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POLISH LEGISLATION ON COMPETITION AND ITS HARMONISATION WITH THE EU COMPETITION LAW

Marian Kępiński*
Christopher Harding**

1. Introduction***

Polish competition law has two main areas of regulation, i.e. unfair competition and the anti-monopoly law. Both areas require adjustment to the law of the European Union. Polish obligations in that field are described in Art. 63 of the Europe Agreement.[1] However, in that article "competition" means matters related to the anti-monopoly law rather than to unfair competition law. Recently, both areas of competition law are subjected to substantial changes in Poland. Those relate rather to anti-monopoly regulations than to unfair competition, because in the last area Poland enacted on 16 April 1993[2] quite a modem law oriented on examples of West European legislations. Unfair competition is not directly dealt with in the Europe Agreement; therefore, its evolution is concealed in documents related to an approximation of laws under the headings of audiovisual policy, free movement of goods and others. It is, therefore, difficult to establish the appropriate timetable of the approximation of law in the field of unfair competition.

2. The Unfair Competition Law (UCL)

On 9 December 1993, the new Polish Law Against Unfair Competition of 16 April 1993 came into force.[3]

The new Law is based on a very liberal approach to the interplay of market forces: that is to say, the market should operate freely without state intervention, if possible. That

* Professor of Civil Law at the University of Poznań.
** Professor of Law, University of Wales, Aberystwyth.
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[1] The Europe Agreement establishes an association between the Republic of Poland, on the one hand, and the European Communities and their member states, on the other hand, signed on 16 December 1991 in Brussels, *Dziennik Ustaw* [Journal of Laws] 1994, no. 11, item 38, further as: "Europe Agreement" or "E.A.".

[2] Law Against Unfair Competition, *Dziennik Ustaw* 1993, no. 47, item 211, amended in 1996 and 1997. Further as: "UCL".

[3] See Article 31 of the Law. The new legislation was published on 8 June 1993 and came into force six months later.

approach can be seen in the decision to reject any administrative methods of influencing market behaviour, in relation, for instance, to such matters as special offers, rebates, prices and the packaging and labelling of goods. Such administrative methods of control do exist in Polish law (as regards the regulation of prices and the labelling of foodstuffs, for example), but they are not part of the unfair competition law *stricto sensu*. Nor does the Office for Competition and Consumer Protection[4] possess any regulatory powers similar to those of the Federal Trade Commission in the United States.[5]

The new Law also rejects the French approach to unfair competition, which makes use of the general law of civil liability (tort) to supply the grounds for unfair competition claims.[6] This is striking, since the Polish Civil Code follows the French model in the area of tortious liability.[7]

The Commission working on the new Law was looking rather for examples of unfair competition regulation in German legal systems:[8] not only the German Law of Unfair Competition of 1909, but also the Swiss, Spanish, Austrian and Hungarian legislation. However, those systems did not provide a model for the new Polish law, but served rather as "material" and as a source for reflection. The Commission was also concerned to preserve as much as possible of the former Polish law, which had inspired a great deal of debate in the last years of its operation.[9]

Similarly to other examples of unfair competition legislation, the new Law contains a general rule of unfair competition (Article 3),[10] and lists a number of specific torts of unfair competition (article 5 to 16, and 22). The role of the general clause within legislation is crucial for the operation of the law in this area.

It would seem that the general clause of good faith may perform the following roles:

(1) In the first place, it may serve to fill gaps in relation to areas not covered by the specific torts of unfair competition, in which case an injured party may rely on the general clause. For instance, the use of French inscriptions on the packaging of goods, although not including an indication of geographical origin, may lead the customers to believe that the goods are of French origin. This would not be covered by Article 8, which refers to misleading geographical indications, although Article 3 could be used as the basis for a remedy, if customers are misled by the use of French on the packaging.

(2) The second function is to supplement specific torts when they are drafted too broadly. The most striking example would be Article 11 of the new Law, relating to the

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[4] Further as: "OCCP".

[5] See G. E. Weston, P. B. Maggs, R. E. Seheehler. *Unfair Trude Practices und Consumer Protection: Cases and Comments,* West Publishing Co. 1992, p. 694-707.

[6] See J. Azema: *Le Droit français de la concurrence,* Presses Universitaires de France 1989, p. 121-126.

[7] See Article 415 of the Polish Civil Code of 1964; compare Article 1382 of the French Civil Code.

[8] See E. Ulmer: *La Répression de la concurrence déloyale dans les Etats members de la CEE,* vol. 1. *Droit Comparé,* Dalloz 1967, p. 8 -19.

[9] See Law Against Unfair Competition of 20 August 1926, *Dziennik Ustaw* 1930, no. 56, item 467. Unfortunately, the Commission did not reproduce the former Article 1, which prohibited the creation of confusion as to the origin of goods and services. Article 10 of the new legislation does not fulfil that function satisfactorily.

[10] Art. 3: "All acts contrary to law and/or good faith which infringe or threaten to infringe the interest of another market participant and/or customer shall be acts of unfair competition".

protection of trade secrets. That expression contains *expressis verbis* a prohibition of the use of another person's trade secrets, but without reference to the rules of good faith. This may suggest that there exists an absolute protection of trade secrets, although that is not the case. Someone who has discovered trade secrets through permitted reverse engineering, for example, is not acting contrary to the law or good faith, and protection against use by such a party must be based on a reading of the general clause together with Article 11.

(3) Third, the general clause may be used to mitigate the rigour of a particular tort of unfair competition in situations where its application would be contrary to good faith. A good example of this kind of situation would be the situation when one party has acquiesced the use of its trade name or similar designation by another person for a number of years, and then begins legal proceedings against the latter when he becomes successful. In such cases, the position of the second party may be seen as deserving some protection, and this may be achieved through the application of Article 3; considerations of good faith then prevent action for the infringement of a trade name under Article 5 of the Law.

