

## **COMPETITION POLICY IN THE POLISH AGRI-FOOD MARKETS**

Paweł Ważniewski

Warsaw University of Life Sciences

**Abstract.** The paper presents the theoretical basis and practice of competition policy implemented in the field of organization and functioning of the Polish agri-food markets. The national governments create competition policy based on the assumptions of economic theory for the effective economy and consumer welfare. As it can be observed in many agri-food markets in Poland, the role of competition policy is limited. Firstly, it is so because of the low level of market concentration, which limits the potential for intervention. In the years 2004–2010 the President of UOKiK (Polish Competition Authority) conducted 11 proceedings regarding infringement of competition law in this sector. Besides only a few of the 137 merger control decisions resulted in merger prohibition or a conditional consent. Secondly, under the rules of the Common Agricultural Policy, markets of farm products are not regulated by competition law in the same way as other sectors of the economy. A likely increase the importance of competition policy in this sector can result from its progressive consolidation and a reform of the Common Agricultural Policy.

**Key words:** competition, CAP, food markets, concentration, antitrust, state policy, mergers and acquisitions

### **INTRODUCTION**

Competition policy is an element of economic policy. Competition policy in Poland is defined in a government document whose purpose is to indicate the most important issues concerning the development of competition in the national economy in the coming years [Competition Policy for 2011–2013]. Competition on national markets should be seen as one of the achievements of the political and economic transformation in Poland and an immanent aspect of the national economy. In case of the application of competition policy in relation to agri-food markets, the impact of this policy at the both national and

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Corresponding author – Adres do korespondencji: Paweł Ważniewski, Szkoła Główna Gospodarstwa Wiejskiego w Warszawie, Wydział Nauk Ekonomicznych, Katedra Ekonomiki Rolnictwa i Międzynarodowych Stosunków Gospodarczych, ul. Nowoursynowska 166, 02-787 Warszawa, [pawel.wazniewski@gmail.com](mailto:pawel.wazniewski@gmail.com).

European level is quite limited due to the rules of the Common Agricultural Policy (CAP) – especially in case of farm product markets.

Competition protection in the Polish food economy is also not often addressed in the Polish economic literature. Only two books – monographs on this subject were created so far in Poland, both in the 90s XXth century, before the Polish accession to the European Union [Czechowicz, Ziętara 1995; Adamowicz, Król 1998].

Those days particular interest in this subject resulted from the fact of initiation and development of legal and institutional basis for implementation of competition policy in Poland in the early 90. Besides it was a period of adjusting the Polish legal system to the requirements of membership in the European Union and therefore both the rules relating to agricultural policy and competition policy were analysed, including the relationships between them. No doubt the question becomes important again in the context of CAP reform and the discussion e.g. within the High Level Forum for a better functioning of the food supply chain.

The analysis covers the period 2004–2010, although it also refers to earlier publications as well as regulatory changes announced in the sector. The aim of the paper is to identify an actual and potential impact of competition policy on the Polish agri-food markets.

## **LEGAL AND INSTITUTIONAL FORMS OF COMPETITION PROTECTION IN POLAND AND THEIR JUSTIFICATION**

Competition policy largely refers to the goals set for the President of the Office of Competition and Consumer Protection (Polish Competition Authority – PCA, President of UOKiK). The mission of the Office of Competition and Consumer Protection (UOKiK) is to improve consumer welfare by protecting and creating conditions for functioning of competition. The President of UOKiK is the central organ of government administration. Under the powers conferred on it by the Act on competition and consumer protection, the President is responsible for market surveillance and competition as well as protects the collective consumer interests.

According to the Polish Act of 16 February 2007 on competition and consumer protection (Journal of Laws No. 50, pos. 331 with amendments), competition protection can be divided into three main areas of activity of the PCA: countering the competition-restricting agreements (such as price collusion), countering the abuse of dominant position and merger control. The activity of the authority may lead to an order to cease the violations and impose fines up to 10 percent of revenue earned in the year preceding the decision. President of UOKiK (initially as President of the Antimonopoly Office) also played an important role in the process of modernization and marketization of the Polish economy even through the work of the government team preparing sectors' restructuring and privatization programs for instance in the sugar industry [Banasiński 2005].

