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Global Forum on Competition

QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

Contribution from Poland

-- Session III --

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Contact: H el ene Chadzyska, Project Manager of the Global Forum on Competition
Tel: 33 1 45 24 91 05; email: helene.chadzyska@oecd.org

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QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Poland--

1. Countries that have been actively enforcing a competition law for a longer period

1. After 1990 the development of competition started to be an inseparable element of the process of creation of free market economy in Poland. The promotion and protection of competition after nearly 50 years of communism and complete exclusion from economic regulations required prudent and consistent policy implemented not solely by the Antimonopoly Office but also by all government and local bodies.

1.1. *Organising your agency and preparing for work*

1. Before the establishment of the Antimonopoly Office ("AO", "the Office"), it was the Department of Counteracting Monopolisation of Economy in the Ministry of Finance, which acted as an antimonopoly agency. The antitrust proceedings conducted by the Department concerned mainly individual monopolistic practices like: fixing prices, payment forms favourable for the sellers and binding transactions as well as forcing purchasers to make advance payments (e.g. making the sales transaction dependent on selling foreign currency, providing services, supplying the producer with raw materials, granting low or zero interest loans).

2. In 1990 a separate public administration body was established in form of the Antimonopoly Office. It started its operation on the basis of the Act on counteracting monopolistic practices of 1990, which constituted an element of the market reform package. The President of the Office reported to the Prime Minister. The independence allowed the Office to act effectively regardless of political circumstances.

3. The President of the Office, although not a member of the Council of Ministers, actively participated in government sessions. The Office was involved in the process of restructuring and privatisation of state-owned enterprises and whole sectors. It performed these tasks through statutory surveillance of the ownership structure of national companies and by participation in government working groups on development of sector transformation programmes.

4. First branch offices began their operation in the same year the Central Office was established. Such structure enabled to reach all the enterprises spread across the country, local and administrative bodies with the competition regulations. During the first years of operation the main task of branch offices was to provide information necessary for conducting proceedings by the Central Office in Warsaw. However, soon they became also entitled to carry antimonopoly proceedings within their region.

5. Apart from counteracting anticompetitive agreements, abuse of dominant position on the market and control of concentration of entrepreneurs, the Office had other tasks, which included: research of the level of concentration in the economy, issuing opinions, drafting government policies and creating conditions for competition development. In order to perform its tasks properly, the authority was equipped with necessary instruments, e.g. the right to perform inspections. Authorised employees were given the right to enter all premises of the undertaking subject to control, inspect all its documents and demand extracts or copies of these documents, demand explanations including written statements, collect data and information on the entity's activity, participate in meetings of the entity's bodies, seize documents and other evidence.

1.2. *Competition culture and competition advocacy*

6. At the beginning of its operation the antimonopoly authority had to focus not only on interventions consisting in combating violations of antimonopoly law, but also on taking steps aimed at creating conditions for the development of competition culture. The Antimonopoly Office got involved in the decision-making processes with regard to ownership changes occurring in Poland opposing the negative pressure from other ministries, which were not willing to pursue a policy supporting competition. The AO's aim was to persuade the entire government to pursue a policy supporting competition by means of getting engaged in the legislative processes (drafting and issuing opinions).

7. In order to achieve the best results a multi-year competition development programmes were drafted and adopted by the government. It set tasks for particular government institutions indicating timeframes for fulfilling their obligations. The first programme was elaborated in 1991 making the other state bodies co-responsible for the introduction of competition in Poland. The document had also an educative and opinion-building character.

8. International cooperation with OECD, USA and European Commission had great impact on competition development in Poland. Foreign assistance in form of seminars, trainings, study visits brought many profits and helped to raise the legal awareness and broaden knowledge of the Polish antitrust specialists.

9. From the very beginning negotiation process and preparation for the membership in the European Union constituted an integral part of the Office's activities.

10. At present one of the main priorities of the Polish Office of Competition on Consumer Protection (OCCP) continues to be the promotion of the benefits of competition protection. The Office participates in the process of introducing new regulations, in cross-ministerial consultations in order to examine the new acts from the competition protection perspective. Our cooperation with other ministries and government agencies is not limited to expressing opinions. We also prepare analyses indicating the course of actions for other government institutions. For example, the Office's experts prepared a report on the energy sector in connection with the planned liberalisation of energy prices. The report recommended directions for the development of the energy market and presented specific suggestions of changes that would result in the establishment of efficient competition in this sector. The report also focused on the issue of protecting weaker market participants, since, according to the Office's analysis, introducing free competition in this industry is not possible in short term without detriment to consumers.

