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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN POLAND**

-- 2008 --

*This report is submitted by the Polish Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 9-11 June 2009.*

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## **1. Changes to competition laws and policies, proposed or adopted**

1. Implementation of *Competition Policy for 2008–2010* and *Consumer Policy Strategy for 2007–2009*, dismantling the Chief Inspectorate of the Trade Inspection and improvement of the state aid monitoring system – these are the most important activities launched by the Office of Competition and Consumer Protection in 2008. We carried out 619 formal administrative proceedings and 719 explanatory proceedings concerning infringements of collective consumer interests, as well as 196 formal antitrust proceedings and 493 explanatory proceedings in relation to practices that restrict competition.

### ***1.1 Summary of new legal provisions of competition law and related legislation***

2. *Competition Policy for 2008-2010*, adopted in July 2008 by the Polish Council of Ministers, stipulates in detail the activities of the Office in this policy domain. One of the main objectives provided in the document was to improve the effectiveness of the OCCP activities. In order to achieve that, the Office continued its works on documents and legal acts, which entered into force at the beginning of 2009.

3. The Office also developed a new regulation on the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines. The Leniency Regulation adjusts the Polish leniency program to the conditions provided for by the Commission's Leniency Notice and ECN Model Leniency Program. Accordingly, it sets up new rules regarding the reception and processing of the leniency applications. *Inter alia*, it provides for the introduction of the markers and sets clear conditions of their perfection. It also introduces a new type of the leniency application – a simplified one. Additionally, the regulation introduces new rules regarding the type of information to be submitted in the applications.

4. Furthermore, the OCCP gave its opinion on over 2 thousand draft legal acts and other documents sent to the Office as part of inter-ministerial consultations. Giving opinion on the drafts, first and foremost, the OCCP takes into account the influence of given regulations on competition, their consequences for consumers and conformity with the rules on granting state aid to enterprises.

5. The Office initiated legislative works on, *inter alia*, following drafts: amendment of the Act on proceedings in matters concerning state aid, regulation concerning the list of entities obligated to submit reports on the state aid granted using the SHRIMP application, ordinance on establishing the statute of the Office of Competition and Consumer Protection (See also point III).

### ***1.2 Other relevant measures, including new guidelines***

6. In 2008 the OCCP prepared Guidelines on leniency, which aim at putting in place transparent measures leading to a more effective use of the leniency. They shall contribute to ensuring clear and complete leniency program and give a boost to its application in practice. They constitute an "instruction manual" addressed to the businesses helping them understand the institution and increasing their trust in its unanimous, fast and predictable application.

7. The OCCP also elaborated guidelines on the criteria for setting fines imposed on businesses infringing the ban on concluding competition restricting agreements and abusing a dominant position. The guidelines' goal is to make the procedure of setting financial sanctions more transparent and predictable. Among the criteria included in the document is ensuring that the penalty works as an adequate deterrent. Thanks to the guidelines businesses will be able to estimate with what penalties a particular infringement of antitrust law may be connected with.

8. When setting the fine, the President of the Office takes into account the harmfulness of the infringement, the benefits obtained by the enterprise as a result of the violation, or the influence which the practice has on the market. The gravity and duration of the anti-competitive behaviour also has an impact on the amount of fine. The President of the Office may also take into consideration certain mitigating circumstances (e.g. the fact that the practice had been ceased by the time the OCCP's proceedings were launched), as well as circumstances that have an aggravating effect (e.g. being the leader or initiator of the practice or having infringed the prohibition of competition-restricting practices before).

9. Both documents entered into force at the beginning of 2009.

## 2. Enforcement of competition laws and policies

### 2.1 *Action against anticompetitive practices, including agreements and abuses of dominant position*

#### 2.1.1 *Summary of activities of:*

10. In 2008 the OCCP launched **196** proceedings in cases concerning anti-competitive practices (including **11** on the basis of Art. 81 and 82 of the Treaty).