An article 6 of the Act on competition and consumers protection ban agreements whose objective or effect is the elimination, restriction or some other distortion of market competition, including in particular: direct or indirect fixing of prices (price collu-

sion) and other conditions of purchase or sale of goods, limiting or controlling production or sales and technical progress or investment, dividing sale or purchase markets, applying onerous or dissimilar terms and conditions in equivalent contracts with third parties, differentiating competition conditions for these parties, restricting the access to the market or eliminating enterprises which are not party to the agreement from the market, fixing terms and conditions of bids between tender participants or between the participants and the organizer of the tender, particularly in respect to the range of work to be done or prices (bid rigging), etc.

In turn, in accordance with Article 9 of this Act, it is prohibited to abuse dominant position in the relevant market by an enterprise, or a group of undertakings, which effectively restricts its contractors' and competitors' independence, and forces them to accept less favourable cooperation terms than those applied when competition had not been distorted. The Act assumes that an enterprise has a dominant position if its market share exceeds 40%. The Act on competition and consumer protection contains a list of practices consisting in abuses of a dominant position i.e.: direct or indirect imposing of unfair prices, including excessively high or grossly low, distant payment, deadlines or other terms of purchase or sale of goods, limiting production, sales or technical progress with prejudice to contractors and competitors, applying onerous or dissimilar conditions to equivalent transactions with third parties, differentiating competition conditions for these parties, making the conclusion of contracts conditional upon acceptance or providing by the other party other benefit (which has no factual or contractual relation with the subject matter of the contract), preventing the shaping of conditions necessary for the establishment or development of competition, providing the undertaking with unjustifiable profits, dividing the market by territory, products or entities, etc.

Article 13 of the Act on competition and consumer protection, determines turnover thresholds above which participants of a planned merger are under the obligation to obtain prior consent from the President of UOKiK. More specifically, this is the case of enterprises whose aggregate turnover in the year preceding the application exceeded EUR 1 billion in the world and EUR 50 million in Poland. Merger control aims to counter the business consolidation, as a result of which competition would be significantly restricted, in particular by creating or strengthening a dominant position in the market. In the result the merger control proceedings of the President of UOKiK may end with the following type of decisions: consent, conditional consent, special consent, prohibition.

Some element of competition policy is also state aid rules. The tasks in this field have also been described in the Competition Policy for 2011–2013. However it is a problem in some respects distinct, with a European dimension, therefore it will not be discussed in detail [Milewska 2009].

Extremely important in the process of regulatory and structural approach to competition is the economization of these processes by the competition authorities [Banasiński 2005]. Competition can be defined as a process during which two or more parties (pursuing its own interests) acting independently to secure the business of a third party (e.g. consumer) by offering the most favourable terms, reporting differing price, quality and other conditions affecting the conclusion of the transaction. At present, in Poland, the main objective of the competition protection is the benefits to consumers [Competition

policy for 2010–2013]. Companies, in general but especially in consolidated industries, are the stronger parties, whereas consumers are the scattered and weaker party in the market, hence the need of their protection.

One can take into consideration two aspects of competition: static and dynamic one [Gorynia 2004]. The static aspect of competition manifests itself in the structure of market in the industry (size and share of markets parties), while the dynamic one refers to behaviours of individual firms, then the sequence of these behaviours, which make up the process of competition. The differences between the market structures of the different levels of concentration were theoretically described by the characteristics of four market models: perfect competition, oligopoly, monopoly and monopolistic competition [Milewski 2003]. The high concentration level (oligopoly, monopoly) results with a threat of restriction of competition in the market, e.g. through abusing of a monopolistic position, which may lead to a reduction in consumer welfare [Sufrin, Jones 2004]. The particular importance of the market structure for competition is emphasized by the representatives of the Harvard School [Jurczyk 2007]. Economists of this school conducted a study on the relationship between structure, behaviour and market outcomes.

