

ADJUSTING POLISH LAW TO THE REQUIREMENTS OF THE EUROPE AGREEMENT

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1. The Europe Agreement¹ imposes an obligation of the approximation of Polish law to that of the Communities (Article 68 of the Agreement). The fulfilment of this obligation is one of the conditions for Poland's economic integration with the European Union (EU).

The adjustment of Polish legislation to the standards of the European Union results from the assumption that the objectives of the Agreement are not only to remove barriers hindering the efficient functioning of the free trade area, but, first of all, to create circumstances enabling Poland to become a member of the European Union. This primary objective of the Europe Agreement demanded difficult negotiations, and was finally expressed in the last statement of the preamble.²

The obligation to approximate laws is aimed, first of all, at an elimination of hindrances in the sphere of Poland's economic integration with the EU. The harmonisation of legislation facilitates the movement of goods, services, and capital. It creates also a compatible legal infrastructure in the areas of competition, protection of intellectual property, rights of employees and consumers, and environmental protection. Similarly to the majority of the provisions of the association agreement, the regulations concerning the adjustment of our legislation to the legal standards of the EU constitute a clear reflection of the provisions of the Treaty of Rome, setting up the EEC, which in Article 3 provides that the approximation of the laws of member states should take place "to the extent necessary for the functioning of the Common Market".

The following article is intended, on the one hand, as a concise analysis of the essence of the obligations concerning the harmonisation of our laws, accepted by Poland in the

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¹The Europe Agreement establishing an association between the Republic of Poland, on the one hand, and the European Communities and their member states, on the other hand, *Dz.U.* [Journal of Laws] no. 11/1994, item 38.

²The conclusion of the preamble is as follows: "Recognising 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, have agreed as follows..." Although the above-quoted statement was formulated as a unilateral expectation of one party of the Agreement (i. e. the Republic of Poland), our aspirations to full membership were accepted at subsequent "summits" of member states of the European Union in Copenhagen (1994) and Essen (1995). In 1991, I took part in the negotiations of the Agreement. The opinions expressed in the article present exclusively my own views.

Europe Agreement; on the other hand, it is conceived as an attempt to assess the legislative priorities, pace, and instruments of the realisation of the above-mentioned obligations by the Government, the Parliament, and courts of the Republic of Poland.

Apart from a few fields, such as intellectual property or the obligation of a quick limiting of legal instruments and the strategic sectors of the economy, including some services (e.g. banking, insurance, or legal services), the liberalisation of our economic law is in the interest of both parties of the Europe Agreement. Furthermore, the global balance of advantages and burdens accompanying the modernisation of our laws is undoubtedly positive - even though the Agreement provides economic subjects of the stronger contracting party with long-lasting unilateral advantages in certain strategically important sectors of the economy, e.g. by means of a radical strengthening of the position of foreign holders of intellectual property rights or the opening of Polish financial and other markets dominated by companies from the European Communities (EC), while it refuses to observe the rules of free competition in the trade of agricultural products, the work force movement, and in labor intensive services.³

The considerable costs of the adjustment of our laws to the requirements of the Europe Agreement are compensated with "interest" by the advantages of opening access to the market of the EC, an increased inflow of capital, and the advantages associated with forcing a pro-competitive behaviour on Polish economic subjects. The expenditure on legislative transformation, however, should be minimised by accelerating the processes of changing law wherever those "investments" promise the highest gains. Simultaneously, the interpretational discretion in the Agreement should be used to account for the slowing down of harmonisation or preserving our legal solutions, when justified by the socioeconomic considerations and not only by the convenience of the entrepreneurs, who would like to prolong the artificial isolation of our market from foreign competition.

2. *The obligation of the approximation of legal regulations.* The Europe Agreement, in principle, does not oblige Poland to accept the law of the Communities as a whole. Both Article 68 and Article 69 of the Treaty use the term "approximation of laws". The approximation of regulations means reaching such a harmonisation of legal institutions which provides the fulfilment of the primary objectives of the Agreement in the sphere of economic integration. The Europe Agreement provides Poland with a higher level of legislative autonomy than in the case of the Member states of the European Union, even in areas regulated by the directives and regulations of EC organs, which do not allow distinct provisions in national legislation. As long as Poland is not a member of the EU, neither regulations nor directives constitute the source of Polish law, but only play a role of patterns (models) of legal solutions, with which we

³ For more information cf. S. Sołtysiński: "Układ o stowarzyszeniu między Polską a Wspólnotami Europejskimi" [Agreement on Association between Poland and the European Communities], *Państwo i Prawo* 1992, no. 6, p. 4 and following. Departures from the principles of free trade and the uniform market, provided for in the Agreement, concern only those fields where the weaker party has, or potentially can have a comparative advantage (agriculture, steel, coal, and textile industries, labour-intensive services, etc.).

should harmonise our legislation.⁴ Therefore, the recommendations included in resolution No. 16 of the Council of Ministers of 29 March 1994, obliging ministers and central agencies of state administration to examine drafts “with respect to their compatibility to laws of the European Union”⁵ are inaccurate.