- The table represents the structure of the proceedings in detail:

	<b>Total</b>	<b>Closed in 2008</b>
<b>Antitrust</b> proceedings:	<i>196</i>	<i>104</i>
a. Antitrust proceedings concerning <b>horizontal</b> agreements		
Including:	14	7
– conducted pursuant to Article 81 of the EC Treaty	5	2
b. Antitrust proceedings concerning <b>vertical</b> agreements		
	30	13
c. Antitrust proceedings concerning abuse of a <b>dominant position</b>		
Including:	152	84
– conducted pursuant to Article 82 of the EC Treaty	6	3
<b>Explanatory</b> proceedings:	493	349

- Structure of the decisions issued by the President of the OCCP in 2008

	Type of practice:		
	Horizontal agreements	Vertical agreements	Abuses of a dominant position
No. of decisions finding the practice to be competition-restricting and ordering its cease	3	3	32
No. of decisions finding the practice to be competition-restricting and recognising that it has been ceased	2	4	10
No. of decisions finding no competition-restricting practice <sup>1</sup>	2	3	11
Other decisions	0	3	31

- Court decisions in antitrust matters:

Enterprises may lodge appeals against the decisions of the President of the OCCP and complaints about the President's resolutions to the Court of Competition and Consumer Protection (Regional Court in Warsaw). Appeals against decisions of the Court of Competition and Consumer Protection may be heard by the Court of Appeals in Warsaw. It is also possible to file a cassation complaint to the Supreme Court.

In 2008, **111** appeals and **22** complaints were lodged.

The statistics of judgements in antitrust proceedings are the following:

	Court of Competition and Consumer Protection	Court of Appeals	Supreme Court
No. of judgements issued in 2008 including:	<b>62</b>	<b>50</b>	<b>12</b>
– concerning <b>vertical</b> agreements	<b>7</b>	<b>1</b>	<b>1</b>
– concerning <b>horizontal</b> agreements	<b>14</b>	<b>12</b>	<b>1</b>
– concerning abuses of a <b>dominant position</b>	<b>40</b>	<b>35</b>	<b>10</b>
– concerning <b>M&amp;A control</b>	<b>1</b>	<b>2</b>	<b>0</b>
Conclusions of the judgements of the Court of Competition and Consumer Protection		Number	
Overruling the decision of the President of the OCCP		6	
Changing the decision of the President of the OCCP		8	
Dismissing the enterprise's appeal		48	

<sup>1</sup> On the basis of the Act of 15 December 2000 on competition and consumer protection.

### 2.1.2 Description of significant cases, including those with international implications

11. The Office detected numerous infringements of antimonopoly law and imposed financial fines on law-breaking enterprises. High profile cases concerned telecommunications, transport, construction markets.

- Paints and varnishes

In April 2008, the President of the OCCP imposed a fine of over 45 million PLN on Castorama and ICI for fixing retail prices of paints and varnishes. The antimonopoly proceeding was initiated in December 2006. The Office checked whether Castorama, the owner of 36 DIY stores located all over Poland, and ICI, a painting products manufacturer, fixed the minimum retail price of fourteen products, such as Kolory Świata, Arktyczna Biel and Hammerite. During the proceeding, the OCCP gathered extensive evidence that the unlawful agreement was concluded. 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 acted in a deliberate and conscious way, obtaining unjustified benefits for many years, and did not cease their practices despite the antitrust proceedings launched by the President of the OCCP.

Artificial inflating of prices by one of the ICI's clients – Castorama – influenced the prices introduced by other distributors of this manufacturer. As a result, consumers were also affected, since they had to buy products at prices determined by the participants of the agreement. Paints and varnishes offered by ICI are one of the most popular ones in Poland.

During the proceedings, Castorama submitted a leniency application. However, according to the President of the OCCP, the company did not actually admit to having been party to a competition-restricting agreement – which is one of the fundamental requirements for leniency – but only to some of arrangements constituting a part of the agreement. Moreover, it did not cease to participate in the prohibited agreement. Consequently, the company did not fulfil the basic conditions for applying for the leniency programme.

