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Harmonising Polish Antimonopoly Law with EC Competition Rules[**]

1. Introduction

Between 1989 and 1990, Poland carried out fundamental change in its political (from a totalitarian state to a democratic state governed by rule of law) and economic (from a centrally-planned economy to a market-oriented economy) systems. „Freedom of enterpreneurship" and „guarantee of ownership" became fundamental principles of enterprise-state relations.[1] Competition, as the catalyst for determining production and for compelling enterprises to act in the most efficient way, became the ruling principle of economic activity. Finally, competition (including demonopolisation) policy, together with restructuring, privatisation, and trade liberalisation policies, became one of the most important parts of economic policy in the system transformation.[2]

Having recognised this, legislation promoting free competition was enacted as early as the beginning of the 90's in Poland,[3] enforcement agencies

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[1] See: e.g. Articles 1, 6, 7 of the Polish Constitution of 29 December, 1989.

[2] See: *Competition Law and Policy in Poland (1990-1993)*, Antimonopoly Office, Warsaw, January 1994, p.1.

[3] The Act of 24 February, 1990 on Counteracting Monopolistic Practices, (*„Dziennik Ustaw"*, no.14, item 89). It was amended several times afterward; compare: T.Skoczny, *Prawo konkurencji (Competition Law)*, C.H.Beck, Warsaw 1995, p.XXI. The final, important change in the law was made through the Act of 3 February, 1995 in Amendment of the Act of 24 February, 1990 on Counteracting Monopolistic Practices (*„Dziennik Ustaw"*, no.41 1995, item 208). The uniformed

were created,[4] and a special governmental programme promoting the development of competition was implemented.[5]

At the same time, success in regional integration became the essential aim of Polish policy. This attempt soon culminated in the Europe Agreement establishing an association between Poland and the European Communities and their Member States,[6] as well as the Free Trade Agreement between Poland and the EFTA countries.[7] Central European Free Trade Agreement (CEFTA) was also concluded.[8] All of the agreements contained competition rules regulating trade between the contracting parties, reflecting the competition rules of the European Communities.[9]

There is no doubt that Poland has, from the start, sought the European Union membership.[10] It was already ascertained in the Preamble to the Europe Agreement: „Recognizing the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective". For this reason among others, the Parts

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text, still current, of the Law which is further known as the Competition Act, was published in the *„Dziennik Ustaw"*, no.80 1995, item 405.

[4] The Antimonopoly Office (AMO), with branch offices (nine at present), was created by the Act on Counteracting Monopolistic Practices of 1990. Together with broadening the range of its competencies concerning consumer interest protection, the Law of 8 August, 1996 on changing some laws standardising the functioning of the economy and public administration (*„Dziennik Ustaw"*, no.106 1995, item 496) has been changed its name for the Office for Competition and Consumer Protection (OCCP). The Antimonopoly Court (AMC) was created by the Minister of Justice's Regulation of 13 April, 1990 (*„Dziennik Ustaw"*, no.27 1990, item 157).

[5] See: „Rz¹dowy program rozwoju konkurencji w latach 1991-93" („The Government Programme for the Development of Competition in 1991-1993"), approved by the Council of Ministers on 19 May, 1991.

[6] See: Europe Agreement establishing an association between the Republic of Poland, of the one part, and the European Communities and their member states, of the other part, signed on 16 December, 1991 (come to force on 1 February, 1994), *„Dziennik Ustaw"*, no.1 1994, item 38.

[7] See: Free Trade Agreement between the EFTA States and Poland, signed on 10 December, 1992 (come to force on 15 November, 1993).

[8] See: Central European Free Trade Agreement Concluded by the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic, signed on 21 December, 1992 (come to force on 1 March, 1993).

