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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from Poland

-- Session IV --

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-- Poland --

1. Introduction

1. A free market governed by an invisible hand is an “out-of-the-book” example of Max Weber’s ideal type. It constitutes a model, which actually does not exist, such as the perfect competition does not exist. It does not exist because the same mechanisms that constitute them – e.g. maximising of profit – lead in certain cases to their depravation, for example, when the entrepreneurs recognise after the calculations that it is more profitable for them not to compete instead of conducting a price war. Or when the maximising of profit takes place at the cost of health or economic interests of the consumers.

2. Presently, there is a clear consensus as to the necessity of legal protection of competition and the consumers – as the condition *sine qua non* of economic freedom. The question remains whether these values should be protected jointly or separately.

2. The institutional model – the pros and cons

3. The institutional model accepted by the Polish legislator 11 years ago – joining in one governmental entity the antitrust and consumer protection policy – was very innovative at the time. Its acceptance resulted partly from the process of adaptation of the national legal system to the *acquis communautaire*. However, most importantly, the process constituted a consequence of the development of the market, which suffered from the lack of an institution articulating the consumer interests whose awareness has raised significantly.

4. In 1996, the consumer protection became in Poland an independent policy and an important issue in the agenda of the Polish Council of Ministers. Entrusting its implementation to the agenda responsible for antitrust policy brought measurable benefits – allowing for leading both policies from a wider perspective, considering the impact of the decisions issued in one area onto the other and using the synergy effect.

5. Beyond a shadow of doubt, the enforcement of both policies under one roof provides for a high level of coordination of the enforcement activities. Any irregularities in the market functioning within the jurisdiction of joint enforcement agency can be analysed together from the point of view of the competition policy as well as assessing the effects they might have on consumers’ welfare leading to an effective counteracting of any practices, which might have a negative impact in both fields. Furthermore, an effective exchange of experiences and ideas between the experts responsible for enforcement of each policy within the agency is provided, as the joint enforcement constitutes a perfect platform for cooperation.

6. The enforcement of both policies in one body leads to a greater understanding in implementation of the policies, due to the fact that joint supervision over those policies provides one common President of the Office of Competition and Consumer Protection (OCCP) with competences for adjusting the structure of activities carried out within each of the policies in a way, which will not only eliminate any potential

clash and overlapping of competences but also give grounds to the emergence of a substantial comparative synergy.

7. The synergy between competition policy and consumer protection policy also means transfer of solutions, which proved to be useful in one area to the other. The new antitrust act¹ on the basis of which the Polish Office of Competition and Consumer Protection has been operating since April 2007 provides for, *inter alia*, enabling the President of the OCCP to impose financial penalties on the undertakings who apply practices infringing collective consumer interests amounting to 10% of their income from the previous year. The Act on competition and consumer protection in its previous form did not provide for such possibility.

8. According to the practice of the Office, this solution proved to be good in case of competition restricting practices – financial sanctions in this amount have a repressive and preventive role. Introduction of analogous sanctions as in the case of the activities conflicting with the antitrust regulations contributes to an even more effective fighting of the most common and severe cases of infringement of consumer economic interest.

9. The synergy resulting from bringing together the two policies also means a substantial reduction of state budget costs. The savings are generated through a joint administration, analytical and research projects, training, as well as lower costs of hiring various experts.

10. Advantages of implementing both policies by one central body are noted also by the entrepreneurs as well as consumer NGO's. However, in the opinion of the latter, there are also some drawbacks to this form of institution.

11. It is considered that in some cases the OCCP is not sufficiently authorised. The Office sometimes does not possess the sufficient means or is not able to take certain actions to influence other public institutions, which often creates provisions with direct or indirect impact on consumers and entrepreneurs' rights.

