

Lund University

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Bachelor's thesis

Competition Policy under transition

- A study of merger regulation in Poland

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Abstract

This thesis discusses the design and implementation of competition policy in Poland. The aim is both to analyze whether the design of competition policy in Poland corresponds to their special needs as a transition economy, and if there is a trade-off between competition policy and industry policy in Polish merger control. After the collapse of communism, the transition to a market economy required that Poland made profound changes in the economy and legal system in order to develop competitive markets domestically. With an aspiration to become a member of the EU, Poland also had to deal with competition from abroad. The EU-15 feared that the new member states would use anti-competitive behaviour to support domestic industries and extensive negotiations were held on competition policy within the Europe Agreements in order to harmonize the law to that of the EU. One finding in this thesis is that the aim of the competition policy at a national level in Poland initially could have been better adjusted to the needs of consumers. Further, the harmonization with EU law was not ideal to even out the distortion in allocation across industries. However, valuable gains from using EU expertise in institution building and experience in case law made the process of trial and error shorter. Another main finding is that the Polish competition authority has not a bias towards clearing mergers that are harmful to competition in order to create national champions, neither in the comparison to other Central European countries or in the assessment of the arguments stated in the decisions. However, a serious problem for implementation is the lengthy appeal system, which has to be improved to avoid (or at least limit) financial penalties' evasion.

Keywords: Poland, competition policy, transition economies, EU, mergers.

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List of abbreviations

AMO	Anti-Monopoly Office
CEEC	Central and Eastern European Countries
DG COMP	Directorate General of Competition
EA	Europe Agreements
EU-15	The first 15 members of the EU
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GVH	Hungarian Competition Authority
NMS	New Member States
M&A	Mergers and Acquisitions
OCCP	Office of Competition and Consumer Protection
OECD	Organization for Economic Co-operation and Development
PHARE	The Poland and Hungary Action for Restructuring the Economy
R&D	Research and Development
SSNIP	Small but Significant Non-transitory Increase in Prises
ÚOHS	Czech Republic Office for the Protection of Competition.

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10 PLN = 28,5 SEK = 2,8 EURO

1. Introduction

In the process of eastward enlargement, the EU required that the candidate countries adjusted their administrative structures so that European Community legislation transposed into national legislation is implemented effectively through appropriate administrative and juridical structures. The prerequisite for accession was the ability to set up the rules stated in the *acquis communautaire* and to enforce them. This thesis addresses how this process has been carried through in Poland.

The focus will be on competition policy and merger regulation in particular. In the period 1991-2002, the European Union experienced a merger wave where EU companies were engaged in as much as 133 000 mergers (Micklejohn 2006 p. 31). During the same period of time, the EU was involved in a process of eastward enlargement. The fact that many of them took place across borders stresses the need for harmonized legislations. Although the EU had a large influence in the development of the legislations and institutions of the candidate countries, it is the responsibility of the national authorities to guarantee that the laws are rightfully enforced in accordance with the EU rules. This might bring about some non-compliance between the vision of antitrust in the EU and the competition law enforcement of the candidate countries.

1.1. Statement of Purpose

This paper will analyze how competition policy towards M&A has been designed and implemented in Poland. Consequently, the purpose is twofold: First, the intention is to analyze *whether the design of Polish competition policy corresponded to the special need it had as a transition economy*. Second, a study of the implementation of merger control will assess *whether there is a trade-off between industry and competition policy in the implementation of merger control in Poland*.

During the 1990's, Poland started a transition from central planning towards market economy and this process involved not only restructuring ownership, but also opening up the economy and facing competition from abroad. With the ambition of

becoming a part of the European Union, Poland signed the Accession Agreements in 1991. The current members feared that the accession countries would use anti-competitive behaviour by supporting their industries, and extensive negotiations were held on competition policy. It is worth questioning whether importing a competition policy from the EU was well-suited for economies in transition and if there was a rationale behind the concern of the West European countries. Further, as Poland was the largest economy of the CEEC, it had the most potential for a study on M&A activity.

1.2. Method, data and limitations

This thesis is inspired by theories of industrial organization that deal with the market effects of merger and acquisitions, and the inspiration will be the Williamson model. The literature chosen concern the implications of introducing competition policy in transitional economies. This incorporates academic literature, official publications and reports from international organizations such as the OECD and UNCTAD, as well as reports from the Polish competition authority. The analysis of the implementation of the merger regulation in Poland will be carried through with statistics collected from the OCCP, GVH, ÚOHS and the European Commission as well as interviews with an official at the OCCP. The chapter on implementation of the merger regulation focus on the years 2000-2007 because the OCCP reports and statistical data for previous years are not available in English.

1.3. Disposition

The first section of the study presents the underlying economic theory of firm behaviour and the evaluation on its effect on the market. The following section gives a background to the conditions of competition policy in transition economies, both regarding the heritage from central planning and in relation to other policies dealing with restructuring and liberalization of the markets. Section 4 deals with the development of the competition legislation and the suitability of harmonization with the EU rules. Section 5 consists of a description of the institutional conditions and the relations with the government and business life. These are important both for the

credibility and implementation of the laws. This serves as an introduction to section 6 where an analysis of the merger decisions will determine whether there are competing policy interests in the stage of implementation. Further, the institutional efficiencies will be evaluated. The last section is a conclusion of the findings in this thesis.

2 The effect of firm behaviour on the market structure.

2.1. The detriment of market power

There is no need for government intervention in perfectly competitive markets. In competitive markets it is assumed that all economic agents are price takers and competitive firms charge a price that is close to (but never below) marginal costs. All markets are cleared as a Pareto optimal and competitive equilibrium is reached. However, in markets with few firms, these assumptions do not hold and firms have some degree of *market power*. This is an essential concept in competition policy and is defined as the possibility to increase prices above marginal costs. If a firm has this ability to dominate the market, there is a risk that the allocation of resources is distorted and the market will be inefficient.

The analysis of the effects of market power can be grouped into two categories: static- and dynamic analysis. In the former, it is assumed that technologies and costs are given and the producers use the most efficient technology available. Static inefficiency refers to when a producer has market power and increases prices or reduces quantity (so called monopoly pricing) in order to make a profit. The monopolist sacrifices the consumers at the margin and overcharges the ones with a higher willingness to pay. As a result, consumers will be forced to consume less or exit the market and more resources will be shifted to the monopolist as profit increases (Viscusi et al. 2005 pp. 79-80).

In the dynamic analysis, assumption of a given technology is relaxed. It is arguable that competition puts a pressure on perfect competitors to be cost efficient and combine their factors of production in the most efficient way. For that reason a monopolist without enough competition may choose a less efficient technology and

may have less incentive to invest in research and development¹ (Motta 2004, p. 249).