[9] See: T.Skoczny, *Komentarz do artyku³ów 63-65 Uk³adu Europejskiego (Commentary to Article 63-65 of the Europe Agreement)* in: *Komentarz do Uk³adu Europejskiego (Commentary to the Europe Agreement)*, ed. C.Banasiñski, A.Wojciechowski, Urz¹d Rady Ministrów (Council of Ministers Office), Warsaw 1994; T.Skoczny, E.Szymañska, *Regu³y konkurencji w umowach miêdzynarodowych (Rules of Competition in International Agreements)*, ELIPSA, Warsaw 1995. See also: *Implementing rules for the application of the competition provisions applicable to undertakings provided for in Article 63 (1) (i), (1) (ii), and (2) of the Europe Agreement*, already enacted by the Association Council.

[10] The formal issuance of application was submitted on 8 April, 1994.

„recognised that the approximation of Poland's existing and future legislation to that of the Community is the essential pre-condition for Poland's economic integration with the Communities". Poland, however, made a one-sided commitment „to endeavour to the best of its ability to conform its future legislation to that of the Community", among others with respect to „competition rules".[11] The Polish Parliament and Government instantly started relevant implementation procedures.[12] The „National Strategy for Integration"[13] accepted in February, 1997 by the Polish Government did not leave room for any doubt in this area.

In the meantime, the EU has formulated its pre-accession strategy for the associated countries.[14] At the present stage, the pre-condition of EU accession is fulfilment of the expectations formulated in the White Paper.[15] One of its chapters (as in the „Questionnaire") deals with competition issues. It provides, among others, for establishment and enforcement of national competition law, approximately the „competition rules for undertakings" contained in Articles 85 and 86 of the EC Treaty as well as in the Regulation no.4064/89.[16]

At this point it must be noticed that both explicit commitment to harmonising Polish competition law with the EC competition rules, contained in the Europe Agreement and the expectations of the European Commission's White Paper are limited to the requirement of approximation of competition legislations. From the formal point of view, before joining the EU Poland does not have to adopt the entire acquis communautaire in this field, including in particular the complete, abundant judiciary output of the Commission and both European courts. However, the voluntary acceptance of judicial standards of the common competition law would quicken the pace of the modernisation of Polish

[11] See: Articles 68 and 69 of the „Europe Agreement....", op.cit.

[12] In Poland see: „Resolution of Sejm of 4 July, 1992"; Governmental "Programme of the Adjustments of the Polish Economy And Polish Legal System to the Requirements of the Europe Agreement" (1992, 1993); „Report on the Implementation of the Programme of the Adjustments of the Polish Economy and Polish Legal System to the Requirements of the Europe Agreement (1995); Resolution no.16/94 of Council of Ministers of 28 March 1994.

[13] Text of the „National Strategy for Integration" is published in full in Part „Documents" of this volume. (Editor.)

[14] *White Paper on the Preparations of the Associated Countries of Central and Eastern Europe for Integration into Internal Market of the Union*, European Commission, COM (95) 163 (translated into Polish and published by the Delegation of the European Commission in Poland, Warsaw 1995). See also: *The European Union's Pre-accession Strategy for the Associated Countries of Central Europe*, European Commission. See also: *Poland's Views on the 'White Paper on the Preparations..'."* in: *Polish Position Paper for the Association Council Meeting* (unpublished).

[15] See: *The European Union's Pre-accession Strategy for the Associated Countries ..."*, op.cit.

[16] Competition rules applying to states (EC Member States, associated states), mainly prohibition of anti-competitive state aids, are not a subject of this article.

competition law and raise the level of clarity of the competition rules, being an important part of „framework conditions" for economic activity.[17] Such modernisation and a high level of transparency are necessary in any case, in order to offer compatible conditions for the Polish companies to act on the Community markets and EC-based companies to act on the Polish market.

Thus, the article below presents the results of comparative studies on the common competition rules as well as Polish competition law taking into regard the judicial output of both legal orders. On the basis of these analyses, particularly in the areas where the assumed differences are obvious and obviously useless, an attempt is being made to formulate concrete, legal-political directives de lege ferenda addressed toward the Polish legislator.