The flexibility of the harmonisation process is used only to a very limited extent. The pace of legislative integration is set rather by such factors as preferences of the ministry responsible for the preparation of a draft, external lobbying, the availability of funds necessary for a particular legislative venture, etc.

The example to follow for reformed Polish law is “Community legislation” (Article 68 of the Agreement). The legal system of the EC consists primarily of three establishing treaties⁶ which, together with subsequent annexes and protocols, were combined into the Single European Act. The Single Act, documents concerning the accession of new member states, and other international agreements, in which the EC are the contracting parties, constitute the so-called primary source of law of the EU. Organs of the Communities issue laws in the form of regulations, directives, and decisions.⁷ In its broader meaning, the legal system of the EC includes also recommendations and opinions of the European Council and the European Commission. Even though it is disputable whether they can be treated as *sensu stricte* sources of law, the two organs exert significant influence upon the final content of the regulations of the Community. The same refers to the judgements of the Court of Justice and the Court of the first instance, which cannot be denied real influence on the shape of the legal system in the EC. The whole of the legal body of the Communities is described with the term *acquis communautaire*. The Europe Agreement, therefore, obliges Poland to approximate (harmonise)⁸ our legislation with the laws of the EC.

The Europe Agreement does not set any concrete deadline for the adjustment of Polish legislation to the legal standards of the EC. This would be impossible, considering the fact that the objective we pursue is changing continuously. Poland is obliged to follow the evolving legal system of the European “fifteen”. The obligation included in the Agree-

⁴It is accurately emphasised that Poland is not obliged to copy directives of the Communities. See L. Zalewski: *Komentarz do Układu Europejskiego* [Commentary to the Europe Agreement], ed. by C. Banasiński, J. Wojciechowski, Warszawa 1994, p. 191. The *White Paper* published by the European Commission in 1995 also indicates that, contrary to the accession to the Union, the integration of the associated countries does not assume the necessity to accept *acquis communautaire* as a whole, “*White Paper*“ *Preparation of the Associated Countries of Central and Eastern Europe for Integration onto the Internal Market of the Union* (Com 1995), 163 final, *Executive Summary*, p. 1.

⁵Cf. § 1 and 4 of the resolution of the Council of Ministers concerning additional requirements for the proceedings with the governmental bill drafts with respect to the necessity of fulfilling the criterion of compatibility to the law of the EU (not published).

⁶The Treaty of Rome and treaties establishing the European Coal and Steel and European Atomic Energy Communities.

⁷For more information see A. Wojciechowski: “Instytucje Wspólnot Europejskich” [Institutions of European Communities], *Więź*, May 1995, p. 69 and following.

⁸I use the terms “approximation” and “harmonisation” interchangeably, but some authors try to distinguish the two notions, see T. Pajó: *Komentarz do Układu Europejskiego...*, *op. cit.*, p. 196.

ment requires using the best endeavours, but does not mention any results.⁹ The latter statement, however, should not be demobilizing. A slow pace of harmonisation makes impossible both quick accession to the Union and taking advantage of the “transplantation” of legislative solutions that were usually verified in practice.

Assertions that Poland preserves independence in setting the pace, order, and the necessary range of adjustment should be treated with caution.¹⁰ The Agreement includes quite numerous provisions determining the schedule of the adjusting measures. They usually concern such areas whose amendment brings more advantages to member states of the EC than to Polish entities. It refers, among others, to amendments of customs law, the schedule of the opening of Polish investment and service markets, restrictions on public aid, introduction of a high level of intellectual property protection, free movement of capital and transfer of any profits coming therefrom, etc.¹¹

It is difficult, however, to find in the Agreement any concrete schedules of changes of the *acquis communautaire* that would remove the restrictions imposed on Polish goods and services or on free movement of workers in all fields where Poland has, or potentially can have a comparative advantage (e.g. the trade of agricultural products, transport services, the movement of workers, and even of employees of Polish companies which supposedly enjoy full freedom of supplying services into the territory of EC Member states).¹²

The pace and direction of the process of the approximation of Polish legislation is, to a large extent, determined by the Association Council - an organ created by the Europe Agreement for controlling the observance of this international agreement. The decisions made by this organ must be unanimous, but, of course, the distribution of power is asymmetrical. Thus, for instance, acting under pressure from EU Member states, at the beginning of 1996, Poland committed itself to make respective amendments in its legislation that enabled recognising EU certificates of safety and marks of quality on the goods imported to Poland from the territory of the Union, unaccompanied by any corresponding concessions concerning Polish certificates in EU countries.¹³ The result of such a distribution of power is that, unlike the EC, an

⁹ Art. 68 reads: “Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation”.