#### **ACTIVITY OF THE PRESIDENT OF THE OFFICE OF COMPETITION AND CONSUMER PROTECTION IN THE AGRI-FOOD SECTOR**

The above tasks of the President of UOKiK (PCA), in accordance to the Act, largely determine the scope of intervention of the PCA in markets related to the production and sale of food, especially the relationship between producers and sellers of food. In practice, the PCA rarely reveals and prohibits unlawful acts like collusion or abuse of dominant position in the Polish food sector. Taking into account a period of 2004–2010, the PCA conducted a total of 11 proceedings, which can be classified as relating to the sector. In most cases they relate to abuse of dominant position, less likely to vertical agreements (between the trading partners at various food chain levels). In particular, those cases concerned the following relevant markets: buying sugar beet and sugar production, the production of yeast, the buying rapeseed and oil production, provision of commercial area on the wholesale marketplaces, etc.

Sometimes the market participants concerned about the possibility of occurrence of the business conduct incompatible with competition law alerted the PCA. However, the authority often excludes the possibility of his intervention due to certain conditions. An example of this is the decision of the PCA No. 24/2007, dated 20<sup>th</sup> April 2007, by which he refused to institute antimonopoly proceedings at the request of the *Wielkopolska Agricultural Chamber* in Poznan against entities designated by the chamber dealing with buying pork. In support of the decision, the PCA stated that the circumstances do not permit the conclusion that pork prices are the result of collusions and are merely a reaction to specific competitive environment and the situation in the relevant market, taking into account the fact that the market is characterized by relatively high fragmentation subjective.

Relatively small (compared to the general office activities in other sectors of the economy) the number of decisions may result from the relatively low level of concentration

in most agri-food markets [Ważniewski 2010]. However, it should be mentioned that in the recent years the growth of concentration took place in many industries such as food processing due to mergers and acquisitions with participation of foreign investors. During this period, the authority issued a total of 137 decisions on merger in this sector. On the one hand this is a fairly large number, indicating a further concentration in the industry. On the other it is only a part of all decisions (for example, in 2010, there were was 188 merger decisions and those relating to the food sector – only 11). The following diagram gives information about the number of merger decisions in each year.

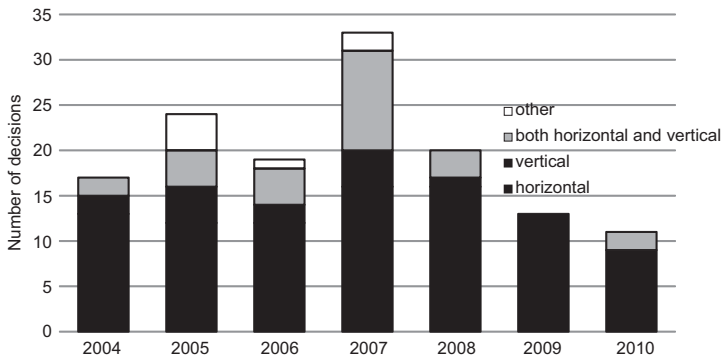


Fig. 1. Merger decisions of the Polish Competition Authority in the food sector in particular years 2004–2010 by type of merger

Rys. 1. Decyzje dotyczące koncentracji wydane przez Prezesa UOKiK w sektorze spożywczym w poszczególnych latach 2004–2010 według rodzaju połączenia

Source: Own calculations based on the Polish Competition Authority Decision Data Base, [www.uokik.gov.pl](http://www.uokik.gov.pl)

Źródło: Opracowanie własne na podstawie bazy decyzji Prezesa UOKiK, [www.uokik.gov.pl](http://www.uokik.gov.pl)