12. According to the municipal ombudsmen and consumer organisations, competition protection dominates over consumer protection. There is a belief that a central institution for competition and consumer protection would grant consumer protection a higher status if it were equipped with the appropriate statutory competences, and would strengthen the position of consumer ombudsmen whose work in the poviats² raises some doubts. The reason for this opinion is that the entrepreneur's interests are believed to be better protected than the consumer interests, and thus a central institution dedicated only to consumer protection would make it possible to balance the powers and the opposing interests of these two groups.

13. Unsurprisingly, the representatives of entrepreneurs claim the things go in reverse. They emphasise that the Office's concern lies in consumer protection only.

3. How competitive markets can promote consumer interest - examples from the Office's practice

14. Still today, joint coordination of competition and consumer protection policies is not a common solution. However, all agree that consumer interests must be considered in the implementation of the

¹ Act of 16 February 2007 on competition and consumer protection (Journal of Laws of 2007, No. 50, item 331).

² Unit of administrative division of the territory of Poland. They constitute part of a region.

antitrust policy. With the experience of the Chicago school, no one questions that the only and final objective of the pro-competitive legislation is consumer welfare. Competition contributes to the increase of effectiveness of management and technical and economic progress. It also contributes to the improvement of goods and quality of services and at the same time to the reduction of their prices. As a consequence, consumers may acquire products on favourable conditions, and what is more important, their choice increases. Therefore, one could say that the final beneficiary of the market competition is always the consumer and the number of competing suppliers constitutes an instrument for ensuring and enforcing his interests.

15. The synergy between the policies is to be best seen in practice, when the effects of competition restricting practices directly influence the situation of the consumers. Examining several cases carried out by the OCCP proves this thesis.

16. As an example, in January 2007 the OCCP issued a decision declaring unlawful the practices applied by twenty banks consisting in jointly setting the fees collected on transactions made with Visa and MasterCard cards. The Office investigated the method of establishing the *interchange* charges (commission from every non-cash transaction, which the bank collects from the seller) and revealed that the amount of the *interchange* charge was not based on real costs incurred by banks for the development and functioning of the payment system. It had been established by the undertakings that came to agreement to keep high income from each transaction with the Visa and MasterCard cards. In the opinion of the Office, the payment established in this way constitutes a kind of a tax imposed on retailers offering goods and services, who lose a certain amount at each transaction paid with the payment card in favour of the card-issuing banks. Economic expenditures of transactions services incurred by the stores, which accept credit cards usually translate into differences in higher prices for consumers, even those paying with cash. Actually, costs of using credit cards pertain to all market participants, even though they might be unconscious of such situation. To restore competition on the market, the President of the Office ordered the banks – participants of Visa and MasterCard systems - to discontinue immediately the disputed practices. According to the OCCP, non-cash transactions can be settled at nominal value, without deducting the *interchange* fee.

17. Often while conducting an antimonopoly proceeding (e.g. in the case of abuse of dominant position) the Office takes into consideration the fact that the undertaking may also recourse to an unlawful activity prejudicial to collective consumer interests. An example of such “two-fold stroke” is the proceeding carried out in one of the OCCP’s regional branches against a water-supply enterprise operating on the regional market in the Lubelskie region. The proceeding embraced an abuse of dominant position consisting in the application to equivalent transactions with third parties of not homogenous agreement terms and conditions, thus creating for the parties diversified conditions of competition. Furthermore, it was found that the practice was harmful to the consumers, who were offered different prices for exactly the same product (water). That is why, a proceeding referring to practices violating collective consumer interests was conducted at the same time and one decision elaborating on both competition and consumer aspects was issued. Worth mentioning is the fact that the proceeding was initiated upon a motion submitted by a consumer.

18. On the whole, it may be said that the Office conducts antimonopoly proceedings in the interest of the entrepreneurs. By combating illegal practices of some companies we enable other ones to conduct their activity in an orderly way, raising their competitiveness. This results beneficial to the consumers.

19. Another remaining question that remains refers to the influence of mergers on the situation of the consumers on the market. Should the consumers be afraid of an acquisition or a takeover or should they be glad about a merger taking place? The answer to this question is ambiguous.