2. General conformity with the need to harmonise some regulations

The scope and the intensity of the process consisting in harmonisation of the antimonopoly legislation to the European competition rules obviously depends on the size of the gap between them. There are many statements and much proof that the competition laws of the Vishegrad Group countries are quite well harmonised with these rules.[18] Also, the Polish Competition Act definitely belongs to the group of statutory acts which comply with the requirements of modern and effective instruments for protecting competition. The following elements attest to the above statement:

- the Act is directed against three main anti-competitive strategies of enterprises: agreements restricting competition (Article 4), abuse of market position (Articles 5 and 7) and excessive concentration (Articles 11 and 12);
- the regulations of the Act are based on the principle of prohibition (Article 6) or the principle of control (Article 11-11e) which provide a clear indication that it is in harmony to a large extent with Articles 85 and 86 of the Rome Treaty (prohibiting agreements and abuse of dominant position by undertakings) and the Council Regulation no.4064/89 on the control of concentrations between undertakings (preventive merger control);
- the Office for Competition and Consumer Protection (OCCP) may apply the same sanctions (including fines) as the EC and its Member States;

[17] According to S.So³tysiñski, *„the general balance of benefits and burdens accompanying modernisation of our legal system is indisputably positive"*. (S.So³tysiñski, *Dostosowanie prawa polskiego do wymagañ Uk³adu Europejskiego [Adjustment of the Polish Law to the Requirements of the Europe Agreement]*, *„Pañstwo i Prawo"*, no.4-5 1996, p.32.)

[18] See: J.Fingleton, E.Fox, D.Nevon, P.Seabright, *Competition Policy and the Transformation of Central Europe*, CEPR, London 1996; F.Vissi, *Approximation to the Competition Policy of the European Union. Paper on Workshop on Competition Policy in Transition Economies*, CEPR, RSC & EUI, Florence 7-8 june 1996.

– the OCCP has a large degree of adjudicative independence, while its decisions are subject to the control of an independent court of law (the Antimonopoly Court).

The hypothesis may, then, be made that Polish antimonopoly law is generally in agreement with the EC „competition rules for undertakings". That state of general compatibility was reached, among others, as a result of the repeated novelisation of the antimonopoly law. In particular, the last amendment of the Polish Competition Act, made complete through the February 3, 1995 Act, increased the level of approximation of Polish competition legislation to the EC competition rules, particularly in the sphere of merger control law.

It would also not be possible to omit that the OCCP has already issued and is going to issue several guidelines (soft law) in order to be more legally certain in the application of the Competition Act (see also the final remarks).[19]

Finally, it must be heavily underlined that, not only in my opinion,[20] the most significant and effective manner of harmonising law is supplanting foreign regulatory and judiciary standards in domestic case law.[21] The essential clarification and elucidation of many concepts and specific features of particular monopolistic practices expressed in the Competition Act were provided by the case law established by the OCCP and the Antimonopoly Court.[22] Several examples of their judiciary achievements will be shown below.

However, in spite of high degree of approximation of the EC and Polish system of competition protection (which include legislation, as well as its application and enforcement), there are still divergences between the EC and Polish „competition rules for undertakings". Some of these divergences are so serious that they must be changed by the next, complex amendments to the present Competition Act, or by issuing a completely new law. The most important of these differences, which must be eliminated, will be presented below.

[19] See: e.g. *Guidelines on the Application of the Act on Counteracting Monopolistic Practices to Patent and Know-How Licensing Agreements*, AMO, Warsaw 1993. Further guidelines were prepared by experts in the framework of the „Harmonising Program of Polish Antimonopoly Law with the Communities' Rules on Competition", carried out on the order of the Antimonopoly Court in the years 1994-1996.

[20] See: S.So³tysiñski, op.cit., p.39.

[21] See: *Indexes of the Antimonopoly Judgements and Resolutions of the Supreme Court* and *Index of the judgements of the Antimonopoly Court* in: T.Skoczny, *Polish Antimonopoly Case Law*, ELIPSA, Warsaw 1995, p.228-251.

[22] For more detailed information see: T.Skoczny, op.cit.