As it can be seen from the diagram in the years 2004–2010 the merger process was intensified in 2007. It was a year of high economic growth in both Poland and abroad, before the economic crisis. The acceleration of the consolidation processes can be observed also in 2005, probably due to Polish accession into the European Union. In the years after 2007, we can observe a decline in the number of mergers decisions which resulted from the new Act on the competition and consumer protection (in place of the Act of 2000). The previous threshold of combined worldwide turnover of merger participants in the financial year proceeding the year of notification, i.e. the equivalent of 50 million euro, was replaced by the two new thresholds, as described above. Raising the thresholds resulted in a decrease in the number of merger cases examined by the competition authority. This way, notifications concerning small mergers of no significant impact on the market were eliminated, which allowed the authority to focus on the assessment of transactions relevant to the economy [Szymczak 2010].

It should be noted that the vast majority of these mergers were horizontal (between market participants at the same level of food chain). This indicates that probably one of the main objectives of the merger is to increase the share in the relevant market. There was relatively small number of decisions on merger in a vertical arrangement. This may indicate that the more important for entrepreneurs in this sector is enlarge his importance

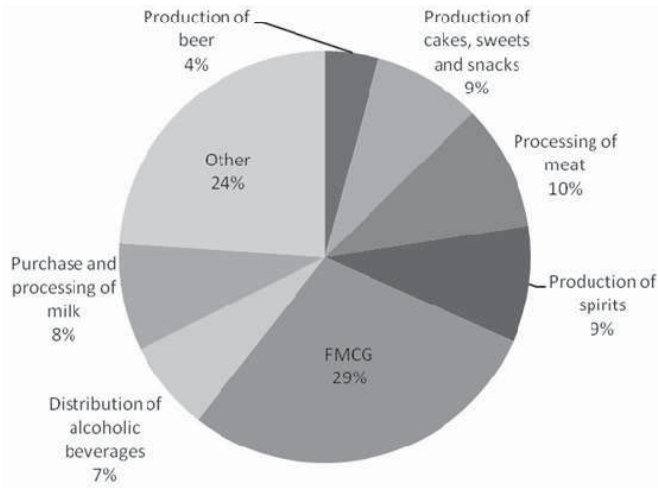


Fig. 2. Merger decisions of the Polish Competition Authority in the food industry in the years 2004–2010 according to the markets concerned

Rys. 2. Decyzje dotyczące koncentracji wydane przez Prezesa UOKiK w sektorze spożywczym w latach 2004–2010 według rynków

Source: Own calculations based on the Polish Competition Authority Decision Data Base, [www.uokik.gov.pl](http://www.uokik.gov.pl)

Źródło: Opracowanie własne na podstawie bazy decyzji Prezesa UOKiK, [www.uokik.gov.pl](http://www.uokik.gov.pl)

in the market to competitors at a certain level of food chain than building links in the supply chain.

It is also interesting which markets were affected by the decisions of the PCA. After all, within the food economy there is a broad spectrum of them. The shares of the most frequently consolidating agri-food markets are showed on the pie chart below.

From the diagram 2 it can be deduced that mergers were often related to trading of fast moving consumer goods (FMCG, which are mainly food products), including the merger and acquisition of chains of wholesale or retail trade, as well as production and marketing of alcoholic beverages. In these industries merger prohibition also occurred in this period (e.g. a ban on the acquisition in the spirits industry) and retail (conditional consent for merger of the retail chains by the order to dispose of the stores in selected local markets). These almost all 137 cases, however, actually were connected with the food processing and or trading markets, (so at a higher level of the food chain). Only in one merger case, the both parties were agricultural producers.

## COMPETITION POLICY IN THE CONTEXT OF THE COMMON AGRICULTURAL POLICY REFORM

The basis conducted by the European Union (EU) competition policy are the provisions of Articles 101 (for anti-competitive agreements), 102 (abuse of dominant position) and 103 (state aid) of the Treaty on the Functioning of the European Union and relevant legislation, including directives and regulations.