¹⁰ Such an assertion can be found, among others, [in:] *Program działań dostosowujących polski system prawny do wymagań Układu Europejskiego*, [Programme of Activities Adapting the Polish Legal System to the Demands of the Europe Agreement], Warszawa 1993, p. 4.

¹¹ Cf. e.g. articles 9-12, 60, 61, 63 section 3, 65, 66 section 2, 67 section 2 of the Agreement.

¹² The apparent asymmetry of rights and obligations between the parties to the Agreement to the advantage of Member states is indicated by some Western economists. Cf. e.g. A. Winters: *The Association Process. Making It Work in Europe*, Brussels 1992, conference materials, p. 3 and 10. I mention the above fact from the perspective of an Euro-realist who, while trying not to question the doubtless advantages which result from the Europe Agreement, wants to point out the real balance of this international agreement (for more information cf. S. Sołtysiński, *op. cit.*).

¹³ More or less at the same time the EC forced Slovakia to abolish import duty on commodities from the Communities. Poland will also have to abolish regulations prohibiting the import of second-hand cars without devices preventing the emission of toxic exhaust fumes, since - according to the EC - this would be an act of a discrimination of vehicles originating from EU countries, considering that there is no prohibition in Poland to register such cars bought on Polish territory.

associated country has much more limited chances for inflicting changes on the *acquis communautaire* which imposes restrictions on the access of Polish goods to the territory of the Communities. Nevertheless, due to the lack of organised lobbying and poor preparation of justified postulates by Polish economic circles, we hardly enjoy the opportunity of putting forward motions to the Association Council, that could help, even if only to a limited extent, to accelerate the abolishing of non-tariff restrictions of free trade present in EC legislation.

The model to which Polish legislation should approximate is not only the *acquis communautaire*, i.e. the legal system created by EU organs, but also typical legal standards which are in force in EU Member states. This refers especially to spheres which are not regulated by the uniform law of the EU, but those where a significant standardisation of national regulations took place in the EU (e.g. civil procedure).

Many fields of law, in particular tax law, civil law, criminal law, and administrative law were less affected by the processes of harmonisation. Nonetheless, the process of approximation has been taking place for a long time also within those fields. The obligation to harmonise the legislation of the member states of the European Union follows from Articles 100-102 of the Single European Act.¹⁴ The latter contains a postulate of the harmonisation of substantive law, including regulations based on common law.¹⁵ In view of the fact that Articles 68-69 of the Europe Agreement are based on the principles of the Single European Act, the analysed notion of the “approximation of legislation” should be understood similarly to the current interpretation of Article 100 of the above-mentioned act.

It is also worth taking note of the phenomenon of delaying the harmonisation of rules on competition resulting from actions of major foreign investors, who exert pressure - often successfully - upon the governments of countries associated with the EU to obtain special privileges. Such a practice violates the principle of an equal treatment of economic subjects. The European Commission brings to the attention of associated countries the fact that yielding to such pressure, which consists in granting generous government guarantees and other long-lasting investment privileges, is against the provisions of association agreements.¹⁶

3. Priority fields in the harmonisation process. Article 69 of the Europe Agreement contains a list of priority fields subject to the obligation of harmonisation.¹⁷ The above enumeration is not exhaustive. Literature on the subject emphasises that the creation of legislative priorities within the fields enumerated in article 69 of the Agreement, and

¹⁴ For more information see T. Kot: “Harmonizacja prawa w Unii Europejskiej” [The Harmonisation of Law in the European Union], *Kwartalnik Prawa Prywatnego* 1995, vol. 4, p. 544 and following.

¹⁵ D. Vignes [in:] J. Megret, J. Louis, D. Vignes, M. Walbroeck: *Le droit de Communauté Economique Européenne*, Brussels 1983, p. 154-155.

¹⁶ The Commission provides an example of the pressure and privileges obtained by telecommunication companies. *White Paper*, section 4.21, *op. cit.* (footnote 4).

¹⁷ “The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment”.

those not included in the list should serve, first of all, facilitating the economic integration of Poland in the EC. The interpretation of Article 100 of the Single European Act, whose *ratio legis* consists in enabling the creation and functioning of the common market, is similar. However, considering the fact that the Association Agreement is also devoted to political, scientific, and cultural co-operation, it should be assumed that the obligation of the harmonisation of our legislation extends to all fields of the legal system, if it is required for the realisation of the objectives of this international agreement. Therefore, while not diminishing the priority role of the harmonisation of economic law, one should also opt for the adjustment of criminal and administrative law or acts on primary, secondary and higher education and scientific research, since such an obligation ensues frequently from specific regulations or objectives of the Europe Agreement.¹⁸

The thesis concerning the necessity of the harmonisation of fields other than economic law was accepted in its broadest sense by EU member states, though with considerable reluctance. It is often emphasised that the harmonisation of selected fields (e.g. criminal and tax law) took place without any help of regulations or directives.¹⁹ However, one could suppose that outside the field of economic law or the fields regulated by directives and regulations issued by EC organs, harmonisation might be less thorough, calculated only for the purpose of “compatibility”, and not designed for in-depth adjustment of legislation.