11. Soft-law constitutes an important part of competition advocacy initiatives. On a regular basis President of the OCCP tries to furnish the entrepreneurs and legal practitioners with interpretations of the antitrust law. Elaborating guidelines is also a common practice, e.g. guidelines on criteria of setting financial sanctions for infringements of competition law or guidelines on applying for leniency.

12. The Office also provides information to consumers through educational campaigns, competition related information bulletins, publications, seminars, trainings, conferences. Our goal is to furnish the weaker participants of the market with the rules of free economy and practices restricting competition.

13. Finally, intensive contacts with the media play very important role in our effective advocacy actions.

1.3. *Conduct cases and investigations – abuse of dominance and restrictive agreements*

14. Although previous legal regulations made it possible to fight anticompetitive practices effectively, it was necessary to adapt them to the changes occurring in the Polish and world economy in

connection with the globalisation process and the development of new technologies. The Act on competition and consumer protection, introduced in 2007, adjusted Polish regulations to the requirements of the Community law. Its provisions respond to the current day needs, taking into account the OCCP's experience and present market conditions. The changes provided an instrument of increasing the efficiency of the Polish competition and consumer protection system.

15. The Act of 2007 abolished the institution of proceedings launched on request. This amendment enabled the Office to better fulfil its responsibilities and to focus on the most important violations of the competition law that have the most significant impact on the market. Before, the President of the OCCP could not extend the scope of the proceedings beyond the scope of the motion to other anticompetitive practices or practices violating collective consumer interests. According to OCCP's experience, in 80 per cent of cases initiated on business's request no breach of antitrust law was found. The new solution, to a great extent, shortened the time of conducting proceedings. It also allowed for the Office to set its priorities for actions in sectors of economy which require most intervention. This is especially important from the point of view on the economy as a whole and consumer welfare.

16. Better effectiveness was also achieved thanks to the leniency programme and creation of guidelines on criteria of setting financial sanctions by the President of the OCCP for infringements of competition law. The aim of the Guidelines is to increase the transparency in respect to the methodology of setting antitrust sanctions. In the opinion of the Office, the explanations will help enterprises understand the way of setting fines which they may face if they undertake unlawful activities. The OCCP has been applying Guidelines since 1 January 2009.

17. One of the main priorities of the OCCP is improving the effectiveness of cartel detection. To this aim a lot of the Office's budget is allocated. As the Competition policy for 2008-2010 states that one of the priorities of the Office is to increase the effectiveness of its actions and as the risk of receiving high fines is supposed to deter enterprises from infringing the competition law, the OCCP plans to impose more severe fines on enterprises which infringe the rules of fair competition on the market. So far severe sanctions have been imposed only occasionally. One of the highest fines imposed by the Office regarded the construction sector. The President of the OCCP imposed a fine of over PLN 45 million on the Castorama and ICI enterprises for fixing retail prices of paints and varnishes. At least since 2004 the companies have been fixing not only the final retail prices of ICI's paints and varnishes, but also the constituents of the prices, such as the profit margin. The enterprises were acting in a deliberate and conscious way, gaining unjustified benefits for many years, and have not changed their conduct despite the launch of the antimonopoly proceeding.

1.4. Mergers

18. Merger regulations were gradually adapted to the changing economic reality in Poland. At first, the AO had to control all mergers regardless of the size of the undertakings. Later, first notification thresholds were introduced. They were rather low as the economy was still developing and needed a greater involvement from the side of the Office in the reconstruction and privatisation process. With time, the upper threshold was increased. Presently, the Office focuses only on the biggest mergers which might have a negative impact on the state of competition on the market.

19. Moreover, in order to increase our effectiveness we changed the OCCP's organisational structure in 2007. The change involved separation of merger cases and assigning them to a new Department of Concentration Control.

1.5. *Judicial appeals*

20. In the beginning of the antimonopoly system in Poland there were no special rules of judicial appeal procedure for decisions issued in the course of administrative proceedings. The antimonopoly decision could only be appealed to the Supreme Administrative Court due to its illegality.