Although a more precise application of Article 3 needs to be worked out through case law, some points of interpretation are clear. First, the general clause must be read in conjunction with Article 1 of the Law: it is applicable to business activities in the sense that only an act carried out in pursuance of economic activity may be regarded as an act of unfair competition. Second, rules of good faith must be understood as rules of morality, existing outside the legal system *sensu stricto*. In this way, reference to good faith allows the judge to apply the law with appropriate flexibility and respond to changing morality. Third, it must be borne in mind that not every violation of law is actionable under the general clause, but only those violations that lead to an undertaking and advantage over competitors. Someone who does not pay a creditor violates the law; this does not amount to a tort of unfair competition, but simply to a breach of contract. On the other hand, avoidance of customs duties, which enables the party concerned to undercut competitors, would be an act of unfair competition in the sense of Article 3. Fourth, the general clause operates only with reference to the torts of unfair competition laid down in the 1993 legislation. If a tort is regulated by other legislation, such as the Commercial Code or the Law on Economic Activity, it is not directly affected by Article 3. Finally, the general clause requires neither proof of damage or proof of fault. Therefore, it provides a different basis for legal liability, compared to the general principle of responsibility for tortious acts as laid down in Article 415 of the Polish Civil Code of 1964.

3. Particular Cases of Unfair Competition

The first group of torts of unfair competition in the new Law relates to distinctive marks (Article 5 to 10). Probably the most important is contained in Article 5, which protects trade names and other designations of business. The protection is based on the use of a designation in the course of a trade. The territorial scope of the protection depends on the territorial range of the enterprise and its good will. Thus, when two enterprises have different groups of customers in different places, the same or similar designations may co-exist without collision. Articles 6 and 7 further apply the same legal concept in relation to the use of an owner's name to designate his business, and to the transformation of enterprises, as is the case quite often in the process of privatisation. Contrary to the text of Article 7(2) of the Law, courts are not able to establish an enterprise's designation, but may only settle the dispute as to which one of the enterprises is authorised to use the disputed trade name of a former company.

Articles 8 and 9 protect indications of origin and appellation of origin. Indications of origin are required to be true and non-deceptive, whereas appellations of origin as such are protected only by the proof of legal protection in their own country of origin. If they do have such protection, then their use must not be deceptive, and even additions such as "kind", "type" or "method" are prohibited. Article 10 prohibits the misleading designation of goods and services. It is concerned in particular with the control of designations which mislead the customers as to the nature or origin of goods or services. It is perhaps regrettable that there is no specific provision dealing with trade marks, as there was under the former law of 1926.

The aim of Articles 11 and 13 is to protect the achievements (trade secrets, get-up of the product) of an enterprise against unfair practices on the market. It should be noted that trade secrets are not protected against their use by a person who has acquired the information in good faith. On the other hand, the protection afforded against a former employee is, as a matter of law, far-reaching, and extends to three years from the termination of the contract. Contracts of employment ought to be drafted carefully in that respect. Any protection against slavish imitation applies only to the distinctive shape of the product and is aimed at the elimination of customers' confusion. It does not extend to functional product features, which may, therefore, be freely copied.

Advertising is dealt with in two distinct provisions: Articles 14 and 16. The former covers false and misleading publicity, both as regards a market participant's own business and personnel as well as those of another party. Other cases may be covered by Article 16 or under the general clause of Article 3. Article 16 was one of most contentious provisions during the legislative debates. It is clearly modelled on the E.C. Directive on Misleading Advertising and is similar to the "Television Without Frontiers" Directive;[11] its final formulation has been open to criticism. It would seem that under Article 16 all cases of misleading publicity should be read in the light of the rule of good faith. [12]

The last group of unfair competitive activities covered by the legislation consists of acts aimed of the diruption of the operation of other enterprises (Article 12 and 22) or a general disruption of the market (Article 15). Article 12 prohibits interference with contractual relationship, whether under contracts of employment or otherwise. Howev-

[11] Council Directive 84/450 on Misleading Advertising, *OJ* 1984 L 250/17; Council Directive 89/552, "Television Without Frontiers", *O J* 1989 L 298/23. Articles 12 to 16.

[12] Only Article 16(1)(1) contains that clause, a fact which may cause some confusion.

er, liability is dependent on an intention to make a profit or cause a loss to another, and this restricts the application of the Article. Article 22 is a novel and interesting provision, which prohibits any legal suit alleging unfair competition.[13] Any person injured by such unjustified litigation may seek damages and an appropriate declaration.

Article 15 is also worthy of note. It is concerned with activities which threaten to disrupt the market. A number of activities are listed under the heading of “making entry to the market difficult” - dumping of goods, unjustified discrimination and boycotts - but the list is not intended to be exhaustive, and other types of market disruption could come within the scope of the provision. As in a number of other cases,under Article 15 the defending party’s actions may be properly assessed only with some reference to the general clause of good faith in Article 3. There clearly exists a legal relationship to be worked out between Article 15 and the distinct MPL, an issue which requires further discussion.

4. The Law Against Monopolistic Practices (MPL)

The history of Polish legislation in this field is marked by unexpected turns in a number of directions. The earliest legislation was enacted already on 28 March 1933[14] and dealt with cartels. The new political system after the Second World War rendered that legislation superfluous. During the “Solidarity” period of 1980-1981, many authors argued against socialistic monopolies as harmful to the national economy.[15] As a result, a new law was enacted on 28 January 1987;[16] however, it adopted a tolerant approach towards monopoly situations and was consequently replaced by new legislation on 24 February 1990.[17] This law has remained in force since that time, although with some important amendments.[18] Such legislation is more consistent with the general contemporary approach to competition regulation, as embodied in the European Community rules and those of many other national systems.