It is worth noticing that, in principle, neither the Europe Agreement nor the Single European Act regulate the obligation of the adjustment of legal procedures.²⁰ The lack of international obligations in the law of procedure should not lead to giving up attempts to harmonise all fields where approximation is good for accelerating the process of integration or improving Polish rules of procedure.

The programmes for adjusting the Polish legal system to the requirements of the Europe Agreement created so far do not take into account in a sufficient way priorities resulting from a thoroughly considered legislative policy, which would aim at supporting the interests of Polish economic subjects facing increased competition on the part of foreign companies acting in the emergent common market. We do not take full advantage of the possibility of “transplanting” such legal solutions, present in EC legislation and in the national legal systems of member states, which contribute to the development of transfrontier trade and investment as well as to facilitating the pursuit of economic activity and, simultaneously, reduce the negative impact of abusing the dominant position of partners who are economically stronger or take advantage of the lack of experience on the

¹⁸ Cf. e.g. art. 85 of the Agreement on preventing “money laundering”, art. 87 (social security) or art. 90 (harmonisation of European information and the audiovisual media policy).

¹⁹ Cf. M. Bigay: “L’application des règlements communautaires en droit pénal français”, *Revue Trimestrielle de Droit Européen*, 1971, vol. 1, p. 14 and following.

²⁰ Cf. D. Vignes, *op. cit.*, p. 533. Cf. also T. Kot, *op. cit.*, p. 553. However, see art. 66 section 1 of the Agreement which obliges Poland to provide the holders of intellectual property rights with “comparable means of enforcing such rights”, which includes both substantive rights and procedural remedies, as well as guarantees their pursuit before a court. This regulation constitutes one of the numerous examples of special privileges granted to holders of intellectual property rights.

part of Polish economic subjects and consumers. The shortcoming of our adjusting programmes is their passive character, which consists primarily in the realisation of the expectations of the opposite party, expressed in the Europe Agreement. Thus, for example, "The Programme for Adjusting the Polish Legal System to the Requirements of the Europe Agreement", adopted by the Council of Ministers on 26 January 1994, provided that the range of highest priority legislative changes should include in particular: customs law, financial services, rules on economic relations, industrial law, intellectual property, protection of the environment, and issues connected with standardisation (the above list constitutes largely a repetition of article 69 of the Agreement). Simultaneously, the said programme did not include any specific bill drafts justified by the special interest of Poland as an associated country. However, it must be emphasised that the specific content of the programme did include some bill drafts, which, though not numerous, were extremely important, and whose passage was prompted, first of all, by the domestic necessity to modernise our legal infrastructure. One should mention the Accountancy Act the Goods and Services Tax Act (VAT) and the Public Procurement Act, passed by the Parliament in the following years.²¹

An example of a completely new act, extremely up-to-date as far as the present shape of the capital market is concerned, is the Law on Public Trading in Securities and Trust Funds.²² Even though neither the law on public trading in securities nor legislation concerning trust funds are enumerated in the list of priorities defined in article 69 of the Agreement, both fields required prompt regulation due to the risks for inexperienced investors and companies that lurk in the spontaneously developing stock exchange and public trading in securities. Despite the fact that it was amended in 1994, this pioneer act is still not free from technical shortcomings, which urgently need further amending.²³

The negative results of a lack of balance in economic potential between Polish and foreign economic subjects in the reality of a rapid opening of our market, can be diminished by "transplanting" numerous legal solutions of the EU. A lack of balance between contracting parties is evident very often in agreements concerning the transfer of technology. In this case, Polish subjects usually appear in the role of licensees and franchisees, as well as in transnational distribution contracts, in which they act as representatives, dealers, or exclusive licensees. Foreign licensors, franchisors, and exporters make the most of the lack of respective regulations in Polish law by imposing on Polish subjects numerous obligations which are illegal in the EC and their Member states. As a matter of fact, it is possible to apply for help in the Anti-Monopoly Office, but until respective regulations modelled on regulations of the European Commission have been issued, only few Polish companies will be able to afford to benefit from the anti-monopoly proceedings, and prove that the requirements imposed on them by a contract of distribution or franchise

²¹ The Goods and Services Tax Act, the Accountancy Act of 29 September 1994, *Dz.U.* no. 121, item 591; the Public Procurements Act of 10 June 1994, *Dz.U.* no. 76, item 344.

²² Act of 22 March 1991, unified text: *Dz.U.* 1994, No. 58, item 139.