Castorama was fined with over PLN 36.6 million, while ICI – over PLN 9 million.

- Collective management of copyright and neighbouring rights

In September 2008 the OCCP fined the ZAIKS Authors' Association and the Polish Filmmakers Association (SFP)-organisations of collective management of copyright and neighbouring rights-with over PLN 1.2 million in total for fixing uniform rates for using audiovisual works and refusing to negotiate the rates with the users of the works.

Each artist is entitled to receive remuneration for the use of his or her work. However, managing and protecting copyright on individual basis is very difficult or even impossible in the era of mass exploitation of artistic output. Therefore, artists' interests are represented by organisations of collective management of copyright and neighbouring rights. In Poland, these are e.g. the ZAIKS Authors' Association and the Polish Filmmakers Association. Their activity includes granting permission to use artistic output by commercial users – TV broadcasters, owners of cinemas or libraries, or press publishers who sell or insert CDs to their newspapers or magazines, etc. The organisations collect fees due for using the rights they manage and allocate them between the creators of audiovisual works.

In December 2005, upon the request of the Chamber of Press Publishers, the OCCP instituted antitrust proceedings against ZAiKS and the SFP. Information collected during the proceedings confirmed that in order to maximise their profits the organisations had made an agreement fixing uniform rates for using audiovisual works and refused to negotiate the rates with the users of the works. This way ZAiKS and the SFP intended to eliminate competition between each other, to the detriment of the undertakings which use copyright for commercial purposes but, first and foremost, at the expense of consumers, as the copyright fee they collect is an essential element of the price of a recording on a carrier.

In the course of the proceedings, the OCCP established that the organisations agreed a fee per copy constituting 8% of its price but not less than a fixed rate per carrier (e.g. PLN 2 for a feature film on a DVD).

According to the Office, remuneration payable to an artist should be decided on a case-by-case basis, and the terms and conditions of the agreement under which the right to use the work is granted should follow from the current market situation and take into account the nature and scope of the work's use. Since ZAiKS and the SFP unilaterally and jointly fixed the rates, undertakings using the works were deprived of the possibility to negotiate them.

According to the information collected by the Office, ZAiKS and the SFP agreed fixed rules for remunerating particular categories of artists. Under the agreement, the film director was to receive 35% of the total rate collected for the particular audiovisual work, the composer – 20% and the cameraman – 10%. Consequently, in practice, artists were supposed to receive the same rates regardless of the costs borne and work put in, or the profit earned by the users of their work.

What is also crucial, the organisations made the arrangements with full awareness that this activity deprived artists of the possibility to choose the organisation which they wanted to entrust with the management of their copyright.

In order to make sure that both parties comply with the agreed terms, ZAiKS and the SFP arranged to regularly exchange information on the collected fees. According to the Office's findings, the illegal practice has lasted since the end of 2003.

In the OCCP's view, the practice undertaken by the organisations led to financial exploitation of the users of cultural goods, and hence, it affects a very wide circle of people. The parties to the agreement were guided by the intention to maximize their revenue and consolidate their market position.

The Polish Filmmakers Association was fined PLN 250 thousand and ZAiKS – PLN 1 million.

Because the proceedings were simultaneously conducted pursuant to EC competition protection provisions, the draft decision was consulted with the European Commission.

- State Forests

In the course of the proceedings, the OCCP established that the State Forests carried out the wholesale of wood to the wood industry, e.g. furniture manufacturers, only via two distribution channels: Internet negotiations and the e-drewno application, with almost 80% of the material being sold in the former way. Only regular contractors of the State Forests can participate in the negotiations. The amount of wood which can be purchased in this way was also limited and followed from individual contractor's purchase history, i.e. could not exceed the amount of

material purchased in the preceding year. Therefore, neither existing customers who intended to develop their enterprise, nor new business entities entering the market could purchase wood using Internet negotiations.