2.2 Horizontal mergers and acquisitions

There are several ways for firms to increase market power and a merger or acquisition is one of the most evident ways.² When analyzing the effect of an M&A two aspects are usually considered. First, it may potentially harm competition since the number of competitors is reduced and a producer might independently get market power. Second, it might create a new structural condition in the industry that favours collusion.

2.2.1. The Williamson model

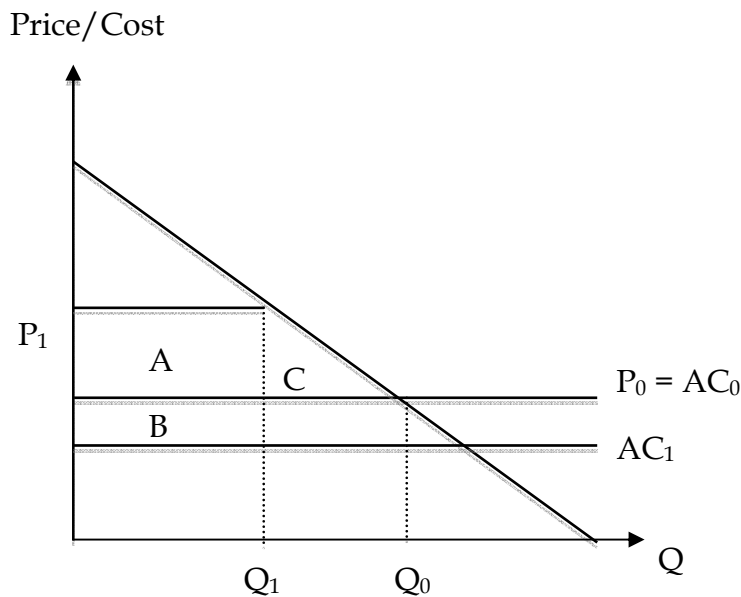
A horizontal merger is potentially harmful to competition; however, socially beneficial cost savings that might arise from combined operations can counterbalance this effect. Using the model developed by Oliver Williamson is the most straightforward way to analyze the change in welfare caused by a merger and it is illustrated in Figure 1 below.

In the pre-merger state there is perfect competition and the horizontal line AC_0 correspond to the average cost of the firms. The competition is sufficient to force down the price to P_0 so that $AC=P$ and at this point the total welfare correspond to the consumer welfare (there is no producer surplus). After the merger, the firm have some market power and increase the price from P_0 to P_1 , which will reduce quantity from Q_0 to Q_1 .

¹ This is not an unequivocal statement. In the static analysis, there is a reverse relationship between market power and welfare, but this relationship is less clear in the dynamic analysis. If firms do not expect to receive some market power and profits, they will never have an incentive to invest and innovate (see Motta pp.39-40).

² Merger and acquisition are two expressions often used as synonyms although they are somewhat different. A merger involves two competitors in the same product market that fusion in order to operate together. This is a so-called "merger of equals". On the other hand, in an acquisition or takeover one company purchases another company where the target company legally stops to exist, and the buyer takes over the business. However, throughout this thesis, the expressions merger, acquisition, M&A and concentration will be used as synonyms.

Figure 1: Benefits and costs of a horizontal merger



This result in a transfer of welfare from consumer to producers represented by the rectangle A and a dead weight loss equal to the triangle C. Nevertheless, if the merger entails cost reductions, it will produce the new quantity to a lower average cost, AC_1 . The gain to society will be corresponding to the rectangle B. If the reduction in costs is large in relation to the price increase, i.e. if area B is larger than area C, the merger will increase total welfare (and the opposite is true if area C is larger than area B). Consequently, the expected cost savings from the merger must be compared to the net losses from reduced consumption (Viscusi et al. 2005 pp. 209-210).

2.2.2. Merger review process

In order to assess the ability of merging firms to raise prices above current level it is possible to use econometric methods based on estimating residual demand elasticity or logit demand models. However, this is often difficult to carry out due to lack of reliable data, and even when it is feasible, it is necessary to complement the results with an evaluation of market power by analysing the market they operate in. The first step in this assessment is the definition of the relevant geographical and product market. The relevant market is defined as a set of products, or geographical area,

where the products exercise a competitive restraint on each other. A test commonly used is the SSNIP (Small but Significant Non-transitory Increase in Prices) where substitutability is tested by assessing whether it would be profitable for the hypothetical monopolist to increase prices by 10% over the current price. If it is possible, the product does not face sufficient competitive pressure and the market is defined. If not, the test must be widened to include a larger geographical area or other products that might serve as a substitute (Motta 2004 pp. 101-102).

The second step is to identify the firms that play a role in the market. This is done by calculating the market shares. If the share after the transaction is very low, it is presumed that the merged firms has no possibility of independently raising prices, and is therefore not harmful to economic welfare. Usually competition authorities have a market share or turnover threshold below which mergers are not investigated. A high market share raises concerns, but it is not a sufficient condition for the ability to raise prices substantially. A price increase would not be possible if entry to the industry was easy, as new firms would enter the market if positive profits were possible. Consequently, easy and likely entry can work as a deterrent for incumbent firms exercising market power. Other limitations are imports from foreign producers, low (or no) transportation costs, or few strong buyers that can use its bargaining power by switching to competing suppliers (Motta 2004 pp. 117-118).

If the previous step indicates that a merger would lead to the exercise of market power, the damage on competition must be weighted against the merger specific efficiency gains, i.e. the cost reduction described above. These gains consists of (i) economies of scale in production and R&D, (ii) economies of scope, (iii) decrease in transportation costs, (iv) introduction of a new product in the market, and (v) elimination of negative externalities/appropriation of positive externalities. Gains that originate in economies of scale or scope are usually agreed to while administrative efficiencies are refused (UNCTAD 1999 pp.6-7).

3. Competition policy under transition

3.1. Features of a planned economy.

A large restructuring of the economies in former Soviet Union and Central and Eastern European Countries (CEEC) has taken place since 1989 with a transformation from central planned to market economies. Many countries still suffer from a legacy of central planning and some of the characteristics of these economies are important for the development of competition and the design of antitrust policy.

One obvious feature of the central planned economies is the *ownership structure*. The state controlled many of the industrial sectors, and the private sector accounted for a relatively small percent of value added. In 1989, the private sector accounted for about 29% of GDP in Poland. Because of a large agricultural sector, this figure was much higher in Poland than in the other Viségrad countries (i.e. Poland, Hungary Czech Republic and Slovakia). This can be compared to the 70% private sector share that Poland had in 2007 (Worldbank Public Enterprise Reform and Restructuring Database). For an economy with this kind of ownership structure, it is critical that competition policy and implementation covers the state sector as well as the private sector (Fingleton et al. 1996, p. 12).