3. Objectives and scope of the Competition Act

There is no doubt that the wording of the Polish Competition Act complies with the EC law standards. The antimonopoly case law deals with the status of specific objectives of competition protection as specified in the Preamble of the Act, with „special regard" to „ensure the development of competition".[23] This corresponds with international and EC standards. Moreover, the case law clearly provides that the value protected by the antimonopoly law is „free competition".[24] Exactly as in the Community law, the protection of free competition is not performed for the benefit of the parties to the contract, but in „the public interest",[25] so the „institution of competition" rather than the „interests of competitors" are subject to protection.

One of the main tasks of the case law in each legal system is determining the three main features delineating the scope of the law: its subject matter, objects, and territory of application. With respect to the above tasks, Polish case law had its work cut out for itself. Only the territory of application of the Competition Act was not difficult to determine, as it is defined precisely in the Act (Article 1); the exterritorial application is also found here.

The subjective scope of the Competition Act is, at first glance, quite evident. Indisputably, the legislator intends to counteract monopolistic practices exercised by „economic entities" and their „combinations", and not to actions of public authorities which aim at restricting competition. This complies with international standards. However, according to these standards, the concept of an „economic entity" should be understood in a broad sense, so as to cover not only private undertakings but also all „proprietary" forms of State, territorial, and professional self-governing bodies' participation in the economy. There was, at first, a lack of precision in the regulation of the subjective scope in which the Competition Act was applied, causing the Polish adjudicative authorities to be confronted also with the issue of enforcing the Act upon the activities of communes and municipal legal persons.[26] Direct application of the Act upon the entities „which organise or provide public utility services" was recognised directly in the 1995 Amendment Act (see: Article 2, point 1 of the Competition Act). The first step toward approximation of the Polish competition law with Article 90 of the EC Treaty was, then, taken. The Pharmaceutical Chambers have been rightly classified as combinations of economic entities, as is the case

[23] See: the first judgement of the Antimonopoly Court of 26 September 1990 (XV Amr 1/90).
[24] See: the judgement of the Antimonopoly Court of 15 September, 1992 (XVII Amr 18/92).
[25] See: the judgement of the Antimonopoly Court of 19 November, 1991 (XVII Amr 13/91).
[26] See: the judgement of the Antimonopoly Court of 23 April, 1992 (XVII Amr 7/92).

in other states, whereby the Act is applied directly in the case of the said chambers.[27]

Undoubtedly, the most difficult task is to precisely delineate the substantive scope of the Competition Act. It does not include any (even imprecise) definition of the subject, which it counteracts, i.e. of „monopolistic practices", both sensu largo (see the title of the Act) and sensu stricto (see the title of Chapter 2 of the Act). In particular, „monopolistic practices" understood in the strict sense were left to be defined by the case law. An illustrative phenomenon is that the Antimonopoly Court took some time before working out a uniform formula which it then expressed most explicitly in the judgement against the housing co-operative S.M. in S.W. According to this judgement, „the essence of monopolistic practice lies in restricting the freedom of contractors, competitors and consumers, compelling them to participate in the trade on terms which are less favourable than those of unrestricted competitive environment by an economic entity, a group or a combination of economic entities, and as a result of unlawful abuse of market power derived from their position occupied on a given market".[28] Definitely this judiciary definition of „monopolistic practices" in the strict sense (Chapter 2 of the Act) contains all the elements which describe the „practices in restraint of competition" or „restrictive practices" pursuant to the interpretation of the EC law or its member states law. This definition also implied a separation into individual and collective monopolistic practices, which formed the basis for differentiating between practices described in Article 85 and 86 of the EC Treaty and other relevant provisions of the Polish Competition Act (Article 4 on one hand, and Article 5 and 7, on the other hand).

The essence of the wide range of „monopolistic practices" (the term used in the title of the Act) may be gathered from the wording and the structure of the Competition Act. As already indicated, the Act promotes the development of competition and protects restrictions imposed by economic entities. In particular, it foresees:

- excessive economic concentration (Chapter 3);
- „monopolistic practices" in the strict understanding of the term (Chapter 2).