²³ Cf. A. Wiśniewski: *Prawo o spółkach. Spółka akcyjna* [The Law on Companies. The Joint Stock Company], Warszawa 1993, p. 152 and following.

agreement constitute monopolistic practices. As a minimum proposal I suggest that the Anti-Monopoly Office should immediately issue interpretations which would take into account the regulations of the European Commission concerning contracts of distribution,²⁴ exclusive purchase contracts,²⁵ and franchise agreements.²⁶ Similar explanations concerning licence agreements, issued by the Anti-Monopoly Office in 1993, slowly help “civilising” the practice of licence agreements. Nevertheless, following the model of EC legislation, respective regulations should be issued in the near future, since the legal status of the guidelines of the Office, which are not sources of law, is unclear and many lawyers do not even realise their existence, owing to the fact that publications of the Anti-Monopoly Office are not easily available.

In the majority of EU member states, distributors are protected not only by anti-trust legislation, but also by civil law. A typical instrument of protection is granting compensation to a distributor in the case a legal relation was terminated, accompanied by the right of statutory claim for compensation for providing the exporter (supplier) with clients in case the contract of distribution expired. Such legal solutions have been in force for a long time, for example, in France, Belgium, and the Netherlands. The analysed problem should be regulated in the Civil Code, which urgently requires amending in this field, or in a separate act. Nevertheless, the work on amending the civil code, conducted so far, has been advancing very slowly, and the existing programme of changes is criticised as an accidental set of proposals which omits many important issues, especially in the field of economic relations.²⁷

One of the most urgent legislative problems, important from the perspective of the national interest of an associated country, is either abolition or a significant change of the statutory joint property of husband and wife (Article 31 of the Family and Guardian Code). This problem could be solved by following the example of Germany or Scandinavian countries. The model of statutory joint property, currently in force, evokes implications which are difficult to accept even when only one of the spouses pursues economic activity. Thus, for example, the requirement to obtain consent of the spouse, who does not participate in civil law partnerships or commercial law companies, for any act exceeding ordinary management performed by the spouse-partner (e.g. voting on payment of profits or transfer of possession of shares) can be reconciled neither with the principles of safety of commerce (especially in the case of trading in securities) nor with efficient exercise of the rights of a shareholder of a commercial law company.²⁸

The “transplantation” of legal solutions of the EU into our legislation is sometimes premature or poorly considered. One should approach draft regulations and draft directives of the EU with particular caution, since many of them never come into force, and

²⁴ Regulation no. 1983/83, *Dz.U.* 1983, no. L 173/1.

²⁵ Regulation no. 1983/83, *Dz.U.* 1983, no. L 173/5.

²⁶ Regulation no. 4087/88 of 30 November 1988, *Dz.U.* 1988, no. L 359/46.

²⁷ Cf. A. Mączyski, K. Zawada: “Zamierzona nowelizacja kodeksu cywilnego” [Intended Amendment of the Civil Code], *KPP* no. 3, 1995, p. 417 and following.

²⁸ For more information see S. Soltysinski, *op. cit.*, note 33, *infra*, vol. 2, pp. 33 and following. The opinion presented above was shared by the majority of members of the Council on Legislation during the sitting of 14 December 1995.

there have already been examples of copying legislative solutions caused by “Euro-enthusiasm” or the “childish illness of Europeanism”. One of the symptoms of this “illness” was the introduction of Article 87 of that act into the Law on Public Trading in Securities and Trust Funds. It imposes an extremely difficult and expensive obligation on the strategic investors of companies listed on the stock exchange, once they have acquired more than 33 per cent of the vote at the general assembly of shareholders. Such an entity is obliged to make a public offer to all other shareholders to pay for their shares the highest price that it paid for the shares in its possession during the previous 12 months, or if there is no such price, to bid the average price from the period of 30 days before the call to register the sale of shares.²⁹ The analysed regulation evoked particular controversies concerning the fact that its verbal interpretation allows for the assumption that it applies also to investors exceeding the 33-percent threshold of the vote as a result of fulfilling an investment obligation imposed on them by the State Treasury in the contract of the sale of the shares of a privatised company (e.g. when an entity which bought from the State Treasury 30% of shares takes hold of an additional block of shares, participating in increasing the company’s equity capital). Such an interpretation would hinder the processes of privatisation. Recently, by employing guidelines of a functional and system-based interpretation, the Polish Securities Commission passed a resolution ruling out the possibility of applying this regulation to strategic investors whenever they take hold of the new shares of a company fulfilling their investment obligations towards the State Treasury, undertaken in the process of the privatisation of state-owned companies.