Table 1: Private sector share of GDP, 1989

Czechoslovakia	Hungary	Poland
11	15	29

Source:: Fingleton et al (1996)

One consequence of the ownership structure was industries and markets characterized by *high concentration*. The economies were run like enormous firms with planners taking output decisions that later were sent out to different industrial ministries for implementation. Planned economies were often run in an inflexible manner where the size of output was set and where the amount of input did not always match it. Since no satisfactory “private” market existed, many of these big

state enterprises started to produce specific key inputs for themselves. This resulted in highly concentrated markets with a few, very large corporations. These corporations faced a limited import competition because of *trade restrictions*. The Ministry of Foreign Trade planned international trade and most of it took place within the Council for Mutual Economic Assistance (CMEA), the Eastern bloc counterpart of the European Economic Community. Trade was complicated as some countries lacked convertible currencies and had trade barriers in the forms of import quotas and high tariffs.

The process of transition requires a new type of legal and institutional framework, as there is no tradition of *the rule of law*. In centrally planned economies, the economic transactions were forbidden unless authorities approved them, contrary to market economies where economic relations are made on a mutual and voluntary basis, and where the courts enforce contracts. This places an enormous burden on the development of new legislations and institutions since the system of law courts has earned no respect from the public before. Because of this it may be better to enforce competition law through an administrative organ rather than within the juridical system (Estrin & Cave. 1993, pp. 8-15).

The system of central planning caused a *distortion in allocation across industries*. First, it had an effect on the balance between agriculture, industry and services. There was a heavy emphasis on material production in relation to services. The CEEC, and Poland in particular, had a notably high concentration of the labour force in agriculture. This was due to a rapid technological process in agriculture and a low demand for services. Second, the coordination of production across centrally planned economies caused each country to be specialized in a few industrial sectors. This resulted in industrial biases and relatively undiversified industry structure (Fingleton et al. pp. 9-10).

3.2. Other policy instruments

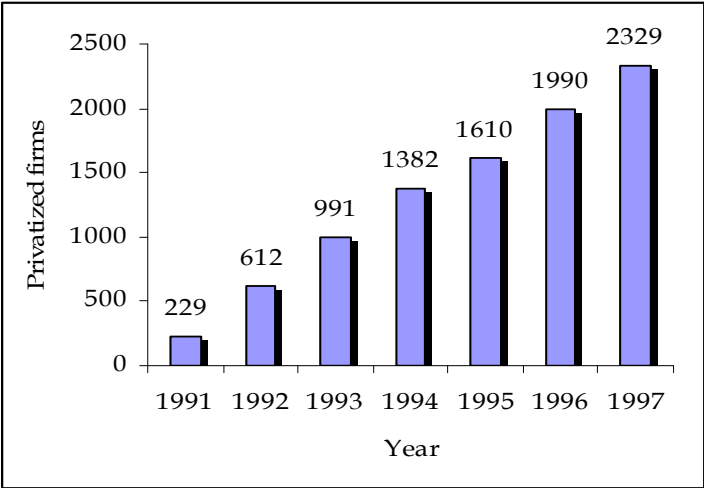
Competition brings about many positive benefits, but it has been questioned through which means it should be achieved. It has been argued that other policies rather than

competition policy are the best tools for transition economies. Policies such as trade liberalization; policies that reduce barriers to entry and policies that aspire to encourage entrepreneurship are a few examples.

3.2.1. Privatization and de-monopolisation

The wave of privatizations that occurred in Poland during the first years of transition is illustrated in Figure 2. This development has led to a more competitive environment and some economists with a Coasian view³ argue that demonopolization and privatization would have been enough to accomplish the desired efficiency and an increased intensity of competition.

Figure 2: Number of enterprises privatized each year in Poland 1991-1997



Source: www.worldbank.org/ecspf/PSD-Yearbook/

Nonetheless, if the ownership restructuring does not occur with a creation of competitive market structures, the privatization may not be satisfactory. It is likely

³ This view stems from the economist Ronald Coase's theorem where it is assumed that products that are worth more than the cost of producing them will be sold, and products that are worth less than they cost to produce will not. If producers are in an environment without limitations on bargaining and contracting (that reduces the costs), they will realize the gains of trade and the market will be efficient. The implication for competition policy is that an unregulated market is optimal and the interference of competition authorities on contracting should be minimal (Hylleberg & Overgaard 2000 pp. 80-81).

that new firms face barriers to entry and small firms' barriers to growth. First, in transition countries was credit to new firms restricted because large existing enterprises had priority access to available funds (Fingleton et al. 1996, p. 13-14). This could be due to intentional policy or because of the banks' desires to shore up their existing portfolios. In general, centrally planned economies were short of capital markets, which made foreign direct investment an important source of funds. Furthermore, the unstable situation in these economies made investors cautious, making the funds available only under tight conditions (Estrin & Cave 1993 p. 15). Second, resources such as distribution networks or land may be unavailable for new firms or distributed in a way that favours existing firms. (Fingleton et al. 1996 p. 13-14).

The inadequacy of restructuring efforts is confirmed in a study by Vagliasindi (2006). It is based on EBRD and World Bank surveys conducted between 1995 and 2005 and analyses the policy- and structural factors that affect the intensity of competition for enterprises in transition economies. The main finding is that competition policy implementation and the intensity of competition are positively. Privatization on the other hand, is neither statistically significant nor negatively correlated with the intensity of competition at a country level. This verifies the claim that privatization does not strengthen competition without the development and enforcement of institutions aiming at changing the market structures. Therefore, governments using privatization as the main policy tool for transition economies face a risk of replacing a state-owned monopoly with a private.

3.2.2. Trade liberalisation

Trade liberalisation is another policy tool that is claimed to substitute competition policy. The effect is largest in small economies and in industries with a monopoly or oligopoly, but it can only be possible under certain circumstances. When a country reduces barriers to trade, the domestic markets are faced with foreign competition through imports, which puts a limit on domestic firms' ability to use any market power. If foreign firms are not inhibited by country-specific conditions and

regulations, the domestic firm will not be able to charge a monopoly price (Fingleton et al. p.7). However, usually there are factors that make the foreign competition insufficient. For example, if foreign firms don't have access to location specific services (such as distribution networks) or face high distribution and transport costs, the intensity of competition from abroad will be restricted. It is possible that know-how, capital and other production factors are concentrated to a few firms (especially if it is in the hands of enterprises that had close connections to political power before the transition). In addition product standards or other regulations introduced by governments, function as a barrier to the domestic market. (Kronthaler et al. 2005 p. 23). So despite the fact that Poland planned to enter the European Union it was important to develop and implement a competition policy.