The law in question established a new regulatory authority, originally called the Anti-monopoly Office, and recently renamed the Office for Competition and Consumer Protection (OCCP), reflecting the increasing concern of the Polish Government for the situation of the consumer and complying with requirements as regards the approximation of law in the Polish text of the Europe Agreement (Article 69,) as well as the duty imposed on public authorities to ensure consumer protection under Article 76 of

[13] Actually, the groundless claim of unfair competition had to include legal proceedings to justify any relief. Threats alone may be actionable under the general clause of Article 3.

[14] *Dziennik Ustaw* 1933, no. 31, item 270. This law was replaced by the law on cartels of 13 July 1939 {*Dziennik Ustaw* 1939, no. 63, item 416).

[15] See summary of that argumentation by J. Trojanek: “Źródła uprzywilejowanej pozycji producenta w gospodarce uspołecznionej” [Grounds for Privileged Producer’s Position in the Socialised Economy], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1986, no. 4, p. 1-13, and articles cited therein.

[16] Law Against Monopolistic Practices in the National Economy {*Dziennik Ustaw* 1987, no. 3, item 18).

[17] Law Against Monopolistic Practices {*Dziennik Ustaw* 1990, no. 14, item 88). Further as: “MPL”.

[18] See the second consolidated text of that law in *Dziennik Ustaw* 1997, no. 49, item 318 as amended in 1997 {*Dziennik Ustaw* no. 118 item 318 and no. 121 item 754).

the new Polish Constitution.[19] Consequently, the Office now includes a department specially entrusted with consumer protection, and consumer interests are referred to in various parts of the legislation, in particular in the preamble and in Article 1.

5. The Main Features of the Legislation

Legislation lists three main categories of prohibited anti-competitive practices, involving the following undertakings: prohibited agreements (Article 4);[20] the abuse of a dominant position (Article 5);[21] and practices of monopolistic undertakings affecting prices (Article 7).[22] Prohibited practices are described in the law as "monopolistic practices". This division follows, to some extent, that of Articles 85 and 86 of the E. C. Treaty, although the third category comprised in Article 7 is not covered separately by those provisions. It might be considered something of an innovation on the part of

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[19] Of 2 April 1997 as accepted in a referendum on 25 May 1997.

[20] Art. 4: Monopolistic practices are agreements which consist in particular of:

1) fixing, directly or indirectly, prices between competitors and the way in which prices are established for the purpose of dealings with other parties;
2) dividing markets according to territorial, product category and/or subjective criteria;
3) fixing or limiting the volume of production, sales and/or purchase of goods;
4) restricting access to the market and/or eliminating from the market undertakings not participating in the agreement;
5) establishing between competitors and/or their associations their contract terms with third parties.

[21] Art. 5:

1. Monopolistic practices also include practices which abuse dominant position on the market and in particular:

1) preventing the establishment of conditions which are necessary for the emergence of the development of competition;
2) dividing the markets according to territorial, product category and/or subjective criteria;
3) selling goods in a way which confers a privileged position on particular undertakings and/or other undertakings;
4) refusal to sell or purchase goods in a way which discriminates against particular undertakings if there are no alternative sources of supply and/or outlets for selling;
5) unfairly influencing the formation of prices, including resale prices and selling below costs in order to eliminate competitors;
6) imposing onerous contract terms which provide unjustified benefits for the undertaking which imposes them;
7) making the conclusion of the contract contingent on acceptance or performance by the other party of another benefit not related to the object of the contract which would not otherwise have been voluntarily accepted and/or performed;
8) creating for consumers onerous conditions for asserting their rights.

2. It shall not be considered a monopolistic practice when a cooperative in dealing with its members grants bonuses, discounts and other economic benefits.

[22] Art. 7:

1. Undertakings occupying a monopolistic position on the market are also prohibited from:

1) limiting, despite the existence of capacity, the production, sale and/or purchase of goods in particular when it leads to higher sale prices and/or lower purchase prices,
2) withholding sale of goods leading to an increase of prices,
3) charging excessively high prices.

2. The prohibitions described under para. 1 apply as well to undertakings occupying a dominant position, if their market share and their practices produce similar effects to the behaviour of undertakings having a monopolistic position.

Polish legislature, inherited from the law of 1987. The generality and lack of clarity in the use of those basic concepts of "monopolistic" and "dominant" positions, and their interrelationship, is likely to prove problematic. It is at least clear from the definition in Article 2 that dominance is less than monopoly, so that the prohibition of Article 5 extends further to capture the abusive practices of undertakings which face some insubstantial competition, and have, in principle, a forty per cent market share.[23]

Although the difference between the scope of Articles 4 and 5 is not made explicitly on the basis of a distinction between horizontal and vertical agreements, the outcome is that Article 4 is, for the most part, concerned with horizontal practices ("cartels"; see, for instance, the reference to competitors in points 1 and 5 of Article 4), while Article 5 is concerned with vertical restraints *via* the concept of a dominant position. Indeed, some of the practices listed in Article 5 had originally been placed under Article 4, but were later transferred to Article 5 in order to reflect this distinction.

To some extent, the definition of market dominance in Articles 2(7) and 5 reflects that of E.C. law, but Polish legislation also employs a threshold of the forty per cent market share as a presumption of dominance. This means in practice that when an undertaking is found to have a market share of less than forty per cent, then any allegation of dominance is to be proven by the OCCP, whereas if the threshold had been established, the burden shifts to the undertaking itself, to show that in the circumstances of the market it is not, in fact, dominant.