20. From one point of view the undertakings joining their powers may offer better quality of products, develop technology, and even lower the prices of services. From a different perspective, there are some instances, where as a result of a merger the competition is eliminated and this can lead to a monopoly. A monopolised market can result detrimental to consumers, due to the independence of activity of the undertaking on the market.

21. The President of the OCCP rarely refuses clearance for mergers as, on the whole, they may be treated as beneficial. However, often conditional clearances are issued. Considering the effects that the merger may cause on a relevant market, the President of the OCCP always examines not only the impediments to competition, but also the consequences to the consumers.

22. As an example, in 2006 the President of the OCCP banned a merger between companies from the spirit branch. The takeover of the company Jablonna by Carey Agri would seriously restrict competition on the national market of flavoured vodka. Taking over control by Carey Agri, one of the biggest producers of this beverage in Poland, would lead to the creation of the biggest entity on the flavoured vodka market. Such a strong position would allow the undertaking to prevent efficient competition, thus enabling it to act in a significant degree independently from the competitors, the contracting parties and most of all from the consumers. The decision of the President of the OCCP probably prevented a vodka price increase, thus was beneficial to consumers.

4. How effective consumer policy can assist the competitive process

23. The awareness that an effective competition is not possible without an effective consumer protection policy is growing. The effect of such opinion is for example the Directive 2005/29/EC of the European Parliament and Council on Unfair Commercial Practices. According to its preamble it – “approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harms consumers’ economic interests and thereby indirectly harms the economic interests of legitimate competitors.” The European legislator, accepting this act aiming at convergence of national regulations protecting the economic interest of weaker market participants considered also the impact it would have on the situation of the entrepreneurs and competition on the market.

24. An efficient system of protection of weaker market participants eliminates unreliable entrepreneurs, which reduces the prices at the cost of the quality or safety of their clients.

25. The postulate for the necessity of consideration of the impact of the policies on each other and running activities in a wider context maintains its validity especially during the construction of the instruments for consumer protection. We always have to consider that in this scope, it is the competition that is a very significant if not the most significant instrument. When competition is weak, the entrepreneurs may maintain higher prices and lower the level of innovation and they can offer worse quality of goods since they are not under pressure of other entities operating on a given market. Such situation is disadvantageous for the consumers and for the entire economy.

26. Of course we can consider circumstances in which attention to competition is against the customers interests. We can imagine such situation studying for example the sales below the costs. This practice, which infringes the antitrust law, brings benefits to the consumers; however, they are only illusory. The prices are reduced only for a short period. After the elimination of the competitors from the given market, they return to the previous level and often exceed it.

27. In this context, balancing the pros and cons of following a more competition approach or a more consumer-oriented protection should be followed by a thorough analysis of the economic situation and revised from a wider national perspective.

5. Conclusions

28. Competition and consumer protection are closely linked to each other and they cannot be considered separately. Both areas of activities complement each other and influence each other. On one hand, the more competition protection policy is protected, the larger is the care for interests of the weaker market participants, and the level of their service becomes an element of competitive advantage of the entrepreneur. On the other hand, consumer protection policy contributes to the implementation of competition protection policy, since it imposes on the business entities specified behaviours towards the consumers.

29. The experiences of the Office of Competition and Consumer Protection show that placing the implementation of competition and consumer protection policies side-by-side brings numerous benefits. It is worth noticing similar development tendencies – in particular at the Community level. The Community competition rules (in particular Articles 81 and 82 of the EC Treaty) from the very beginning considered consumer interests. Due to that, both the European Commission and the Community courts could, in their settlements, refer to the position of the consumer on the common market. This possibility became a necessity after the entering into force of the Amsterdam Treaty. In its Article 152(2) it states that the requirements for consumer protection are considered at determination and implementation of other policies and measures of the Community. Therefore, there is no doubt that consumer protection is to be an element of all the policies significant for consumer protection, in particular competition policy. This is the path pursued by the Office of Competition and Consumer Protection.