The second form of sale operated by the State Forests was the e-drewno application. It is an open Internet auction, where interested entity can purchase the wood which was not sold by way of Internet negotiations. Consequently, only a small percentage of the total amount of the material is available at e-drewno.

On the basis of the evidence collected during the proceedings, the President of the OCCP decided that the State Forests abuse their market position by making the participation in negotiations – the main channel of wood distribution – dependent upon purchase history and its course.

According to the OCCP, this system of sale was especially discriminating to entities entering the market or having a short purchase history. Enterprises might buy wood via the e-drewno website but only in minimal amounts. Moreover, transactions made via the auction, the purchase history established this way and its course had influence on further cooperation with the State Forests. This practice led to the restriction of the competition among wood processing enterprises. The attractiveness of their offer was not determined by the competitiveness of the product (neither in terms of quality, nor price) but by whether the enterprise had access to the material.

The President of the OCCP ordered that the practice be changed. The system of wood sale should work according to clear, transparent and equal terms of purchase for all enterprises.

The State Forests National Forest Holding was fined with PLN 1.5 million.

- Polish Airports

The decision was issued on the basis of both the national and EC law. The proceedings were initiated by the OCCP *ex officio*. The President of the Office in its decision declared on the basis of the national law the practice used by the Polskie Porty Lotnicze (Polish Airports) on the market of payable services related to the access to the infrastructure of the airports Warszawa/Okęcie, Rzeszów/Jasionka and Zielona Góra/Babimost as restricting competition. The practice consisted in imposing, without justifiable reasons, different airport charges (landing, passenger, parking and special services charges) and navigation charges on the national and international carriers. The proceedings as to the breach of Article 82(c) of the Treaty were discontinued.

A fine of PLN 200 thousand was imposed on Polskie Porty Lotnicze. The enterprise appealed from the decision of the President of the OCCP to the Court of Competition and Consumer Protection (CCCP). The appeal proceedings are ongoing.

## 2.2 *Mergers and acquisitions*

### 2.2.1 *Statistics on number, size and type of mergers notified and/or controlled under competition laws*

12. In 2008, **197** cases concerning merger and acquisition (M&A) control were conducted, of which 177 were closed with the following result:

	<b>Number</b>
<b>Total number of M&amp;A cases conducted by the OCCP in 2008:</b>	<b>197</b>
Including:	
– concluded in 2008	<b>177</b>
<b>Types of conclusions reached in M&amp;A cases in 2008:</b>	
a. <b>consents</b> in total	<b>153</b>
Including:	
– consents to M&As which will not significantly limit competition – <b>waivers of M&amp;A prohibition</b> (Article 20 § 2)	<b>0</b>
b. <b>conditional consent</b>	<b>2</b>
c. <b>prohibition</b>	<b>0</b>
d. <b>discontinuation</b> of antitrust proceedings concerning M&As	<b>6</b>
e. <b>returns of M&amp;A notifications</b>	<b>11</b>
f. decisions imposing a <b>fine for failure to notify a M&amp;A</b>	<b>3</b>
g. other conclusions	<b>2</b>

### 2.2.2 *Summary of significant cases*

- Conditional consent: Jeronimo Martins Dystrybucja

In January 2008, Jeronimo Martins Dystrybucja, belonging to a Portuguese capital group Jeronimo Martins, submitted an application for the OCCP's consent to take over the Plus Discount company. The acquiring company runs a chain of 1045 Biedronka supermarkets all over Poland. The target entity, a member of the Tengelmann concern, is the owner of 210 Plus retail outlets.

During the proceedings the President of the OCCP checked how the planned transaction would influence the retail sector of everyday use articles. The analysis showed that the acquisition would have a negative influence on the competition in some local markets. Therefore, the President of the Office granted a conditional consent – the transaction was cleared, however, subject to conditions determined by the OCCP. Jeronimo Martins Dystrybucja had to dispose of all its rights – including property rights, the right of perpetual usufruct and lease rights – to 13 Biedronka stores and 25 Plus stores, in favour of investors independent of the

acquirer. Moreover, the OCCP obligated the company to reduce the usable floor space by renting it for another retailing or service activity in three Plus outlets and obligated the enterprise to provide information on the method of fulfilling the conditions imposed within a given time limit.