Similarly to Article 85(1) of the E. C. Treaty, Article 4 provides a non-exhaustive list of prohibited practices, but does not include explicitly any reference (as does Article 85(1) in its general prohibition) to the wider criterion of practices, which have "as their object or effect the prevention, restriction or distortion of competition". Without such a clause, it is difficult to identify prohibited anti-competitive practices beyond those specially enumerated in Article 4. A similar point may be made in relation to Article 5: the kinds of activity listed there, and especially those referred to in points 6, 7 and 8, may well occur outside situations of dominance, yet are not obviously regulated by the law beyond the context of market dominance.

As a general rule, the law (Art. 8 para. 2) provides that contracts entered into in violation of Art. 4, 5 and 7 are void, either wholly or in their relevant part. The joint application of that provision and Art. 58 of the Civil Code produces the effect of severance. That effect allows parts of the agreement to continue being in force, if it is possible for the agreement to operate without the anti-competitive clauses (Art. 58 para. 3 of the Civil Code).

The kinds of activity referred to in Article 9[24] - collaborative agreements providing for specialisation, joint selling and purchasing - fall within a somewhat different re-

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[23] Monopolistic position is described in Art. 2 p. 6 as: the position of a undertaking when that undertaking is not exposed to competition on a national or local market.

[24] Art. 9:

1. The President of the Office for Competition and Consumer Protection may issue a decision which prohibits the implementation of an agreement which:

1) sets up product specialisation in the production or sale of goods, or

gime, since in principle they are not prohibited. Only if they do not satisfy the criteria laid down in Article 9(2), the OCCP may issue a decision which prohibits the implementation of such an agreement. The approach taken here is, in fact, reminiscent of the balancing exercise carried out under Article 85(3) of the E.C. Treaty, and although, as noted below, Polish law does not provide for an exempting mechanism as such, the discretionary method of regulations laid down in this Article has a similar practical outcome. It should be noted, however, that Article 9 covers a limited range of cooperative ventures; significantly, for instance, it does not include collaboration as regards research and development.

Finally, it should be noted that in Article 2 legislation is said to apply to "undertakings", defined in wide terms in Article 2(1) as "natural and legal persons and entities without legal personality which are engaged in economic activity". One controversial aspect of this definition has been the application of the law to local government authorities, as suppliers of certain services and rented accommodation. As such, they comprise important monopoly powers at a local level, and are now within the scope of the definition of "undertaking" in Article 2.

6. Mitigating the Prohibition

Article 6 lays down a general principle, referred to by some commentators as a "rule of reason".[25] However, its real significance would seem to place it closer to Article 85(3) of the E.C. Treaty than to that of the rule of reason in American practice. Article 6 allows practices listed in either Article 4 or Article 5 to be justified.[26] This is perhaps that feature of Polish law which most clearly diverges from the E.C. approach, especially in that it opens the door to the justification of practices embarked by dominant undertakings.

This rule provides that practices listed in Article 4 or 5 are prohibited unless:

- they are necessary for technical, organizational, and/or economic reasons to perform economic activity, and
- they do not significantly restrict competition.

Both conditions must exist cumulatively, and the burden of their proof lies with the person who is relying on them. From the very beginning, the OCCP was very reluctant to

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2) provides for joint sale or purchase of goods, if such an agreement may prejudice the interests of other undertakings and/or consumers.

2.The President of the Office for Competition and Consumer Protection shall issue a decision prohibiting the implementation of an agreement described in para. 1, if the agreement results in a substantial restriction of competition and/or conditions for its emergence on a particular market and/or violates the interests of consumers, and does not give rise to economic benefits, consisting, in particular, of:
1) significant reduction of costs of production and/or sales costs; or
2) improvement of the quality of goods.

[25] See, for example, T. S k o c z n y: *Polish Anti-monopoly Case Law*, Warszawa 1995, p. 149-155.

[26] Art. 6: The practices described in Art. 4 and 5 are prohibited, unless they are necessary for technical, organizational and/or economic reasons to perform an economic activity and if they do not significantly restrict competition; the burden of proof of these circumstances lies with the person who is relying on them.

apply Art. 6 in order to exempt some practices listed in Art. 4 and 5 from its enforcement: "Otherwise, the very objectives of the law might be undermined".[27] An evaluation of the above mentioned criteria is made from an objective point of view, taking into account both the interest of the market participant and the interest of the national economy as a whole. Unfortunately, and unlike in Art. 85(3) of the E.C. Treaty, the interests of the consumers are not mentioned in Art. 6. Due to the general provisions of preamble and Art. 1 of the MPL, the violation of consumer interests shall be also taken into account while evaluating the impact of particular practice on the national economy. Usually, that condition is covered by the requirement that the practice under scrutiny shall restrict competition in a less onerous way for other competitors and consumers.

For example, RUCH, a press distribution company occupying a dominant position on the market, which compelled its franchisees to contribute financially to the franchisor's business, violates Art. 5 of the law. That action could not be considered as necessary to perform the franchisor's economic activity under Art. 6.[28] Equally, there was no ground to justify an exclusive right to dig graves in a cemetery granted to a leasee in a contract of lease by a local government. In such a case, competition on the market of funeral services was virtually foreclosed, taking into account the fact that there was no other cemetery in the locality in question.[29]

In as far as Art. 6 indicates a more lenient approach to the exercise of dominant market power, this practice may be difficult to justify in the future. Admittedly, economic conditions in the earlier period of legislation may have been regarded as exceptional. This argument was put forward by the former President of the Anti-monopoly Office in a paper published in 1993, in which she commented on the earlier policy of the Anti-monopoly Office: "The strategy of the AMO, which began its operation on 13 April 1990, adopted a structural attitude toward competition policy. In the peculiar circumstances of the Polish economy, adopting a regulatory attitude would mean preventing the consequences of economic monopolisation derived from the centrally planned economy, rather than eliminating the reasons thereof".[30]

It should be noted, however, that a justification defence is clearly not available in relation to any of the third category of practices listed in Article 7 related to pricing.