The impact of trade policy on competition is unclear in empirical studies. Krakowski (2005) used data from the World Economic Forum (WEF) to analyse the efficiency of competition policy and the intensity of local competition in 101 countries. The result shows that the introduction of competition law has a large initial effect on the domestic market structure during the first years of implementation and that "external protection" (i.e. weighted tariff and non-tariff barriers) does not have a significant effect on the intensity of domestic competition.

3.3. M&A activity in the New Member States

The candidate countries have used somewhat different strategies in achieving a balance between the uses of policy instruments in order to create competitive markets. The scope of privatization and restructuring efforts, development of business law, and the role of institutions have been crucial in firms' decisions to go through with M&A.

As the 1990's was characterized by a period of transition to a market economy for many of the New Member States (NMS) (with Malta and Cyprus as exceptions), and for this reason, the levels of M&A were initially quite low. However, this started to increase after 1993 as restructuring and privatization plans started to realize in most

countries, and by 2000 more concentrations take place in NMS than in the EU-15. During the years of 2000-2004 was the average ratio between number of concentrations and GDP (in billion Euros) in the NMS as much as 2,4, in comparison to the 1,3 ratio in EU-15 (Micklejohn 2006 p.19).

The amounts of concentrations taking place in the NMS was distributed fairly even between the countries, with the exception of Poland, Czech Republic and Hungary that had much higher levels (see table 3). These three countries also had the highest level of total economic activity - together they accounted for 77% of the GDP of the NMS.

Table 3: Distribution of M&A activity in New Member States 2000-2004

	Share of total number of M&A in NMS (%)	Share of GDP in NMS (%)	Merger intensity ratio**	Private sector share of GDP* (%)
Cyprus	4,8	2,6	1,8	-
Czech Republic	18,9	17,3	1,1	80,0
Estonia	6,6	1,7	3,9	80,0
Hungary	17,6	15,3	1,1	80,0
Latvia	4,6	2,2	2,1	70,0
Lithuania	6,1	3,5	1,7	75,0
Malta	0,4	1,0	0,4	-
Poland	29,2	44,9	0,65	75,0
Slovak Republic	6,0	6,1	0,98	80,0
Slovenia	5,8	5,4	1,07	65,0
NMS Total	100	100	-	-

Notes: * The value is for the year 2004.

** Merger intensity ratio = share of M&A total number of M&A/share of GDP

Source: Micklejohn (2006) p. 19, EBRD.

Poland alone stands for approximately 45% of the NMS' total GDP and 29, 2% of the total number of transactions. Even though Poland has a private sector share similar to other CEEC, the level of merger intensity in Poland is surprisingly low considering the size of the economy. This is likely due to the fact that Poland carried out privatizations of large enterprises later and to a smaller extent than its neighbour

countries. Many privatizations took place in the 1990's, but at the end of 2002, the Polish state had a majority of shares in 2100 enterprises (Micklejohn 2006 p. 20).

Another reason might be the impression of Poland as excessively regulated among foreign investors. Poland is ranked 76 out of 181 economies in the "ease of doing business" ranking made by the World Bank. The biggest challenges are the regulations concerning construction permits, starting a business and paying taxes. This can be compared to Hungary that is ranked 41 (www.doingbusiness.org).

4. The development of the legal framework

The market conditions described in the previous section demonstrate the need for a clear and well-built legislation that prevent enterprises from controlling and segmenting markets. Fingleton et al. (1996) suggests a competition framework where the law should prevent dominant firms from eliminating present or potential competition through mergers and joint ventures or by blocking entry.

4.1. Drafting of the Polish Statute

Poland introduced the first competition legislation in 1987. The prohibited practices in the act was similar to those in mature market economies, but since nearly all state-owned enterprises was exempted from the law and the enforcing authority had close connections to the government, it was ineffective. The succeeding Act on Combating Monopolist Practices, introduced in 1990, was more successful as it was a part of a large package of reforms aimed at introducing market economy. During the first few years of its existence, the AMO was mainly focused on developing competition rather than protecting competitors. This meant changing ownership structure, provisions required to develop new businesses and the restructuring of existing monopolies. The control of prices was especially significant as monopolies prevailed in many markets. Price control gradually became less important during the progress of restructuring (Kronthaler and Stephan 2006 pp.20- 21). Merger control was an essential part of the law as it supported the process of eliminating monopolistic practices and prevented the monopolies to be re-created or newly created.

The act brought about an installation of a separate, public competition authority called the Anti-Monopoly Office (AMO). The position of the AMO as an independent competition authority gave more credibility to decisions than if the office had been directly subordinate to the polish parliament or the Supreme Administrative Court. Administration law covered the proceedings before the AMO, and a creation of the Anti-Monopoly Court made it possible to appeal against the AMO decisions. The terms of civil procedures covered the proceedings in the Anti-Monopoly Court.

Since then, 10 amendments of the competition legislation have been done (see Table 2). The changes included increases in turnover thresholds for notifications, inclusion of a wider range of entities in the definition of enterprises, giving more power to the OCCP when collecting evidence, changes in procedures, and a deadline for the decisions of M&A (Cylwik et al. 2005 pp.48-59).

Table 2: Adoption of competition law and amendments 1990-2007

Year	-90	-91	-92	-93	-94	-95	-96	-97	-98	-99	-00	-01	-02	-03	-04	-05	-06	-07
	*	◇				↑	◇	◇	◇		**			↑	↑			↑

Note: * indicates adoption of initial law, ** indicates an adoption of a second law, ↑ indicates year of amendment with notable changes and ◇ indicates year of amendment with minor changes.

Source: Vagliasindi (2006) p. 5, OCCP (2008) p. 11

These amendments were made to adjust the legislation to the changing needs of the economy, improve efficiency and to harmonize with the EU competition law. Much like in the EU, focus of the policy was on creating competition between producers and removing barriers to entry. Consumer protection was not an explicit policy goal and consumers had no legal interest. It did not receive much attention until 1996 when the AMO changed name to OCCP (Office for Consumer and Competition protection). The before that, the OCCP acknowledged that competition and consumer protection are related, but the competition office feared that too many resources would be shifted away from developing competition between producers (OECD 2002 p. 10).