21. Now, the decisions of the OCCP are reviewed only by independent civil courts. In 1990 a specialised Antimonopoly Court in Warsaw was created serving as an appeal body of first instance (later transformed into Court of Competition and Consumer Protection). A few years later the undertakings were equipped with the right to appeal the rulings of the Antimonopoly Court to the Appeal Court - a lack of such possibility was earlier recognised as contradictory to the Polish Constitution.

22. The OCCP is very particular about ensuring that the Office's decisions are upheld by the courts of higher instances. We have managed to achieve the efficiency rate of over 80 per cent in this respect and we are continuously trying to further improve that result.

1.6. *Resources*

23. Ensuring stability and maintaining institutional memory in the Office is crucial. Therefore, it is of great importance to allocate sufficient financial resources for salaries of the employees and their training.

24. The Office has faced many budgetary problems and continues to thrive for more resources for these aims as insufficient finances result in highly experienced staff being lost to the private sector. The Office makes an effort to provide its employees with interesting solutions for career development (such as internships in foreign institutions, trainings, courses) which would constitute incentives for staying with the OCCP. Moreover, the Office implements a career development programme to help the employee to indicate the directions of his/her professional development.

25. The OCCP has at its disposal state budget resources and is at the same time responsible for implementing tasks envisaged in the state budget. The performance of the tasks is measured by a number of predetermined indicators, like: cases won/ cases handled ratio; merger applications examined and decided/applications examined and decided within the statutory deadline ratio; matters handled successfully/ matters received ratio. The performance of the Office influences the budget allocated.

1.7. *Independence*

26. The President of the Office reports directly to the Prime Minister and is selected from amongst the members of the State Staffing Pool, i.e. persons who have fulfilled the necessary requirements to be appointed for high-ranking public offices, without any fixed-term. Under the previous provisions, he/she used to be chosen by an independent commission from among competition/consumer law experts and appointed for a fixed 5-year term in office, which ensured an even greater transparency in the selection of the head of the Office.

2. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

2.1. *Organising your agency and preparing for works*

27. Priority setting is an important part of the antitrust office's work organisation and undoubtedly contributes to improving the agency effectiveness. We recommend to prepare a "Competition policy

strategy”, a governmental document, which would comprise both long and short term goals and priorities of an antimonopoly agency as well as an assessment of the actions after they are accomplished.

2.2. *Competition Culture and Advocacy*

28. Better effectiveness can be achieved not only through a well constructed and adapted to economical reality antitrust law, but also by soft-law.

29. Participation of an antimonopoly authority in the legislation process is of utmost importance. It is inevitable to search for all government agencies’ support. A number of activities to justify the usefulness and necessity of competition existence have to be undertaken on the governmental level.

30. The competition authority should conduct activities related to the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness on the benefits of competition.

31. Effective competition improves consumer welfare. Therefore the antimonopoly agency could initiate educational campaigns designed to equip the weaker market participants with information on how to act on the market and what are the tools given to them by competition law (ex.: private enforcement). Furthermore, big efforts should be also placed on raising the knowledge of the entrepreneurs as regards the competition law. The Polish antimonopoly Office has conducted a sociological research to assess the knowledge of this social group and later tailored a special educational campaign for them (publications, radio programmes, press articles, TV spot).

32. Finally, cooperation with European and international organisations (such as ICN, OECD, ECN) and other antimonopoly bodies constitutes an essential tool for fostering competition law by grasping best practices and learning from others’ experience. We recommend study visits and exchange of experts, which provide a good opportunity to gain new experiences and help to establish fruitful international collaboration.

2.3. *Judicial Appeals*

33. It is necessary to introduce transparent control procedures of decisions taken by the antitrust authority. It seems that such a function is best fulfilled by another fully independent body, i.e. a special court.

2.4. *Resources*

34. Investing in the Office’s human resources is crucial. The quality of the implementation of competition protection law depends on the expertise of the employees of the competition protection agency. Trainings, seminars, internships in other antimonopoly institutions and career development programmes are a good way to achieve this goal.

2.5. *Independence*

35. As the Polish experiences show, in the process of implementation of economic transformation and competition the antimonopoly authority often comes into conflict with other economic ministries, therefore its independence is of great significance. It is the autonomy that guarantees the proper fulfilment of its role. Thus, if the decision-makers intend to pursue a policy of competition protection, they should provide the competition authority with institutional and, as far as possible, financial independence.