The aspect of Polish legislation most open to criticism is the absence of any kind of general procedure for issuing exemptions or clearances in relation to specific practices, or of any legal authority on the part of the OCCP to adopt general or group exemptions for the guidance of undertakings when drafting their agreements. The need for such an ex-

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[27] Judgment of the Anti-monopoly Court of 23 April 1992 (XVII Amr 5/92), *Wokanda* 1992, no. 11, quoted by T. S k o c z n y: *Polish Anti-monolpoly..., op. cit.,* p. 150.

[28] See Judgment of the Anti-monopoly Court quoted by T. S k o c z n y: *Przeciwdziałanie politykom monopolistycznym w świetle orzecznictwa* [Counteracting Monopolistic Practices in Jurisprudence], Warszawa 1994, p. 114.

[29] See Judgment of the A.C. of 14 June 1995 (XVII Amr 11/95), quoted by S. G r o n o w s k i: *Ustawa antymonopolowa. Komentarz* [Anti-monopoly Law. Commentary], C.H. Beck, Warszawa 1996, p. 151-152, 154.

[30] A. F o r n a 1 c z y k: "Competition Policy During the Process of Economic Transformation", *The Anti-monopoly Office Bulletin,* September 1993, no. 1, p. 8, quoted in the volume ed. by T. Skoczny in the following footnote, p. 72.

empting procedure is clearly felt. For instance, the OCCP has adopted a kind of notice[31] indicating what is permissible as regards patent and know-how licences; nonetheless, this is not a legally binding instrument. This "soft law" approach may produce its own problems.[32] On the one hand, there is little scope for any legal review of the practice in which the OCCP is engaged in this way; on the other hand, there may be constitutional doubts concerning the authority of the Office to issue this kind of notice by virtue of the "closed system" of legal acts provided for in Articles 87 and 93 of the present Constitution. There is also no general provision in the law for the application of a *de minimis* principle; this may also prove to be a long-term problem if the OCCP begins to find itself overburdened with cases which have little real impact on market conditions.

It will be interesting to note that the Implementing Rules of 16 July 1996 for the Application of the Competition Provisions (...) in the Europe Agreement[33] already provide that in the application of Article 63 of the E.A. the principles contained in the block exemption regulations, in force in the Community, are applied fully. Therefore, at least in the relations between the E.U. and Poland, E.U. block exemptions are applicable. The same is true when the effects of activities are negligible. Implementing Rules provide that negligible effects are presumed to exist when;

- the aggregate annual turnover of the participating undertakings does not exceed ECU 200 million, and
- the goods or services which are the subject of E.A., together with the participating undertakings' other goods or services, which are considered by the users to be equivalent in view of their characteristics, price, and intended use, do not represent more than 5% of the total market for such goods or services in the area of the common market affected by the Agreement, and the Polish market affected by the Agreement, respectively.

Here again, and similarly to block exemptions, the *de minimis* rule is applicable through the back door *via* the Implementing Rules to the E.A. It seems, therefore, advisable to have those notions and appropriate legal institutions introduced into domestic legislation, since Poland has to apply them already in its relations with the E.U.

7. Organisational and Procedural Aspects

The tasks necessary for implementing the MPL are carried out by the President of the OCCP. They consist mainly of the prevention of monopolistic practices, the promo-

[31] Reproduced in S.Gronowski: *Ustawa o przeciwdziałaniu praktykom monopolistycznym* [Law Against Monopolistic Practices], Warszawa 1994, p. 189-198 and English translation in: T. Skoczny (ed.): *Harmonisation of the Polish Competition Legislation with Competition Rules of the European Communities*, Warszawa 1997, p. 322-330.

[32] I. Wiszniewska: "Dostosowanie polskiego prawa antymonopolowego do prawa europejskiego" [Approximation of Polish Anti-monopoly Legislation to the European Law], *Studia Prawnicze* 1996, no. 1-4, p. 129-152, takes the view that this notice is too restrictive in many points and, therefore, not suitable for the present Polish legal system. She shares the opinion that the attempt to make Polish law compatible with E.U. law by enacting notices has failed (see p. 147-150).

[33] Decision No 1/96 of the Association Council, *Dziennik Ustaw* 1997, no. 10, item 74. See Council of Ministers Regulation of 13 January 1997 *(Dziennik Ustaw* 1997, no. 10, item 74) and Annex to those Rules.

tion of competition and the protection of consumers' interests. The President carries out his tasks with the assistance of the OCCP, which is located in Warsaw. In addition, the President has established regional offices of the OCCP, located in the nine main towns of Poland: Bydgoszcz, Gdańsk, Katowice, Krakow, Lublin, Łódź, Poznan, Wroclaw and Warsaw. The President (and Vice-presidents) is appointed by the President of the Council of Ministers, and is an semi-independent authority within central state administration, accountable to the Council of Ministers. The President is not a member of the Government, but it is customary to invite him to Government meetings.[34] As might be seen, the President and Vice-presidents may be dismissed by the Prime Minister at any time, which shows the political dimension of the OCCP. Therefore, unlike in many other countries, the OCCP is not an entirely independent administrative body within the state administration, and political changes in Poland produce personal changes in the position of the President of the OCCP. That structural aspect of the MPL still requires future discussion, and it seems that it is already necessary to grant the OCCP an authority independent of political changes.