Hölscher and Stephan (2004) argue that the focus on supporting the rights of producers is not necessarily consistent with the needs of the markets in the CEEC. Levelling the playing field between producers and removing barriers to entry will usually benefit the consumers, however, initially; the polish consumers only had a general legal interest, in contrast to the producers whose rights and obligations were stated in the law. The CEEC have a history of large-scale state ownership and lack of competition where the interests of consumers were completely overlooked. It is

reasonable that a more suitable starting point for countries with a heritage of disproportionate support for producers' interests might have been an explicit declaration of priority of consumer interests. The AMO might have acknowledged that consumer and competition goals were interrelated, but this did not pave the way for any policy strategy that aimed at maximizing consumer surplus.

No sooner than the adoption of the 2007 Act on Competition and Consumer Protection, the OCCP started to seriously emphasize consumer interests. Consumer protection was earlier an independent policy area, but with the new act are consumer and competition protection analyzed jointly. This entails a higher priority for consumer protection and the OCCP is now allowed to levy undertakings that use conduct that contravene collective consumer interests up to a total of 10% of turnover (OECD 2008 p. 3).

4.2. Harmonization with EU Competition Policy

In the end of 1990, Poland started the first stage of negotiations for an accession agreement with EU. The chapter of competition policy in the Europe Agreements (EA) can be understood as an obligation to make competition policy harmonize with Article 85 and 86 of the Rome Treaty. Initially the aim was compliance in practice rather than in principle (i.e. acts of the law) and they formed the first step in the negotiation process on competition policy. The second step of the negotiations was taken in 1995 when The Act on Combating Monopolist practices from 1990 was remarkably amended. The legislation had to meet the OECD requirements and be compatible with the EU legislation as a part of the *acquis communautaire*. This called for a more intense stage of negotiations, which required an actual act of the law and a time plan for the definite adoption of rules (Kronthaler & Stephan 2006 p. 21).

The main objective of competition policy in the EU was to achieve an economic integration among its members. It originates from a harmonization that has evolved to cooperation between mature market economies that exists side by side with national law. The idea of a common market and the free movement of goods and

people were reflected in all Community policies and this had to be combined with the reality of Poland's under-developed markets. The appropriateness of harmonization has been analyzed in several studies with various results. Some scholars, such as Barr (1994) have come to the conclusion that an "export" of the EU institutional framework for competition policy in transition economies is not recommended. Others are more positive, for example Estrin and Holmes (1998) that in their analysis compare the usefulness of this alternative in comparison to their own institution building.

One of the most serious drawbacks of the influence of EU competition policy is that it was aimed towards maintaining a "level playing field" within industries in the whole Union. This has led to a definition of the relevant geographical market as the European rather than the domestic market. Above all, this was relevant in the case of M&A through FDI. In this aspect, the national legislation does not satisfy the criterion of regulating industry structure. What the CEEC needed to focus on was rather a balance between different industries in the domestic market. Even so, the harmonization with the EU rules brought great advantages since these types of processes are usually accompanied by problems of trial and error. This "shortcut" involved taking over a ready-made institutional system that already had been tested and proven to be working well, and for which considerable implementation experience in case law existed. (Hölscher and Stephan 2004 pp. 324-325). It is also likely that the inclusion of competition policy in the EA gave extra authority and support to the OCCP decisions. If certain industry interests that were important to the national economy opposed to competition enforcement, the OCCP could plead to the national interest of the law in order not to fail the EU requirements.

4.3. Current merger regulation.

The transactions with a community-wide dimension are handled by the European Commission; however, a majority of transactions are administered by the national competition authorities. According to Article 13 of the Act of Competition and Consumer Protection, the transactions covered by the merger regulation are (i) a

merger between two or more enterprises, (ii) a takeover through acquisition or possession of stocks, securities etc. (iii) joint ventures and (iv) an enterprise's acquisition of another undertaking if the turnover was more than 10 million Euros during the two preceding financial years in Poland. Before a concentration is carried out, the parties must issue a notification to the OCCP with a comprehensive report on what the companies aim at. Only enterprises that have had a combined worldwide turnover of more than 1 billion Euros or national turnover of 50 million Euros during the preceding year are required to submit a notification (www.concurrences.com). If a transaction is completed without being cleared, the OCCP may take on the task of restoring competition. This can be done by for example command that that a portion of the enterprises' shares are sold or impose a fine up to 10% of the involved firms' revenues (www.uokik.gov.pl).

If the investigation shows that concentration is not expected to create a dominant position that significantly decreases competition, OCCP can clear the merger. According to the 2007 Act of Consumer and Competition Protection, a dominant position is assumed if the undertaking has more than 40% share of the relevant market. In that case, the transaction is forbidden. It is also possible to issue a conditional clearance where the undertakings must dispose of the whole or parts of the assets, divest control of an undertaking (or several) or give a competitor exclusive rights. Efficiency gains resulting from the transaction are taken into account. The President shall clear a concentration that impedes competition if the suspension of the transaction is justifiable, especially if "the concentration is expected to contribute to economic development or technical progress" or "it may exert a positive impact on the national economy" (Article 19 and 20 of the Act).

5. The institutional and operational conditions

The institutional conditions can give quality to competition legislation, as it needs to be reinforced in an environment where competition previously was absent. The decisions made by competition officials must be respected, which requires that the potential offenders must both know the law and expect a breach of it to be punished. Consequently, the recipe is clearly defined violations with serious penalties. As important are little bureaucracy, and transparency of the rules and the decisions taken by the competition authority (Fingleton et al. 1996 p. 60-61).

5.1. Technical and financial assistance

In order to facilitate implementation of the *acquis communautaire*, Poland and the other candidate countries received technical and financial assistance from EU within the PHARE programme (<http://europa.eu/scadplus>). The technical assistance was aimed at helping with (i) legislative assistance (such as the assessment of the need for a competition law, and the drafting of it), (ii) institutional and operational assistance (such as the creation of a competition authority and a proper process of investigations) and (iii) law enforcement assistance. Poland received most of this assistance around 2000 and the largest part was focused on the transfer of know-how from in the area of institutional assistance. The aid from EU included workshops, conferences, consultations, study missions/internships and the assistance of long-term advisors. According to an inventory of the International Competition Network (ICN) and OECD were workshops, seminars and conferences the types of assistance with the highest impact. For this reason it is reasonable to assume that the assistance was effective (Kronthaler and Stephan 2006 pp.25-26).

5.2. Competition advocacy

Naturally, competition advocacy was (and it still is) an important part in Polish policy, but it is more focused on the relations to the government, enterprises and consumers. Except for the main responsibility of investigating and reach decisions in competition cases, the OCCP has the responsibility for making changes in

competition law. The office prepares an initial draft and disseminates this to relevant departments and agencies for comments that finally are included in the legislation where (if) they fit. Correspondingly, the OCCP has to comment on legislative drafts from other government agencies or departments, which gives the office an opportunity to influence legislations that might decrease competition (for example licensing). This competition promotion was a major workload during the first years of the office: the AMO gave more than 500 opinions on draft legislation between 1990 and 1995.