Agricultural policy is the only EU policy in relation to the competition rules apply in very limited range [Brodecki 2004]. This is connected with the particular nature of agricultural activity, resulting from the social structure of agriculture and from structural and natural disparities between the various agricultural regions. According to Article 42 of the Treaty on the Functioning of the European Union (ex Article 36 TEC) the provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

Special provisions and procedures of application competition rules in agriculture are contained, inter alia, in Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products and Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation).

According to Council Regulation (EC) No 1234/2007, the rules on competition relating to the agreements, decisions and practices referred to in Article 101 (ex Article 81 of the TCE) and to the abuse of dominant positions should be applied to the production of, and trade in, agricultural products, in so far as their application does not impede the functioning of national organisations of agricultural markets or jeopardise the attainment of the objectives of the CAP. A special approach is warranted in the case of farmers' organisations the particular objective of which is the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition or jeopardises the attainment of the objectives of Article 39 (ex Article 33 of the TCE). In order both to avoid compromising the development of a CAP and to ensure legal certainty and non-discriminatory treatment of the undertakings concerned, the Commission should have the sole power, subject to review by the Court of Justice, to determine whether agreements, decisions and practices referred to in Article 101 (ex Article 81 of the TCE) of the Treaty are compatible with the objectives of the CAP.

The issue of reform of the Common Agricultural Policy, is at the time often elaborated in the economic papers. From the perspective of this study the competition aspects of the reforms should be analysed. The proposed changes support market mechanisms in agricultural markets and reducing regulation and intervention [Czyżewski, Stępień 2011]. The EU's agricultural policy initially focused on increasing productivity and structural problems in agricultural production. According to the past and planned reform, it is important to reconcile the welfare of consumers, agricultural income and the appropriate use of rural space as a public good [Forum Inicjatyw Rozwojowych 2010]. Economic efficiency is not the sole criterion for evaluation of the EU budget expenditure on agricultural policy due to the peculiarities of the land agent and the role that rural areas in serving the public [Czyżewski, Stępień 2011].

Another view on this issue is represented by the competition policy. The main objectives are to maximize economic efficiency and consumer welfare. The concept of competition policy is not to be preferable for certain professional groups as it is in the case of agricultural policy. Introduction of market mechanisms in agriculture on a larger scale is consistent with the objectives of competition policy. The adjacency of market interven-



tion is likely to lead to lower food prices in the internal market for consumers. This will reduce the farmers' income. However, more broadly, it will reduce the amount of taxes paid by taxpayers. This will also enable an increase of international competition and thus improve the efficiency and lower prices for consumers [Czyżewski, Stępień 2011].

On the other hand, taking into account the nature of the food sector, certain exemptions from the principles of competition law are proposed. Therefore, EU is to promote cooperation between market participants by collective negotiations and arrangements of the so-called producer organizations ("POs") and inter-branch organisations ("IPOs" – between farmers and processors) to strengthen the bargaining power of the smaller entities [European Commission Proposal for Single CMO Regulation]. Meanwhile, the European Commission as a European competition authority (through one of its Directorate – DG Competition) also participates in the formation of the new provisions on the Common Agricultural Policy. Furthermore, it is very likely that in the result both European and national competition authorities will have new powers and regulatory obligations to general food economy.

The above proposals are to be introduced e.g. in the milk industry [The Commission Proposal on Contractual Relations in the milk sector 2010]. These solutions are designed to increase the bargaining power of farmers by enabling pricing agreements (according to certain rules harmonised with competition law) e.g. within producer organisations. Unlike producer organisations which only include farmers, inter-branch organisations cover part or all of the supply chain: farmers, processors, distributors and retailers. They can potentially play useful roles in research, improvement of quality, promotion and spreading of the best practice in production and processing methods. They exist in a few Member States (e.g. milk cooperatives in Poland are some kind of IPOs) today and carry out these roles whilst respecting EU law. Furthermore, in sectors such as fruit and vegetables, specific EU rules provide for such actions, subject to limits, and often Commission scrutiny. It is proposed to apply the rules on the objectives of IPOs in the fruit and vegetables sector to the dairy sector, with appropriate adaptations, so that hardcore restraints of competition (including price fixing and market partitioning) remain excluded and the agreements concerned are submitted to Commission approval.