The procedure before the OCCP is of an administrative nature, conducted according to the Code of Administrative Procedure. However, unlike in other administrative proceedings, appeals against decisions of the OCCP are lodged with a special Anti-monopoly Court based in the Voivodeship Court in Warsaw, and not with the Supreme Administrative Court. The Anti-monopoly Court (A.C.) is a specialised judicial body created only to deal with appeals against all the final decisions of the OCCP. An appeal shall be lodged within a period of two weeks from the day of handing down the decision by the OCCP, including those made by regional offices of the OCCP. The A.C. decisions are final, and can be appealed against to the Supreme Court only in extraordinary situations of an interpretation of law.[35]

The OCCP may impose rather heavy fines on undertakings calculated upon the basis of a 1/12 turnover earned during the preceding fiscal year. Commentators observe that the amounts imposed so far by the Office, and upheld by the A.C., were comparatively low, and note a too tolerant approach to the violations of the MPL.[36] The heaviest fines up to date were paid by the telecommunication undertaking - a sum of 75.000 zlotys; other fines considered as high amounted to 50.000 or 20.000 zlotys.[37]

As regards the fines which may be imposed under Chapter 4, it is interesting to note the power to impose such penalties on individuals, as distinct from the enterprise as a whole - Article 16 (possible under American law, but not under the E.C. rules). The maximum fine in such cases is fixed by referring to a multiplier of the "average salary", a concept which is further explained in Article 2(9), i.e. the average monthly salary in

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[34] See. A. F o r n a l c z y k: "Competition Law and Policy in Poland in 1990-1995" [in:] *Harmonisation ..., op. cit.*, p. 46.

[35] Art. 392-39320 and Art. 47935 of the Code of Civil Procedure. That extraordinary appeal is called after the French term: "kasacja".

[36] T. S k o c z n y (ed.): *Harmonisation..., op. cit.*, p. 106-107.

[37] See T. S k o c z n y: *Polish Anti-monopoly..., op. cit.*, p. 193.

state enterprises during the last month of the preceding quarter year (this information is based on an official statistical source).

The OCCP's powers of investigation are listed in Article 20(3). Some of them are cast in wide terms, particularly as regards the scope of the explanations, which can be required under point 3, and of the information, which may be collected under point 4. The law does not give the OCCP employees the power to search property and premises in exercise of investigatory powers. Commentators doubt whether employees of the OCCP may even ask the police to help them to conduct investigations, since such a right has not been mentioned by the law. In practice, there have been no cases as yet of a refusal to exercise the right to inspect the premises of an undertaking under investigation,[38] but the problem to extend those powers is a topic for further discussions. The jurisprudence of the A.C. has, however, denied the OCCP the right to require that the controlled undertaking produces special documents, such as reports or analyses, for the needs of investigation, if those documents have not been required by the law.[39]

8. Control of Concentrations

This is a newer chapter substantially amended in 1995 under the convoluted title of "influencing the process of the formation of the structure of the undertaking". Previously, the control of mergers or concentrations was virtually non-existent.

The new version of the MPL subjects mergers to the preventive control of the OCCP. Article 11 of the legislation requires notification to the OCCP of any intention to bring about a concentration within fourteen days of the initiating act. The notified concentration may be prohibited by the decision of the OCCP when, as a result of the concentration, the undertakings taking part in it would acquire or strengthen a dominant position on the market. In the case of the assumption of key functions in two competing undertakings by the same person,[40] it is enough for competition to be significantly weakened. That result is presumed in a case when the joint market share of the participating undertakings exceeds 10%. The OCCP is also entrusted with a scrutiny of the transformation of companies, undertakings and utilities into companies in which only the State Treasury or local governments has shares. Article 12 gives the OCCP the power to break up or dissolve companies, cooperatives or state-owned undertakings which are found to have a dominant position.

It could be argued, in fact, that control of transformations does not make a great deal of sense. What is being considered in such cases is not a structural change within the market, but simply a change of the legal form of an existing undertaking from state-owned to private. The only convincing justification for legal scrutiny of such transformations is if the outcome would be a company occupying a dominant position on the

[38] See S. G r o n o w s k i: *Ustawa antymonopolowa..., op. cit.*, p. 343.

[39] Judgment of the A.C. of 6 September 1993 (XVII Amr 22/93), *Wokanda* 1994, no. 2.

[40] Those functions are described as: director, deputy director, member of the board, member of the supervisory board, member of the board of auditors or the chief accountant (Art. 11 para. 2, p. 5).

market (see Article 11(c)(3) and Article 12 - but we may ask whether the former provision is at all necessary, since Article 12 appears to give the OCCP sufficient powers to deal with this situation). The OCCP has itself recently proposed that Article 11 (c) should be repealed.

When undertakings formerly owned by the state or local government are in the process of a transformation into private companies, it is considered that the state is still interested in monitoring how and where the assets are being disposed. A similar interest is expressed in the Law on Companies with Foreign Participation of 1991,[41] reflecting an attitude which prevailed more in the past socialist regime, by evincing distrust of foreign participation or control.

Undoubtedly, the most significant aspect of Article 11 is the part relating specifically to concentrations. The concept of concentration is, in many respects, similar to that employed in E.C. law through Council Regulation 4064/89, although the Polish definition is somewhat wider. Under Article 11, concentration covers: (a) acquisition of the assets of another company (Article 11(2), points 1 and 2); (b) acquisition of shares (points 3 and 4); (c) acquisition of control by other means (for instance, by contractual arrangement (point 6); (d) the carrying out of the same function in competing undertakings by the same persons (point 5). This last method of concentration is not explicitly covered by the E.C. regulation, although it may be assumed that "other means of control", mentioned in Article (3)(1) of the E. C. measure, would cover the situation referred to in Polish law. On the other hand, Polish legislation does not explicitly deal with joint ventures, which are covered in Article 3(2) of Regulation 4064/89.