The above-described example illustrates well the results of a poorly considered and premature adoption of a draft directive of the European Commission, which, as a result of criticism on the part of Member states, was thoroughly changed in the course of a several years’ debate. At the beginning of 1996, the Commission gave EU Member states a completely free hand to choose means for the protection of minority shareholders or to give up specifying a compulsory threshold of shares, whose exceeding incites shareholders to sell their shares at an attractive price in order to give them an opportunity to leave a company taken over by a new entity.³⁰

4. *Methods of the harmonisation of Polish legislation with the legal system of the EC.* The adjustment of Polish law to the standards of the EU is primarily conducted by means of legislative interventions. Simultaneously, we observe an interesting process of a “pro-European” interpretation of Polish provisions in force, carried out by par-

²⁹ This regulation discourages many strategic investors to invest in the company by subscribing for new shares. Disregarding the fact that the threshold set by this article is definitely too low, the analysed regulation does not take into account many situations when penalisation of a strategic investor is unjustified (e.g. when the 33-percent threshold is exceeded independently of the will of the holder of a large block of shares, for example, due to the redemption of a proportion of shares, inheriting, the loss of voting privileges by other shareholders, etc.).

³⁰ Cf. European Commission Proposal for a 13th European Parliament and Council Directive on Company Concerning Takeover Bids (1989, changed in 1990 and 1996). Source: COM (95) 655 final, Brussels, 7 February 1996.

ticular courts, and even - though rather seldom - by administrative authorities. The latter instrument of harmonisation was approved by the legal doctrine.³¹ The interpretation of the regulations of Polish law, compatible with the law of the EC, constitutes the cheapest and, at the same time, the fastest means of adjusting our legislation to models existing in Western Europe.

Such a direction of a functional interpretation, which serves the realisation of the objective of integration, should be regarded as one of the guidelines of the so-called dynamic interpretation of business law regulations, especially in fields enumerated in article 69 of the Agreement.³²

A "pro-European" interpretation of provisions in force can be applied in those cases when a regulation of a given problem contains ambiguities or interpretational margins and, simultaneously, there are no significant socioeconomic reasons to realise different objectives or values protected by the Polish legal system. However, there could also appear situations with serious arguments for choosing other social, political, and economic priorities instead of the ones adopted in the legal system of the EU.

It is possible to apply a pro-European interpretation of legal norms both in such cases when Polish law adopted those solutions of the Communities that underwent judicial interpretation, and in such fields which are rooted in prewar Polish legislation, modelled on regulations of the future founder-states of the EEC (e.g. on German and French legislation). Such fields of our legislation include, first of all, civil law, commercial law, and the law of civil procedure (e.g. the Civil Code, the Polish Commercial Code, the Code of Civil Procedure, the Bankruptcy Act, and private international law). In many cases, the practice of using the output of the German judiciary or the directives of the ECC in the process of an interpretation of, for example, company law, allows to accomplish necessary harmonisation, and compensates for more than fifty years of a standstill in this field of law in Poland.³³ The method of taking into account arguments of a comparative nature - based on the legislation of the Communities - is frequently used by the Anti-Monopoly Court.³⁴

³¹ See S. Sołtysiński [in:] S. Sołtysiński, A. Szajkowski, J. Szwaja: *Komentarz do kodeksu handlowego* [Commentary to the Commercial Code], vol. 1, Warszawa 1994; M. Safjan: "Prawo Wspólnot Europejskich a prawo polskie" [The Law of European Communities and Polish Law] [in:] *Prawo Spółek* [Company Law], Warszawa 1996, p. 2.

³² M. Safjan, *op. cit.* T. Skoczny: *Przeciwdziałanie praktykom monopolistycznym w świetle orzecznictwa* [Counteracting Monopolistic Practices in the Light of Jurisdiction], Warszawa 1994, p. 179 and following.

³³ Cf. S. Sołtysiński, *op. cit.*, vol. 2, p. 100-101, 128, 146; See also The resolution of the Supreme Court of 7 April 1993, III CZP 23/93, *OSNCP* 1993, item 172. Judging the implications of potential invalidity of articles of a joint stock company and the deed of the formation of a limited liability company in view of the commercial and civil codes, the Supreme Court took into account the regulation of art. 11 of the First Directive of the Council of the European Communities dated 9 March 1968 concerning companies.

³⁴ This court referred directly to the sources of antitrust law of the Communities in several decisions, e.g. defining the notion of "relevant market", determining permissible limits of franchising agreements, substantiating the noxiousness of chain transactions, etc. The above decisions are quoted by T. Skoczny, *op. cit.*, p. 180-181.