## SUMMARY

Summarizing the outcome of this analysis, competition policy's role in the functioning of the Polish agri-food market is currently quite limited. This may result from the nature of competition policy, which is applied in particular to the highly concentrated markets. The other reason is CAP legal provisions, according to article 42 of the Treaty on the Functioning of the European Union, which exhibits detail rules of competition law in agriculture, so they are obligatory according to "*lex specialis derogat legi generali*" rule.

Competition policy largely refers to the goals set for the President of the Office of Competition and Consumer Protection whose mission is to improve consumer welfare by protecting and creating conditions for functioning of competition. According to the Act on competition and consumer protection, competition protection can be divided into three main areas of activity of the PCA: countering the competition-restricting agreements



(such as price collusion), countering the abuse of dominant position and merger control. These tasks of the President of UOKiK largely determine the scope of intervention of the PCA in markets related to the production and sale of food, especially the relationship between producers and sellers of food.

The intervention of the President of UOKiK is limited by the certain rules. For example the Act assumes that an enterprise has a dominant position if its market share exceeds 40%. There are only a few food industries which are supposed to have such market structure as e.g. an oil industry. Most industries do not reach a high concentration ratio (which can indicate that a high concentration of market share is held by the largest). Consolidation processes, however, can lead to an increase in the importance of legal protection of competition. This is indicated e.g. by the recent conditional consents for merger in retail chain.

Furthermore, perhaps after 2013, due to changes in the Common Agricultural Policy, European and national competition authorities, including Polish, gain new powers and responsibilities for the supervision of the functioning of the agri-food markets. Nevertheless, specific activities of these bodies can take place only in cases provided by competition law. So it devotes to satisfy certain conditions learned from economic analysis of impact of the form of e.g. food producer organization and of their specific behaviours. The final aim of competition authority is to increase consumer welfare (not the certain professional group e.g. farmers) and this should result with the national welfare growth.

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## POLITYKA KONKURENCJI NA RYNKACH ROLNO-ŻYWNOŚCIOWYCH W POLSCE

**Streszczenie.** W artykule zaprezentowano podstawy teoretyczne i praktyczny wyraz polityki konkurencji realizowanej w warunkach organizacji i funkcjonowania polskich rynków rolno-spożywczych. Podstawą prowadzenia przez rządy krajowe polityki konkurencji są założenia teorii ekonomii dotyczące ekonomicznej efektywności i dobrobytu konsumentów. Jak zostało wykazane, na wielu rynkach rolno-spożywczych w Polsce rola polityki konkurencji jest ograniczona. Po pierwsze jest tak ze względu na niski poziom koncentracji rynków. W latach 2004–2010 Prezes Urzędu Ochrony Konkurencji i Konsumentów (polski organ ochrony konkurencji) prowadził 11 postępowań z zakresu naruszenia prawa konkurencji w tym sektorze. Ponadto tylko nieliczne spośród 137 decyzji dotyczących koncentracji zakończyły zakazem koncentracji lub zgodą warunkową. Po drugie wynika to z zasad Wspólnej Polityki Rolnej. Prawdopodobny wzrost znaczenia polityki konkurencji w tym sektorze może przynieść postępująca jego konsolidacja, a także reforma Wspólnej Polityki Rolnej.

**Słowa kluczowe:** konkurencja, Wspólna Polityka Rolna, rynki rolno-spożywcze, koncentracja, ochrona konkurencji, polityka państwa, fuzje i przejęcia