Competition advocacy is not required legally, but nonetheless an important function for a transitional country. In a report from 2002, the OECD acknowledges the positive results originating from the within-the-system advocacy, but welcomes more public advocacy. For example, the Polish statute does not require the publication of annual reports (although they are) (OECD 2002). However, available are guidelines concerning the procedures and criteria for notifying intended concentrations that are useful for companies intending to go through with a transaction. The OCCP has also initiated educational campaigns including publications and educational material, regional conferences, events on business ethics for students at universities etc (<http://www.uokik.gov.pl>).

5.3. Organizational structure

According to Article 29 of the Act on Competition and Consumer Protection, the President of the OCCP is the central government administration body and responsible for the enforcement of competition policy. The two vice presidents and Director General are each responsible for a few of the 14 functional and administrative departments (see Figure 3 below). The central office is located in Warsaw, but 9 regional sub-offices⁴ carry out the tasks of the OCCP within the region (OCCP 2007 p. 7).

⁴ The regional offices are located in Bydgoszcz, Gdansk, Katowice, Kraków, Lublin, Lodz, Poznan, Wroclaw, and Warsaw (OCCP 2007 Annual Report on Activities).

Figure 3: Organizational structure of the OCCP

President of the OCCP: Małgorzata Krasnodębska-Tomkielin			
Vice President Małgorzata Kozak	Vice president Jarosław Król	Director General Monika Bronkau-Lugowska	
Dept. of Consumer Policy	Dept. of Legal Affairs and European Jurisprudence	Office of the Director General	Dept. of Concentration Control
Dept. of Market Analysis	Dept. of Competition Protection	Dept. of Budget and Administration	Dept. of State Aid Monitoring
Branch Offices	Dept. of Market Surveillance	Independent classified information specialist	Dept. of Int'l Relations and Communication
		Independent Internal Auditor	Office of the President of the OCCP

Source: OCCP (2008) p. 6

5.4. Procedures

The decision-making procedures are of great importance for the effectiveness and credibility of policy enforcement as well as for the costs of undertakings. Therefore it is essential to consider how cases are chosen and decided, what time limits are imposed, how information is collected and what rights the parties have.

The legal proceedings of OCCP are regulated in Article 48 of the Act on Competition and Consumer Protection. There are three different types of proceedings: (i) explanatory proceedings⁵ that may lead to (ii) anti-monopoly proceedings or (iii) proceedings that violates collective consumer interests. Although the office might initiate investigations by own efforts, a majority of the concentration cases in Poland originate from notifications from the undertakings. According to the statute it is the

⁵ The explanatory proceedings are a mean of initially establish whether there has been a breach of the Act, study market structure and concentration or determining whether an obligation to submit a notification of an intended concentration exists.

President of the office that makes the decisions, however, in practice this task is handed over to investigators, except in very important cases (Fingleton et al. 1996 p. 102). In order to test whether a merger is creating a dominant position, the OCCP use a substantive test similar to the SSNIP-test used by the European Commission. The proceedings shall be brought to an end no later than 2 months after the explanatory proceedings are initiated (with an exception with a maximum of 2 weeks for the financial sector) (www.concurrences.com).

A two-stage appeal is possible according to the statute. Within two weeks of the decision, an undertaking can appeal the decision to the Court of Consumer and Competition Protection. If so, the President of the Office must send on the decision and records of the proceeding to the court. However, if the President judges the appeal to be well founded he may reverse or change the decision without remitting records to the court (Art. 81 in the Act). The court can approve the President's decision or overrule it (fully or in part) if the substantive or procedural course of action has any shortcomings. The appeal process is usually lasting for about 2 years. A second appeal is possible to the Appeal Court and the cassation complaint may be brought to the Supreme Court (OCCP 2008 p. 22).

6 Implementation of concentration control

6.1. Case law in the Viségrad⁶ countries and EU

When looking at the decisions taken by the competition authorities in the Viségrad countries during 2006, it is evident that the distribution of decisions in Poland is similar to that of Hungary and Czech Republic (see Table 4). Again, it is clear that the OCCP has more competition cases than the GVH (Hungary) and the ÚOHS (Czech Republic) and this is probably why it is the only competition authority that has a negative decision. On the other hand are the numbers of conditional clearances higher in Hungary and Czech Republic (and much higher in proportion to total decisions).

Table 4: Merger decisions taken by CEEC competition offices and in DG Comp, 2006

Country	Decisions	Clearance	Conditional Clearance	Prohibitions
Poland	310	215	1	1
Hungary	43*	40	3	0
Czech Rep.	61	-	3	0
DG Comp	10	4	6	0

Note: *This number is much lower than in 2005 as the notification thresholds were raised from 10 to 15 million HUF in a new competition act. In 2005, the GVH had 70 cases, 1 conditional clearance and no prohibitions.

Source: OCCP, GVH and ÚOHS annual reports for 2006, <http://ec.europa.eu/>

The comparison with the decisions of the DG Comp is the most interesting since Poland has harmonized its competition legislation with that of EU in order to achieve the pre-requisites for accession. In 2006 did only 13 cases go through a PHASE II investigation (similar to the anti-monopoly proceedings exercised by the OCCP) by the DG Comp and three of them were withdrawn. The majority of investigations

⁶ The Viségrad group includes the Slovak Republic as well; however, since the merger activity is much lower there, it will not be included in the analysis.

resulted in a conditional clearance and no prohibitions were made. Until October 2003, the Commission only decided on 18 prohibitions in total, however, in 21 cases were the notifications withdrawn by undertakings during the PHASE II investigation (i.e. transaction cancelled), and it is reasonable to think that some of these cases would have been prohibited (<http://ec.europa.eu>).

6.2. Polish case law

Despite the fact that the competition law in Poland allows some industrial policy to be carried out through efficiency gains, the question is how (and how often) these arguments are used in the OCCP assessments of concentrations. During the last seven years has a greater part of the investigations resulted in clearances and only very few in prohibitions (see Table 5).

Table 5: Decisions taken by the OCCP 2000-2007

Year	Decisions	Clearances	Conditional clearances	Prohibitions
2000	1107	911	0	0
2001	542	-	-	0
2002	169	168	1	0
2003	152	149	2	0
2004	256	175	1	1
2005	276	-	2	0
2006	310	215	1	1
2007	263	205	2	0

Note: The large difference between the cases decisions taken and the number of opinions published is due to the fact that some decisions were not completed or were subject to other rulings (such as fines).