Among administrative authorities that actively respond to the idea of adjusting our law to the *acquis communautaire* by means of a pro-European interpretation, one should mention the Anti-Monopoly Office (AMO).³⁵ Attempts to harmonise law by means of a pro-European interpretation of domestic legislation can be traced also in selected decisions of the Polish Securities Commission and the Patent Office. An example of a restrictive interpretation which does not take into account the necessity to harmonise our law is, for example, the interpretation of article 11 of the Law on Corporate Income Tax³⁶ that dominates in the practice of revenue offices. According to many of them, expenses on joint research and development, training, etc. paid by two or more economic actors (entities) domiciled in various countries, can be classified as the costs of obtaining income only when incurred in the territory of Poland. Such an interpretation is not justified even in view of the directives of a verbal interpretation of tax law, and constitutes an obstruction for the participation of Polish companies in transborder co-operative ventures. As a matter of fact, the above issue is not regulated by the law of the EU; almost in all member states of the EU, there are appropriate precedents or provisions in force, which encourage participating in research and development ventures run by capital groups or companies with no capital links.³⁷

The *White Paper of the European Commission* (1995), devoted to the problems of adjusting the legal systems of associated countries to the standards of the EC, indicates the necessity of a comprehensive harmonisation of the priority fields of legislation.³⁸ The above proposal is based on the assumption that a fragmentary adoption of selected regulations in a particular field of law will bring about neither desirable synergic effects nor compatibility of the legal infrastructure of associated countries with the legislation of the EU. An example of the incomprehension of the analysed postulate is the well-prepared draft of the intellectual property code in which, contrary to the stance of the Council on Legislation and the doctrine, the Patent Office did not provide for the institution of the so-called extraterritorial exhaustion of intellectual property rights.

³⁵ Thus, e.g. in the case of *Niku vs. Sony* (1995) the AMO conditioned its consent for a settlement between the organiser of a selective distribution network (Sony Poland) and the independent wholesaler of imported Sony products by the abolition by Sony Poland of the ban on parallel import of its products from the EU as well as the removal of all non-quality requirement intended solely for providing customers with appropriate service. The criteria of legal appraisal of selective distribution systems set by the Communities were applied by the AMO also when it discontinued proceedings instituted upon a motion of the Access and Digicom companies against Centertel (1996). The applicants accused Centertel of attempting to monopolise the market of cellular telephones sale and of practices on the part of the organiser of the distribution network that make it difficult for them to sell their telephones by the intermediation of the Centertel network. The AMO approved the settlement, which guarantees access to the Centertel distribution network on nondiscriminating terms not only to the applicants, but also to other sellers of cellular telephones. The criteria of legal appraisal of selective distribution systems applied by the AMO are based on case law of the EC and, in particular, on the rulings in the *Metro I*, *Metro II*, and *Grundig* cases.

³⁶ *Dz.U.* no. 106, item 482 with subsequent amendments.

³⁷ The above-described problem is the subject of litigation between an economic subject with foreign shareholdings, a member of a European capital group, that might soon find its way to the High Administrative Court, which makes it impossible for the Polish company to participate on equal rights in the profits derived from international co-operation.

³⁸ *White Paper*, *op. cit.*, sections 2.3-2.4; see footnote 4.

The sense of this institution consists in the fact that the holders of patents, patterns protection rights, or registered trademarks right cannot force a ban on the import of a product protected by exclusive right once the product has been brought into circulation, e.g. once the sale of a patented device or appliance with a registered trademark has occurred. The above concept assumes that a monopoly concerning a particular object is exhausted at the moment of the first transaction, performed by the right-holder in the territory of any country with which Poland has signed a free trade agreement. The introduction of this institution would enable Poland to import state-of-the-art products of best quality from the cheapest source within the territories of the EC, the EFTA, and the CEFTA. Despite the fact that it has been long since the case law of the EC adopted a stance maintaining that without freedom of parallel import, which ensues from the ex-territorial exhaustion of intellectual property rights, the uniform, highly integrated European market cannot function; the draft of the intellectual property code does provide for an ex-territorial exhausting of the right, justifying this with the necessity of obtaining consent from our commercial partners.³⁹

What remains unsettled is the problem of choosing legislative techniques which would be the best for the objectives of harmonisation. Currently, the adjustment of our law is conducted by means of amending provisions in force or passing new regulations. The schedule expressed in Articles 44 and 45 of the Agreement - declaring an increasing pace of introducing the principle of freedom of establishment and providing services, which means the abolition of all kinds of discrimination of Community companies and nationals in the remaining fields of industry, commerce, and services - will probably impose the passing of a new type of acts that will remove, for example, the requirement of Polish citizenship for eligibility to pursue certain economic activities. Such restrictions exist in more than 20 acts; therefore, it seems worth considering the preparation of appropriate acts that would repeal "wholesale" most of the provisions which discriminate nationals and undertakings of the EC. Another solution would be the unambiguous settlement of the controversial problem of the "self-execution" of those selected provisions of the Agreement which do not require being incorporated into domestic law.⁴⁰

An important factor in the approximation of legal systems is the reciprocal recognition of certificates, diplomas, marks of quality, etc., since those institutions might hinder the movement of goods, services, and the work force. However, reciprocal

³⁹ The above-mentioned view is groundless. Neither the Europe Agreement nor any other international agreements restrict the powers of Poland in this sphere. Cf. footnote [in:] T. Cotter: *Current and Future Issues Related to the TRIPS Agreement: A European Perspective*, ANN. AIPPJ (1995), p. 83 and following, as well as a comment by the same author on p. 61.