- Conditional consent: Cinemas

The proceedings were initiated in February 2008. The Multikino company, a member of ITI Holdings – the owner of 14 multiplexes in eleven Polish cities, notified of its intension to acquire the Silver Screen chain, consisting of five cinemas in Warsaw, Gdynia and Łódź.

The OCCP analysis showed that the consolidation of the two companies may result in a significant lessening of competition in Gdynia and its surroundings, where a Silver Screen multiplex is operating and where opening new facilities was planned.

Due to the above, the President of the Office issued a conditional consent. Multikino was allowed to acquire the cinemas belonging to Silver Screen on condition that it does not take any actions in order to acquire any rights to another multiplex. The condition referred to potential investment projects in the Wzgórze Gdynia Shopping Centre. According to the OCCP, having acquired the multiplex belonging to Silver Screen in Gdynia, Multikino could distort competition on this market if it bought another facility.

Moreover, in order to check the fulfilment of the conditions stipulated in the decision, the OCCP obligated the acquirer to provide the Office with information on the number of cinemas possessed by 10 January each year and until competition in this market becomes effective.

### **3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

13. The OCCP shapes competition policy not only by conducting administrative proceedings and imposing fines on dishonest businesses. The Office also participates in the law-making process. Annually we screen about 2 000 legal acts as part of cross-ministerial consultations – taking into account their influence on competition.

14. In 2008, the OCCP participated in the works on different legislation, including:

- freedom of economic activity;
- energy law;
- air transportation law;
- telecommunications;
- pharmaceutical law;
- certified auditors and their professional self-government, audit companies and public supervision;
- protection of patients' individual and collective rights and the Ombudsman for Patients' Rights.

15. The activities are focused on specific sectors where competition law enforcement is limited or not possible due to market failures and/or governmental policies. For example, in 2008 the OCCP's experts

prepared a report on the power sector in connection with the planned liberalization 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 focuses on the issue of protecting weaker market participants, since, according to the analysis, introducing free competition in this industry is not possible in short term without detriment to consumers.

16. Moreover, the President of the OCCP cooperated with the Ministry of Finance in preparing amendments to the act on certified auditors and their professional association. The OCCP stressed that the proposed changes could legalize the price collusion on the market of certified auditors' services, or at least give wide possibilities to unify the prices of financial audit services. Such situation certainly would influence the price level with detriment to the recipient group. The Office also pointed out the discrepancies between the proposed amendments and the Council Directive 2006/43/EC regarding the supervision of the certified auditors' association.

17. The power and financial sectors are not the only ones where competition rules do not fully comply with the set of rules. It is also the case in the postal services, railway services and air transport. Although there are sector regulators responsible for ensuring competition in these areas, the OCCP also tries to be active in this respect. Additionally, the OCCP participated in the intergovernmental consultations concerning the rules of wood sale by the company 'State Forests', which is the main wood producer in Poland.

#### 4. Resources of competition authorities

##### 4.1 Resources overall<sup>2</sup>

##### 4.1.1 Annual budget

	2007		2008	
	PLN	USD**	PLN	USD***
Total annual budget:	<b>46.75 mln</b>	<b>21.35 mln</b>	<b>51.08 mln</b>	15,5 mln
Expenditure structure:				
(a) OCCP	<b>26.6 mln</b>	<b>12.15 mln</b>	<b>29.77 mln</b>	9,1 mln
(b) TICI*	<b>17.7 mln</b>	<b>8.1 mln</b>	<b>19.17 mln</b>	5,8 mln
(c) funding for non-governmental associations carrying out governmental consumer protection tasks	2.4 mln	1.1 mln	2.14 mln	0.65 mln

\* Trade Inspection Chief Inspectorate

\*\* USD = 2,19 PLN

\*\*\* USD = 3,3 PLN

<sup>2</sup> Period covered by the above information: 1 January 2008 – 31 December 2008. All amounts rounded