Source: OCCP Report on activities (2004-2008), OECD Annual Report on Competition Policy in Poland 2000-2003, Cylwik et al. p.84

Further, no noticeable change over time can be seen in Poland, which can cause presumptions about a lax merger control (possibly in favour of industry politics). However the decisions have to be put in perspective of the design of the legislation

and the institutions. The OCCP has continuously modernized the competition law to meet the requirements of the changing economy and to focus on the most important transactions. In 2000, the year of the adoption of the Act of Competition and Consumer Protection (and large changes in notification thresholds), the OCCP took as much as 1107 decisions concerning mergers. In following year, the number of decisions had decreased with more than 50% (Cylwik et al. 2005 p.84). This decrease implies that more resources are spent on cases that are relevant, giving the investigations a higher quality and more accurate decisions. In addition, the OCCP has had a large increase in both funds and employment at the office between 1999 and 2007 (see Table 6).

Table 6: OCCP budget and employment 2000-2007

Year	Annual budget (in million PLN)	Employment
1999	14,7	190
2000	17,8	219
2001	21,2	220
2002	22,3	237
2003	26,6	274
2004	21,1	259
2005	25,4	273
2006	25,6	282
2007	26,6	285

Source:: OECD Annual Reports on Competition Policy and Developments, 1999-2004, OCCP Report on activities 2004-2008

Another reason for the low number of violations can be the methods used to determine the relevant market and whether a concentration creates a dominant position. For example, if the relevant geographical market is widened to include regions of neighbouring countries, then the total market share of the merging parties will be lower and competition less negatively affected. The OCCP has also taken import substitution into consideration in the past when establishing relevant market and evaluating the market power. One example is the acquisition of *Polam-Pabiance SA* by *Philips Lighting*

Holding where the OCCP determined that the analysis should include not only the domestic market but also the European market. The merger would result in a dominant position with the entity reaching an 80% market share in Poland. However, the OCCP noted that import accounted for 10% and that import tariffs were low. This resulted in a clearance of the concentration, as the concentration would bring other gains to the Polish economy (Mavroidis and Neven 2000 pp.12-13).

6.2.1. Treatment of efficiency gains

Poland has had a wave of “economic nationalism” that is linked to the new government that was elected in 2005. Industrial policy and national motives has been pursued in at least one case during the last few years. The *UniCredito/HVB* case created a controversy as it involved the EU and several member countries. This takeover of the German bank HVB made by the Italian bank UniCredito would lead to a merger between the second biggest bank, Pekao (owned by UniCredito) and the third biggest bank BPH (under the control of HVB) in the Polish market. The transaction would result in the biggest bank in Poland, taking the lead from the state-owned PKO BP. Since the merger had a community wide dimension, the European Commission handled the case. It was cleared by both EU’s competition commissioner, Neelie Kroes, who found that the post-merger market in Poland would be competitive enough. The OCCP came to the same conclusion in their analysis. Regardless of that, the Polish government blocked the deal because it would decrease competition, and cause a job loss of approximately 9% in the merged banks. Moreover, it is likely that the newly appointed nationalist government was resentful because Poland’s biggest bank would be run from UniCredito headquarters in Austria (The Economist 2006). With a government that is so determined to pursue industrial policy, it is easy to come to the conclusion that this will be reflected in the OCCP treatment of efficiency gains. Conversely, it seems as efficiency gain arguments are appropriately used by the OCCP. In 2006-2007 there were three cases where the efficiency clause was used. All three of these cases concerned

concentrations in the energy sector, and is an example of how the OCCP reason around efficiency gains.⁷

All cases had similar factors that were decisive for implementation of the efficiency gains' clause. The President of the OCCP pointed on positive changes in the national power policy following the merger: *"In regard of anticipated growing demand for power and obsolete infrastructure, huge investments in power branch are needed. That could be obtained only if the bigger subjects (undertaking) consolidated and with good financial condition will ensure financial agenda in order to modernize and rebuild new power plants and whole power supply infrastructure that will be able to generate and deliver bigger capacity. The other important factor existing in Polish power branch is that power generation in Poland is mainly based on coal and brown coal"*⁸ (Wiktor Kwiecie 2008)

More specifically, these gains were:

- 1) "Creation of a capital group that comprises power stations, power plants and power suppliers together, who would be able to rebuild and revamp the obsolete and neglected national power system and would bring benefits to this branch" (Wiktor Kwiecie 2008).
- 2) Economies of scale that brings about larger capability of the power generation and supply.
- 3) Development of a supply system that makes it possible to supply energy not only to Poland but also to other countries.
- 4) Creation (and coordination of) complete energy systems that are important in case of energy supply crisis or problems with local undertakings.
- 5) Investments in power generation and power supply branches
- 6) "Better financial capability after merger" (Wiktor Kwiecie 2008).

⁷ These cases are Decision No DOK 163/06 , Decision No DOK 29/07 and Decision No DKK 32/07.

⁸ Noteworthy is the fact that more than 80% of the energy produced generated from coal, mainly because of a powerful coal lobby. With the accession to the EU, Poland has promised to produce at least 10% of its energy from renewable resources by 2010 and if this goal is not met, companies will be forced to buy green energy from abroad (www.concurrences.com). Further, the decision is consistent with the National Agenda for Electric Power which takes on elimination of governmental and administrative barriers to facilitate investments in the Polish power branch (Wiktor Kwiecie 2008).

For the above-mentioned reasons, the concentration was regarded positive for the industry in a long-term perspective, not only because of the advantages it will bring to the national economy, but also the benefits to households that will encounter better power price policy (Wiktor Kwiecie 2008).

According to the Williamson model, the efficiency gains resulting from an M&A must be compared to the effect of increased market power (and prices). If a competition authority wanted to create a “national champion”, it would clear mergers that limit competition by referring to other policy interests or gains that are not specifically result from the transaction. However, the OCCP appear to have made a proper assessment of the efficiency gains that is compatible with this economic theory. The types of efficiencies included in the arguments are improved quality and service, cost savings from economies of scale and economies of scope, as well as dynamic efficiencies such as technological process. In addition, the arguments that refer to the restructuring of the energy sector are reasonable since a well functioning energy infrastructure is vital in a modern society. These gains are likely to benefit the consumers in a long-term perspective although competition is limited in the short run. The decisions are free from referrals to administrative gains and industry motives (such as unemployment). Further, it can be argued that the efficiency arguments in an anti-competitive merger should only be accepted when the efficiencies cannot be realized through other means; however it is a difficult task for the OCCP to determine what the alternative could be in this case.