4. Principles of preventive merger control

The first goal of competition legislation in the countries undergoing economic transformation is promotion of the development of competition (see the Preamble of the Act) by way of counteracting excessive economic

[27] See: the judgement of the Antimonopoly Court of 19 November, 1992 (XVII Amr 24/92).

[28] See: the judgement of the Antimonopoly Court of 10 May, 1993 (XVII Amr 6/93).

concentration. The Polish Competition Act makes counteracting excessive economic concentration possible by:

- demonopolising the dominant economic entities (Article 12);
- taking preventive control of mergers and the transformation of economic entities (Article 11-11e).

At the start of the 1990's, the Polish economy was tightly monopolised. Competition, then, could not be developed on account of the structure of the majority of the markets itself. Breaking up the monopolised structures in the economy was therefore necessary (mainly through trade liberalisation). The state, as these enterprises' owner, either liquidated them or divided them.

The Competition Act, however, created a possibility for compulsory splitting off or dissolution of economic entities being dominantly positioned on the market, if they continue to limit competition or the conditions for its creation (Article 12, par. 1). This exceptional legal power, as a rule not given to competition authorities in countries where the market economy is developed, in the beginning had been often used as a means to demonopolise local markets (e.g. those buying or processing agricultural products). Local monopolies, then, put up exceptionally enduring barriers for entry into these markets of potential competitors.

The splittting of state enterprises described in Article 12 of the Competition Act are carried out less and less often. In today's already more demonopolised economic structure, activity counteracting the anticompetitive concentrations between undertakings has begun to receive the most attention.

Until the moment when the 1995 Amendment Act came into force (on 19 May, 1995), a dual system of counteracting excessive concentration in form of anticompetitive concentrations between undertakings existed in Poland. It included:

- preventive control of mergers (amalgamations) of organisational character (former Article 11);
- relative prohibition of property and capital mergers or acquisitions, as well as interlocking directors (former Article 4, para. 2, points 3, 4).

From the very beginning, it was highly unlikely that case law would be able to deal with the difficulty of applying the former Antimonopoly Office so that it would work against excessive concentration in the Polish economy under the Antimonopoly Act of 1990. The lack of an obligation to report to the former Antimonopoly Office in the case of implemented capital and property mergers or personal unions (as exists, for example, in the German cartel law) rendered the prohibition of such mergers, (considered in the former Article 4, para. 1, points 3, 4 to be monopolistic practices), totally ineffective. On the other hand, the lack of a statutory obligation to notify the intention to „merge"

economic entities known (former Article 11) made it impossible to develop a system of preventively controlling such mergers.

The 1995 Amendment Act essentially changed the legal grounds for counteracting excessive concentration in the Polish economy, which so far have made up the weakest element of the Act. The Act rightly abandons the idea of dualism in competition protection - a statutory prohibition of implemented mergers (former Article 4, para. 1, points 3,4) and preventive control over the intention to merge (former Article 11) and opts for (following the example of most of the world and the EC)[29] the solution according to which concentrations of economic entities are permitted by law, but made subject to preventive control. It includes a reservation that the said concentrations may be prohibited by administrative order if they may possibly result in gaining or maintaining a dominant position on the market (Article 11, para. 1, and Article 11a, para. 4, point 1). The statutory definition of facts which establish concentrations subject to control, in particular mergers and acquisitions, and which delineate the obligation to notify of the intention to merge, and those which bear a high significance (Article 11, para. 2), is to be considered a positive phenomenon.

Thus, the statutory model of prohibition of mergers will probably have to be amended in part once again. First of all, I do not consider to be positive the exclusion of control over acquiring shares admitted to public trade from the reaches of the Antimonopoly Act (Article 11). It is difficult to believe that the Securities Commission could be more effective in terms of protecting competition against excessive concentration than the OCCP. This is also contradictory to international and EC standards. Second, the principle of rule of law in Poland shall force a statutory provision announcing when the President of the OCCP „may" prohibit a given merger, and when it „may" renounce the issuance of such a prohibition, in spite of the fact that it leads to the gaining or strengthenning of a dominant position in the market. Third, the number of practical difficulties in interpreting some statutory prerequisites about the obligation to announce the intention to concentrate will have to be solved while making changes to the Competition Act regulations and/or by preparing Merger Guidelines. Finally, the practice will probably show that it is necessary to create separate legal grounds for the control of mergers in the insurance market (similar to bank concentrations) and mass media market.