4.1.2 *Number of employees*

Age	Employment			Total	% of all employees
	Lawyers	Economists	Other professions		
Up to 30	47	13	38	98	33
30-40	70	21	33	124	42
40-55	14	19	18	51	17
Above 55	2	15	6	23	8
Total	133	68	95	296	100

Staff turnover in 2008		
	Persons	Posts
Employed	58	52.65
Terminated employment	44	41.7

5. **Summaries of or references to new reports and studies on competition policy issues**5.1 *Market analysis*

18. Selected market research carried out by the OCCP in 2008:

5.1.1 *Research of the market of banking charges*

19. The objective of the study was to analyse the increase of charges for operating a bank account, as well as services related to that, in respect of possible use by banks of competition-restricting practices (forbidden agreements). The analysis did not give bases for further actions by the OCCP.

5.1.2 *Research of the market of construction materials*

20. Following complaints submitted to the OCCP concerning significant increases of prices of selected construction materials, in 2008 the Office carried out research of these markets (aerated autoclaved concrete, ceramic brick, silicate, ceramic tiles, cement tiles and metal roofing). The analysis concerned, first and foremost, the level of their consolidation. According to the gathered information, the rapid increase in prices was the result of a significant increase in demand, which in the case of some products could not be satisfied. Moreover, the Office analysed the terms of cooperation between the manufacturers and distributors. Because of the OCCP's reservations concerning some companies (Xella Polska, Plannja), proceedings concerning possible prohibited price agreements were instituted.

5.1.3 *Research of the market of wood sale*

21. The objective of the research was to analyse the system of wood sale operated by the State Forests. The analysis showed that the system, which had been in force since the end of 2008, restricted the role of price in regulating demand and supply, which was distorting competition on the wood material markets. New entries on the market were virtually impossible, which reduced the competitive pressure on enterprises operating on the market.

22. Results of the research were used when passing the decision against the State Forests, described earlier in the Report.

## 5.2 *Information and education activities*

23. Alongside enforcement and legislative initiatives, the OCCP focuses also on education of all market participants. It concerns both consumers and businesses. In 2008, the OCCP carried out active publishing activity addressed both to enterprises and consumers. In total **15** titles were released and distributed for free to all interested institutions (local authorities, non-governmental organisations, academic centres). The publications are available in electronic version at the Office's website: [www.uokik.gov.pl](http://www.uokik.gov.pl) (in Polish).

### 5.2.1 *Libertas et Auxillium Awards*

24. As a part of the Office's advocacy activities, the Libertas et Auxillium awards were granted. The aim of the initiative is to honour journalists who have had a significant contribution to the education of market participants. Awards were granted for the best articles and broadcasts dealing with competition and consumer protection. In both categories the winners were journalists from *Polityka* weekly. Moreover, the jury decided to honour the editorial team of the *Uwaga* TVN magazine with a special award. The Office organised the competition in cooperation with the Adam Smith Centre and the Association of Polish Journalists.

### 5.2.2 *Best Master's thesis competition*

25. In 2008, for the first time, the competition of the President of the OCCP for the best Master's thesis devoted to competition protection was organised. The idea of the action was to increase young people's interest in the subject related to competition law. The winner was chosen by a jury composed of specialists in law and economy. Moreover, distinctions were granted to authors of three theses.

### 5.2.3 *Relations with media*

26. The basic aim of the OCCP's cooperation with the mass media is to reach the public opinion with information and thus enhance the awareness of all market participants. In 2008, the Office actively cooperated with national, regional and local media. Nearly 140 press releases were issued (65 related to competition protection, 54 – consumer protection, 6 – state aid). The media released over 14 thousand press articles and Internet publications and over 2 thousand pieces of radio and TV coverage related to decisions of the President of the OCCP and other activities taken by the OCCP. The Office prepared over 8 thousand answers to ad hoc inquiries of journalists.