⁴⁰ See K. Skubiszewski: "Wzajemny stosunek i związki między prawem międzynarodowym i prawem krajowym" [The Mutual Relation and Links between International Law and Domestic Law], *RPEiS* 1986, no. 1, p. 4 and following; E. Skrzydło-Tefelska, R. Skubisz: "Skuteczność wewnętrzna prawa międzynarodowego. Układ Europejski a wybrane kwestie spółek z udziałem zagranicznym" [The Domestic Effectiveness of International Law. The Europe Agreement and Selected Questions Concerning Companies with Foreign Shareholdings], *Rejent* 1994, no. 10, p. 43-44.

recognition of professional qualifications, certificates, and other documents also requires prior legislative changes.

5. *The organisation of the process of harmonisation.* The organ responsible for the co-ordination of the process is the governmental Committee for European Integration. Its President appointed for this purpose a group of legal experts and commissioned it to prepare a long-term programme of the harmonisation of Polish law with the legislation of the EU. The group singled out 25 legislative fields, whose adjustment is crucial to our future membership in the EU. The efforts made so far by the Committee for European Integration deserve recognition. It was on its initiative that the Commentary to the Europe Agreement (1994) and the Report on the realisation of the programme of adjusting Polish economy and legal system to the requirements of the Europe Agreement in 1994 were devised. Simultaneously, work on another *White Paper* conceived by experts of the Committee has reached its final stage. The paper contains a list of specific legislative tasks connected with the introduction into Polish legislation of all binding directives and regulations issued by the European Council and the European Commission. Comprehensive studies on the legislation of the EC are conducted, among others, by the Ministry of Justice other ministries and the Anti-Monopoly Office.⁴¹

On the strength of resolution No. 16 of the Council of Ministers of 28 March 1994 (not published), an obligation was introduced to examine legislative acts as regards their compatibility to the law of the European Union (§ 1). Ministries and central authorities of the state administration (§ 3) are responsible for the fulfilment of this obligation. A final opinion should be drawn up by the Committee for European Integration. The described solution was necessary, and helps to accelerate harmonisation and to eliminate bill drafts contradictory to obligations deriving from the Europe Agreement.

A still unsolved problem, however, involves pronouncing opinions on drafts of laws initiated by MPs or the President. It seems worth postulating the creation of a single strong centre for the co-ordination of main legislative undertakings that should act on the basis of powers conferred by law. It is also worth considering whether a single centre should take care of rebuilding our law, whose responsibility would be to examine the compatibility of legislation to the requirement of the approximation of our legal system to the *acquis communautaire*. Finally, it should be considered in this context whether to create an institution with powers similar to the ones of the prewar Codification Commission.

The shortcomings of the current situation are the dispersion of funds for legislative activity, the fact that many problems are solved from the narrow perspective of one government department or central authority, as well as the slowness and poor results of procedures for interdepartmental arrangements. Despite the creation of ministerial cen-

⁴¹ Thus, e.g. the Institute of the Administration of Justice issued in the series *Prawo Wspólnot Europejskich a prawo polskie* [The Law of European Communities and Polish Law] a study entitled: *Prawo Spółek* [Company Law] (1996), ed. by M. Saffjan; the Anti-Monopoly Office patronised the preparation of a multi-volume analysis concerning the antitrust legislation of the EEC, ed. by Prof. Skoczny.

tres, whose purpose is to supervise the compatibility of Government bills with the *acquis communautaire*, numerous drafts are submitted to the parliament contrary to particular provisions of the Europe Agreement, which has been indicated in literature.⁴² Meanwhile, a government bill draft still assumes, for example, that no foreign subject can set up companies or open branches. Such restrictions with regard to selected investors from the EC should have been abolished already when the Agreement became effective.

In spite of the above-described difficulties that result largely from the lack of funds for legislative activity, the process of the harmonisation of Polish legislation with the legal system of the EU has considerably advanced in many fields, gathered increasing momentum, and become a significant factor in modernising new law in economic area.

⁴² Thus, e.g. reviewers commissioned by the Parliament indicated that in spite of the appropriate *imprimatur* of compliance to the law of the EC, selected provisions of the act on amending the Act on Companies with Foreign Shareholdings are in conflict with the provisions of Articles 44 and 45 of the Agreement, which determine a precise schedule of granting Community persons the right to set up companies and acquire real estate in Poland on terms no less favourable than accorded to Polish companies. Cf. E. Skrzydło-Tefelska, R. Skubisz: *Skuteczność wewnętrzna...*, *op. cit.*, p. 43; S. Sołtysiński, *op. cit.*, p. 188 and following.