6.3. Institutional efficiency

An undertaking that fails to follow the rules concerning notifications or go through with the merger before a clearance or use behaviour that contravenes consumer interests violates the law. Consequently, a breach of it is expected to be punished and the term “institutional efficiency” refers to the ability of OCCP to enforce penalties for these firms. As no lucid statistics are available on divestitures, the focus will be on the financial penalties. Table 7 shows the amount of fines levied and collected by the OCCP in the last few years. The amounts of fines levied have varied greatly over

time, which can be due to differing amounts of notifications and size of transactions.

It is evident that a great weakness of the competition policy enforcement is the inadequate penal system. The amount of fines that punished undertakings have paid is low in comparison to the amount imposed. Although there has been more than a sevenfold increase of fines collected between 2005 and 2007, the difference was as much as 156 million PLN in 2007.

Table 7: Total amount of fines levied and collected by the OCCP in 2004-2007

Year	Amount of fines levied	Amount of fines collected
2004	174,2	2,1
2005	38,0	2,0
2006	339,0	10,2
2007	170,8	14,8

Note: The numbers are expressed in million PLN

Source: OCCP Report on activities 2004-2007

Table 8 illustrates the fine collection efficiency in 2007. Only a small amount of the fines were obtained within the required time frame, and the rest are fines that should have been paid during previous years.

Table 8: Fine collection efficiency in 2007

Fines levied	Fines collected	No lag	1-year lag	2-year lag	>2-year lag
170,8	14,8	0,395	7,65	2,25	5,694

Note: The numbers are expressed in million PLN

Source: OCCP 2008 p. 8

The reason for the low fine collection efficiencies can probably be ascribed to the legal system. According to the Doing Business Report 2009, the estimated time for a lawsuit procedure is 830 days from the filing of the suit to payment is received. This is one of the biggest challenges for enterprises in Poland. The approximate time of a legal process in the appeal courts is 2 years and the long appeal process allows the offenders to put off the payments although obvious violations has occurred. Consequently, the firms that actually pay the fees are smaller firms and first-time

offenders who do not have the funds to take the case to the appeal court. The larger firms that can afford to start an appeal process are benefited from this. These large companies also have the largest fees, which explain why the difference between fines levied and collected is so large. The purpose of a fine is to reverse the profit that the enterprise gained from the offence and to hinder future violations. The low amount of fines collected above is a sign of poor implementation (Dorabialski 2008). Another reason for the low levels of fine collection can possibly be ascribed to a disrespect for courts that lingers from the days of central planning.

It is conceivable that the inefficiency in collecting fines is related to the appeal system; however, the statistics above cover not only M&A but all types of anti-competitive behaviour. Table 9 below segment the appeals made in 2007 in different categories.

Table 9: Court decisions on antitrust matters during 2007

	Court of Competition and Consumer Protection	Court of Appeals	Supreme Court
Total no. of rulings in antitrust cases of which on:	95	37	6
-vertical agreements	1	1	0
-horizontal agreements	19	4	1
-abuse of dominant position	69	32	5
-concentrations	6	0	0

Source: OCCP 2008 p. 22

In reality, only very few of the appeals to the Court of Competition and Consumer Protection are cases on the subject of concentrations, and none of these continued to the Court of Appeals or the Supreme Court. This is only 2% of the cases investigated that year. In 2006, there were no cases what so ever in the appeal process that referred to concentrations, hence it is a signal of some accuracy of the OCCP

decisions concerning concentrations.

7. Conclusion

The first aim of this thesis was to analyze whether the design of the competition policy in Poland corresponded to its special needs as a transition economy. The study showed that the aim of the policy was somewhat misguided in both the national and supranational level. First, the Polish competition authority, the AMO, should have included some explicit goals on protecting consumer interests in the legislation at an initial stage, considering that consumers were previously totally disregarded in the planned economy. Second, the competition policy goal of the EU (to create a balance within industries in the whole EU) did not fully correspond to the transition economies' need of a system that would deal with the distortion in allocation across domestic industries. Even though it came with some difficulties, the benefits of not having to develop and perfect the legal framework for competition policy are predominant. The possibility to use the EU case law and expertise in institution-building has most likely enabled Poland to introduce competition policy in a much faster pace in comparison to the time and effort that would have been required to develop it independently. In addition, the important task of restructuring and creating a balance between industries are also carried out with other policy instruments, such as the privatization plan of the Ministry of Treasury, policy aimed at attracting FDI and development of the credit market. The alternative, to not include competition in the accession agreements, might have aggravated the membership if Poland failed to follow a compliance of the law.

Further, the institutional set-up had to give citizens confidence in and abide the rules of the law. The position of the AMO as an independent competition authority gave more credibility to decisions and the appeal system, including all three institutions of legal suits, makes the president and officers answerable for the decisions. However, justice delayed is justice denied. The implementation has to be improved to avoid (or at least limit) financial penalties' evasion. In addition, the injured party should have the right to have a speedy trial. The consequences of this shortcoming are serious for a juridical system that earlier earned no respect from its citizens.

The second aim of the thesis was to analyze whether there is a trade-off between industry policy and competition policy in the implementation of Polish merger control. The result shows that there in comparison with Hungary, the Czech Republic and the DG Comp, the Polish competition office shows no bias for clearing M&A. Further, signs of this trade-off would be shown as weak arguments in favour of efficiency gains in the decisions. The danger with this type of behaviour is that it would jeopardize the competitiveness of markets domestically, but also within the EU in a more indirect way. It could spur other member states to use the same type of lax competition policy, and that could be detrimental to the EU as a whole. However, it seems as Poland have evaded that difficulty in general. It is easy to assume that the nationalistic stance of policy in the new government would affect the decisions of the OCCP and it is clear that the government had clear industry objectives in the controversial UniCredito/HVB case. Nevertheless, the OCCP clearance of it can be seen as a confirmation of the office's independence. In the cases of the Polish energy sector, the OCCP appear to have made a proper analysis that is compatible with economic theory and is free from referrals to any administrative gains or industry motives. The efficiencies also need to be compared to the anti-competitive effects. Given the information available, it is difficult to evaluate to what extent the competition in the relevant markets was limited, and additional information from the OCCP on state-ownership, market shares and price increases would have enabled a more balanced analysis.

In this study, the findings concerning the conflict between industry policy and competition policy in implementation does only involve merger control. An area for future studies could be to examine if this exists in other areas of competition policy, for example state aid. Further, the UniCredito/HVB case mentioned earlier represents a conflict between the decisions of individual member states and the European Commission. Consequently, another area for future studies could be to assess whether there has been any significant conflict in the allocation of jurisdiction in merger control between the CEEC and the EU. This would enable a discussion on how implementation of international antitrust should be organized.

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