5. Prohibition of abuse of dominant position

[29] For a more detailed presentation see: T.Skoczny, *Chapter Poland* in: *International Mergers - the Antitrust Process*, ed. W.Rowley, D.Baker, 2nd ed., Sweet & Maxwell, London 1996.

In a highly monopolised economy the greatest threat to competition are individual activities of economic entities exercising control over the market. The monopolistic structure of the majority of markets was the main reason why, in the beginning of the 1990's, the Polish legislator placed the heaviest emphasis on the prohibition of „monopolistic practices" (sensu stricto) of economic entities which could abused their dominant position.

Until the 1995 Amendment Act, the Polish competition legislation prohibited not only the abuse of monopolistic and dominant position (Articles 5 and 7), but also monopolistic practices of economic entities lacking a qualified market position (former Article 4, para. 1, points 1, 2).[30] But, case law decided that the Competition Act „does not apply these provisions irrespectively of the position occupied by the given entity in a given market".[31] As a consequence, former Article 4, para. 1, point 1, 2 constituted the basis for prohibiting certain practices for dominant and monopolistic entities (especially to natural monopolists). Therefore, the order to cease the practices had not been given to entities which had not a „qualified market position".

Thus, also regarding this issue, case law adjusted Polish antimonopoly law to European standards prior to legislative action in that direction. The 1995 Amendment Act eliminated these provisions. Now, the practices covered by them (imposing onerous contracts, tie-in obligations) are prohibited only if they are on abuse of dominant position.

Though Polish law prohibits absolutely only excessive behaviour of those entities which hold a monopolistic position in the market (practices of dominant entities are only relatively prohibited), the application of the rule of reason (Article 6) by the adjudicative authorities with respect to such cases is rare. This results in a situation where the two systems are not very different from one another, thus they fall close to the application of Article 86 of the EC Treaty.

Finally, it should be mentioned that Polish case law is quickly adjusting to the scope of delineating the product group market on the basis of the criteria of „close substitutability"[32] and interpreting dominant position as the capacity to act „to a large extent independently of the competitors and clients, thus also the consumers".[33]

Nevertheless, the provisions of the Competition Act laying the groundwork for counteracting the abuse of market position (Articles 5-7) need to be elaborated upon. First of all, in theory and in practice it is difficult to find the grounds for maintaining the distinction between the monopolistic and dominant

[30] See: the judgement of the Antimonopoly Court of 26 September, 1990 (XV Amr 1/90).
[31] See: the judgement of the Antimonopoly Court of 10 May, 1993 (XVII Amr 6/93).
[32] See: the judgement of the Antimonopoly Court of 8 November, 1993 (XVII Amr 27/93).
[33] See: the judgement of the Antimonopoly Court of 8 November, 1993 (XVII Amr 39/93).

position (Article 2, points 6 and 7). In any case, such distinction may not be based on a different kind of prohibition. Second, the extension of the prohibition on abuse of a dominant position would be advisable for the actions of enterprise groups, in order to effectively control the state and development of competition on the oligopolistic markets. Third, in my opinion, it should not be possible to overrule the prohibition of dominant position abuse under the rule of reason envisaged in Article 6. Each kind of individual action undertaken by entities possessing market power (and not only entities of monopolistic position) constituting abuse of this power, should be absolutely prohibited (as in the current Article 7). Making the abuse of dominant position subject to absolute prohibition would be tantamount to taking the next step toward harmonising these provisions with Article 86 of the EC Treaty.