However, the most significant difference of approach to the control of concentrations between E.C. and Polish law remains in the low thresholds for notification, established by the latter. They are set at an aggregate turnover of 5 million ECU for undertakings taking part in concentration on the Polish market, and 2 million ECU in the case of an acquisition of assets. For banks, however, the threshold has been set at 50 million ECU. Those thresholds appear to be very low in comparison with those employed in E.C. law; assuming that the Polish market is about one-tenth the size of that of the Community, scaling down the E.C. threshold would lead to a turnover figure of about 25 million ECU for a market the size of Poland. This view seems to be accepted by the OCCP, which recently submitted a proposal to raise the threshold for notification to 25 million ECU for all concentrations, except for those listed in Article 11(2)(2), where the figure would be 5 million ECU. In this last situation, the issue at stake is the value of the acquired undertaking rather than the aggregated value of the merging companies.

Controversial provisions of the MPL include Art. 11 para. 2, p. 6, which excludes from OCCP scrutiny the acquisition of shares traded in public. The Polish Securities Commission (S.C.) is entrusted with this task by the Law on Public Trading in Securities of 21 August 1997.[42] Here, there is an obvious conflict of interests between OCCP and the S.C. and the respective fields of regulations of the Law on Public Trading in

[41] Law of 14 June 1991, *Dziennik Ustaw* 1991, no. 26, item 143.

[42] *Dziennik Ustaw* 1997, no. 118, item 754.

Securities and the MPL. The Law on Public Trading in Securities gives to the OCCP only the right to express its opinion in the matter of the acquisition of shares on the stock exchange, but the decision of the S.C. is decisive in that matter. The S.C. is not obliged to take into consideration the same criteria as the OCCP, and, in particular, the acquisition or strengthening of a dominant position on the market.

The notification of the intention to concentrate produces a suspensive effect on prospective concentration. The undertakings taking part in it are obliged to suspend activities, which could result or may result in attaining or strengthening a dominant position on the market, until their actions receive notification from the President of the OCCP, namely, that there are no objections to the intention to concentrate or to transform them. That effect is similar to the suspensive effect provided for in Regulation 4064/89.

The final decision prohibiting a concentration or assumption by the same person of functions mentioned in Art. 11 para. 2 point 5 shall be taken by the President of the OCCP within a period of no more than 2 months. That period is considered as a *stricti iuris* period which cannot be extended. As a result, the OCCP decision issued after the expiry of that period is invalid and may be quashed.[43] The length of this period is obviously too short. The OCCP can only formally evaluate submitted concentration in two months. The power given to the OCCP to submit the undertakings to conditions under which the concentration may be effected (Art. 11a para. 2), has to be considered only as an entirely formal pronouncement. As the result of that deficiency, the final decision in the matter of concentration cannot impose any conditions or duties on undertakings taking part in it. Such a decision may only prohibit concentration or the assumption by the same person of indicated functions (Art. 11a para. 4), or notify parties about the OCCP's lack of objections to the intention to concentrate (Art. 1 la para. 3). Only a formal evaluation of concentration by the OCCP requires critical appreciation. In European Law, the position of the Commission is quite different, and never reduced to sole formal decisions. Here again, the MPL requires amendments and the role played by the OCCP needs to be reevaluated.

9. The Spheres of the Application of the MPL and the UCL

There is no doubt that almost all the situations referred to in Articles 4 and 5 of the Anti-monopoly Statue may render "entry to the market difficult" in the sense of Article 15 of the UCL. But it seems that the latter provision should be interpreted in the broadest possible way. For instance, Article 15 should enable an enterprise which is already established on a particular market to seek relief on account of such activities as dumping or boycotting, even though it has tried to enter the market as such. At the same time, any activity which is prohibited under the MPL is by definition contrary to law, and usually to good faith, and would, therefore, be actionable under Article 3 of the UCL.

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[43] Supreme Court Judgment of 21 November 1993 (III CZP 63/93), *OSNCP* 1994, no. 6, item 132 with commentary of T. W o ś, *Państwo i Prawo* 1995, no. 1.

There arises the question how the scope of the two statutes may be respectively delimited. The most widely accepted argument refers to the kind of protection, which the legislation seeks to provide in each case: the MPL seeks to protect the freedom to compete, while the UCL aims to protect honesty and fair dealing in competition. The former statute is concerned to protect the existence of competition on the market, while the latter prescribes the manner in which competition should operate and attempts to preserve its “quality”.[44]

It should also be remembered that the two statutes belong to different branches of the law: the UCL is within the field of private law while MPL legislation is within that of public law. This leads to an important distinction in terms of the kind of remedy available under each statute. The MPL entrusts legal action against anti-competitive behaviour to the OCCP, which is primarily an administrative body. The UCL, on the other hand, relies on the initiative of private parties (businessmen, customers and their associations) to take action against violations which they consider to have caused them injury. The different orientation of the two statutes is based on the different kinds of interest, which are the subject of protection in each case. The MPL is concerned with anti-competitive activity, which has adverse consequences for a large number of competitors or for the operation of a particular market. In other words, it has been established to deal with activities which endanger the structure of the market.[45] The unfair competition rules, however, seek to protect the individual interests of competitors and customers rather than the market itself.

The UCL is, therefore, of great significance for private parties. It opens the way to litigation before courts of general jurisdiction, and means that injured parties need not wait for the decision of the OCCP, but can act on their own initiative at what they consider to be an appropriate moment. At the same time, the OCCP will not be obliged to deal with complaints from individuals relating to injury to their specific interests, but instead can direct such parties to the use of civil proceedings. While the exact borderline and interaction between the two statutes will have to be determined by case law, there is every indication that the legislation on unfair competition will come to play an increasingly important role. Generally, the underlying aim is to make Polish legislation on competition matters compatible with that in other European Union legal systems. The UCL is a serious step in that direction. A further revision of the MPL in order to align that law more closely with the law of the European Union is now the second stage in the process of legislative reform.

