difficult to unambiguously evaluate the influence of the concentration test on legal certainty and possibility of predicting the result of the proceedings. On the one hand the formalism of the simple dominance test made possible a relatively simple assessment of the effects of a given concentration and its influence on market structure. However, on the other hand the SIEC test gives entrepreneurs a better chance to prove that they are right and obtain a favourable decision. Nevertheless it is necessary to admit that the need to expand the proceedings to take evidence might lead to greater difficulties in predicting the outcome of the proceedings, which in particular relates to new markets and collecting data unavailable to the participants of the concentration.

#### **5. International cooperation**

20. According to OCCP, the unification of concentration assessment tests depends exclusively on the decision of national competition protection authorities. OCCP decided to introduce such a change wishing to make its policy more flexible and aiming at full harmonization of the test used in Poland and by the Commission. In the opinion of OCCP the choice of the test *per se* should not have a significant influence on international cooperation regarding the matters of concentration. It is worthwhile to point out that even in the case of using different tests; results of analyses are as a rule convergent. Besides, the fact that a given test has been formed differently does not need to mean a different use of the test itself and different interpretation of the used concepts. Skilful use and proper interpretation of the dominance test cause that there are no indicative differences between this test and the significant impediment competition test. While it is necessary to point out that using the public interest test might lead to indicative differences in the course of examining the same concentrations by different national competition protection authorities. The

public interest test gives administration bodies a wide scope for interpretation and introduces political elements to economic analysis. Deciding a case on the basis of this test might lead to cross-border concentration effects. That is why it is necessary to adopt an exceptionally careful approach to the use of the public interest test in relation to concentration as it might cause such effects. The policy adopted by OCCP might be an example of such a skillfully devised method of finding balance between the values of competition and public interest.