6. Counteracting competition restricting agreements

The Polish Antimonopoly Act (Article 4) treats certain, after the 1995 Amendment Act not exclusively listed, „agreements" as „monopolistic practices" (sensu stricto). The approach to „monopolistic agreements" by the Polish adjudicative authorities is definitely critical, which corresponds to the international standards. However, as in the European Community, the number of proceedings directed against agreements, especially cartels, is limited. Although the Competition Act allows such agreements by the rule of reason (Article 6), it occurs rather rarely in practice. On the contrary, especially with regard to horizontal agreements (cartels), and in particular to price cartels, the decisions of the OCCP which order the cessation of such practices are usually enforced by the Antimonopoly Court. Such was the case with regard to the sugar cartel, a phenomenon which is also known in the competition law of the EC.[34] Polish law remains harmonious with EC law also when considering indirect evidence as the means of proof of concerted practices (cartel).[35] The Antimonopoly Court remains critical with respect to franchising contracts, though this may change in the future.[36] Polish case law displays a particularly critical view (even more critical than of other competition rules) on the issue of exclusivity. However, counteracting the exclusivity clauses which restrict

[34] See: the judgement of the Antimonopoly Court of 1 March, 1993 (XVII Amr 37/92).

[35] Ibid.

[36] See: the judgement of the Antimonopoly Court of 21 July, 1992 (XVII Amr 12/92) and 6 December, 1993 (XVII Amr 35/93).

access to monopolised markets by entities having qualified market position complies to international standards.[37]

The new amendment to the Competition Act (or even the new Act) should, in particular, clearly define the concept of „monopolistic agreements" (or, better, „competition restricting agreements"). The current wording of the Act which states that such agreements are „contracts, understandings and resolutions" (corresponding with the range of protection in Article 85 of the EC Treaty) which are „contrary to this Act" (Article 2, point 3) is a tautology. Undoubtedly, the range of the Act should include agreements which „aim at or result in elimination or restraint of competition on a national or local market". This shall adequately harmonise the Polish antimonopoly law with that of the European Communities.

Such a definition of a competition restricting agreement („monopolistic agreement") shall eliminate the apparent conflict between the current provisions of Article 2, point 3, and Article 9 of the Antimonopoly Act. The latter provision, though applying the concept of "agreement" defined in Article 2, point 3 as action "contrary to this Act", does not refer to prohibited agreements and only permits an administrative decision to be issued prohibiting the „implementation of an agreement". The agreements referred to in Article 9 (specialisation or common sales agreements) are thus permitted by the Act until the point at which such prohibition is issued.

The existence of this conflict and failure to eliminate the conflict by the latest amendment to the Competition Act indicates that the legislator is aware of the fact that certain kinds of competition restricting agreements should be treated in a more lenient manner. It refers particularly to vertical agreements, specifically distribution agreements (agreements on exclusivity, franchise agreements or selective distribution agreements) which lead to the restraint of competition among the distributors of the same brand product (intra-brand competition), yet most often promote the increase of competition among the competitors of such brand products (inter-brand competition). Therefore, certain agreements between competitors enhance co-operation between enterprises which is beneficial for the economy and the consumers, rather than restrain competition.

The rule of reason envisaged in Article 6 of the Competition Act does not create sufficient grounds for excluding such agreements from the range of prohibition of „monopolistic agreements". Also, Article 9 fails to play such a role in practice. Therefore, we should go back to the idea of creating a system of exemptions from the range of prohibition of „monopolistic practices", incorporating the so-called group exemptions (by statute or by governmental

[37] See the judgements of the Antimonopoly Court of 6 December, 1990 (XV Amr 5/90) and 21 July, 1992 (XVII Amr 12/92).

regulations). It should include statutory exemption of agreements of minor importance and the so-called individual exemptions (upon application of the parties to a given agreement), and provide a means for the enterprises to apply to the OCCP for a so-called negative clearance, (i.e. a declaration about the lack of objections to the intended agreement), which is close by nature and form to the statement of a lack of objections regarding the intention economic entities to merge, referred to in Article 11a, para. 3.

On the other hand, I would like to underline that the resale price maintenance should be formulated explicitly in the new or amended Competition Act.