10. Conclusions

The whole field of competition law in Poland appears to be quite modem and compatible with West European standards. However, the situation is diversified, because

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[44] See H. E i s e n m a n n: *Grundriss Gewerblicher Rechtsschutz und Urheberrecht,* C. E M u l l e r 1985, p. 128-129; and T. S k o c z n y [in:] J. S z w a j a (ed.): *Commentary on the Law against Unfair Competition,* 1994, notes 1 to 5 on Article 15.

[45] See also E. U l m e r, note 8 above, p. 58 and the judgment of the A.C. of 25 January 1991, *Orzecznictwo Gospodarcze* 1991, no. 5, item 35, with the comment by Z. M a r m a j.

the E.A. pays more attention to the competition (anti-monopoly) law than to unfair competition. In fact, unfair competition law as such does not exist on the E.C. level except for few areas, such as advertising, food products marking, or trademarks.[46]

In the area of unfair competition law it seems that the most needed change in the Polish UCL is a different attitude towards comparative advertising. According to Directive 97/55/E.C. of 6 October 1997, amending Directive 84/450/EEC, comparative advertising shall be permitted, while in the UCL it is still prohibited. In addition, the burden of the proof of factual claims in misleading advertising cases shall rest on the advertiser and not on the claimant, as in the UCL.

Another controversial issue relates to geographical indications. The E.U. law introduced a system of a registration of geographical indications and designations of origin for agricultural products and foodstuffs. No system of a registration of geographical indications exists in Poland, where such indications are protected only without registration, through the provisions of Art. 8 and 9 of the UCL. On the other hand, protection of domestic geographical indications in Poland is very weak, because that type of intellectual property right was generally neglected under the socialist regime, and many indications were simply destroyed.[47] Such an attitude clearly contradicts the approach taken by the EC J in its judgment of 10 November 1992,[48] where the Court clearly recognised that the protection of all geographical indications falls under the term of industrial and commercial property according to Art. 36 of the E.U. Treaty. As a way to promote the development of domestic geographical indications, a bill on industrial property law provides for the registration of those indications with the Patent Office in Warsaw. Those provisions are compatible with Regulation No 2081/92. Therefore, the effect of the approximation of law will be achieved.

I. Wiszniewska[49] indicates some differences between Polish provisions on advertising specific groups of products and those of the E.U. law. They relate to alcoholic drinks, cigarettes, tobacco and pharmaceuticals. It seems, however, that those differences are not important enough to require legislative intervention at present.

The M.P.L., on the other hand, is considered by the authorities in Poland as more or less compatible with the European Law.[50] This optimistic approach probably requires verification. Some points in which the law needs to be changed have already been indicated. They include:

- prohibition of agreements which have as their object or effect the prevention or restriction of competition in Art. 4 MPL;
- extension of "rule of reason" formula in Art. 6 in a way similar to that of Art. 85(3) of the E.C. Treaty;

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[46] See R. S k u b i s z: "Polskie prawo o zwalczaniu nieuczciwej konkurencji - z perspektywy prawa Unii Europejskiej" [Polish Law Against Unfair Competition - from the Perspective of the Law of the E.U.], *Państwo i Prawo* 1996, no. 4-5, p. 88-100.

[47] The best example could be "Kiełbasa krakowska" [Cracow Sausage].

[48] Case No C-3/91 - "Turron", *ECR* 1992,1-5529.

[49] I. W i s z n i e w s k a: *Polskie prawo reklamy* [Polish Advertising Law], Warszawa 1998, p. 157-159.

[50] See *Report on Harmonisation of Polish Law with the E.U. Law of May 1998*, p. 168, 170-171.

- introduction of the *de minimis* exemption;
- introduction of group exemptions, individual exemptions and negative clearances;
- liquidation of the exclusion of stock exchange transactions from OCCP's control;
- further development of the investigative powers of the OCCP.

Two areas which belong to the E.U. competition law remain, however, almost unregulated in Polish law. Those are public aid and public undertakings, to which special or exclusive rights have been granted (Art. 63 and 65 of the E.A.).

Implementing Rules to the E.A. on competition do not relate to public aid, although this form of aid is covered by the provisions of Art. 63 para, l(iii), para. 2, para. 4 and para. 6. It follows that public aid in Poland has to be assessed already on the basis of criteria arising from the application of Art. 92 of the E.C. Treaty. The term for the implementation of those provisions is not clearly stated in the E.A. It is, however, obvious that it started on 1 March 1992, i.e. the date on which the Interim Agreement came in force (Art. 122 of the E.A.). This means that the first five years after the entry into force of Art. 63 expired already in 1997. Despite this fact, Poland has not yet prepared appropriate legislation establishing criteria for granting public aid similar to the provisions of Art. 92 of the E.C. Treaty, and permitting to monitor and report the total amount and distribution of aid each year. The appropriate text is being prepared by the Minister of the State Treasury, but attempts to translate the provisions of Art. 92, certain EEC directives, and certain rules of GATT relating to subsidies into Polish have not been successful. Those texts simply do not correspond to general legislation relating to public finances in Poland. Another problem is the poor quality of the translations of the appropriate texts.

The Association Council has also not issued any regulations dealing with public undertakings and undertakings enjoying special rights (Art. 65 of the E.A.). It seems, however, that the period for the implementation of the rules provided in Art. 90 of the E.C. Treaty has already elapsed. Unfortunately, Polish law has practically no provisions dealing with such undertakings in a general way, but rather legislation concerning the particular sectors in which such undertakings operate (e.g. transportation, coal mining, gas and oil drilling, telecommunications, post, radio and television). This type of regulation does not provide the consistency required by Art. 65 of the E.A. Therefore, a general regulation implementing the provisions of Art. 90 of the E.C. Treaty in domestic legislation seems to be necessary. Contrary to the public aid sector, where preparatory work on the appropriate bill has already begun, such work has not been initiated in public undertakings. Here again, a prompt reaction from the Ministry of State Treasury is required.