7. Procedure, institutions, sanctions

The Polish Competition Act contains only very few procedural provisions. While the effectiveness of the enforcement of competition law is extraordinarily important, strengthening the powers of the OCCP in administrative proceedings (Article 19a), and, at the same time, enhancing the confidentiality of the information gathered in the course of the said proceedings (Articles 20a and 21a) by the 1995 Amendment Act, are also to be praised.

There is no doubt that to date the OCCP has treated the economic entities applying monopolistic practices too leniently. The same opinion has been proclaimed by the Antimonopoly Court.[38] The policy guidelines extended the waiting period until the „maturity" of entities and avoided imposing fines upon new and private entities which are still learning the principles of operating in a free market economy. In the latest period the number and high price of fines for monopolistic practices, particularly for agreements made between competitors and for abusing their dominant positions by such monopolies as, for example, Polish Telecom, have grown tremendously. The 1995 Amendment Act improved the standards which sanction the infringement of the Competition Act (Articles 14-16). In particular, it made it possible for OCCP to fine for not fulfilling the obligation to notify this Office concentrations between undertakings. Nowadays, these regulations are becoming wider and more sharply used. Undoubtedly, the provisions relating to procedures of activity of the OCCP and to antimonopoly sanctions require the introduction of further improvements.

Finally, with due regard to the increased scale of the case law, achieved through the increased activity of territorial branch offices of the

[38] See the judgement of the Antimonopoly Court of 5 December, 1991 (XVII Amr 15/91).

OCCP, it shall be necessary to work out a new organisational formula for the activity of the OCCP, which could provide for a uniform enforcement policy. In any case, we should look for solutions enabling the division of the investigative function from decision-making which is the power of the OCCP. It could perhaps be solved by way of establishing within the OCCP a „council" or a „board" for competition (as has been done in Spain or Hungary) or special „adjudicating boards" (based on the German example) having adjudicative powers, composed of the most experienced case handlers and competition rules practitioners. The provisions on civil procedure should then be applied for the proceedings before such institutions.

8. Final remarks

The scale of unsolved problems is so vast, that in any case the idea of preparing a new Act on promotion of the development and protection of competition should not be abandoned. This act should fully comply with the development of the Polish economy and the requirements relating to harmonisation of Polish law with European co mpetition rules. It shall also enable it to comply with the requirement of contributing to acquis communautaire, which is a condition of Polish accession into the Union.

As of today, it should be postulated to improve the case law through wider reference to the Community case law and that of countries in which it is highly developed by the OCCP and the Antimonopoly Court. It had not been easy until recently, since the case law has not been available in the Polish language. This situation has been improved and it still being significantly improved thanks to harmonising projects launched on order from the OCCP with PHARE funds.[39]

Significant progress in adjusting the Polish law to the competition rules of the European Communities may also be achieved by way of publishing and implementing by the OCCP guidelines regarding the application of the Act in special sectors the economy or in relation to certain economic phenomena. Drafts of such guidelines have been prepared within the framework of implementing certain projects financed by PHARE.[40] These achievements should not be wasted.

[39] The series of 36 books, containing, first of all, the Polish translations of all EC secondary competition regulations and almost 200 competition case law decisions (of the Commission and the European courts), was published by the Antimonopoly Office in 1994-1996.

[40] The drafts of 14 guidelines on application of the Antimonopoly Act in certain sectors (e.g. telecommunication, postal services, broadcasting) and to certain agreements (exclusive dealing, exclusive purchasing, franchising, co-operation, R&D, selective distribution in the motor car

The scale of antimonopoly case law and its increasing lack of transparency commands us to return to the idea of publishing of the „Official Journal" by the OCCP. Such a journal would promulgate:

- implementing acts for the Competition Act as well as other acts and official documents, in particular the guidelines for the application of the Act;
- all individual decisions of the OCCP and its territorial branch offices as well as all antimonopoly judgements of Polish courts.

sector) were prepared and published in the framework of the „Harmonising Program of Polish Antimonopoly Law with the Communities' Rules on Competition" in 1994-1996.