INTEGRATION
OF COMMUNITY COMPETITION LAW AND POLICY
IN POLAND
AS A EU MEMBER STATE

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INTRODUCTION

Since the end of the Cold War and the collapse of communist regimes of the former Soviet Block, the countries of Central and Eastern Europe - and Poland among them - have come a long way. This spectacular and fundamental change has been to a large extent motivated by the will of these countries' societies and political elites to catch up for the lost 50 years of development and to rejoin the family of European nations, of which these countries and their people have always felt to be a part. In the course of these modernisation efforts, the relationship with the European Communities (and later the European Union) has played a determinant part, especially as from the moment when the objective of accession to the latter has become not only a declared aim of the countries interested but also of the Communities/Union themselves/itself.

The process of forging new, closer links between the countries of Central and Eastern Europe and the Communities began as early as the late 1980s, when the Soviet Union and the Soviet-led "alternative" to the Western-European integration model, i.e. the Council of Mutual Economic Assistance (CMEA), still existed[1]. At that time, the Community resorted to the new type of "Commercial and Economic Co-operation Agreement", first applied in 1976 to relations with Canada, which was based not only on the ex-Article 113 EEC (now, after amendment, Article 133 EC[2]) but also on the general provisions of Article 235 (now Article 308 EC), which allows the Community to take action for the attainment of one of its objectives if the Treaty has not provided expressly the necessary powers in that matter. These "First Generation Agreements" were concluded with those of Central and East European countries which - at that time - had already expressed their commitment to political democracy and free market economy. The Agreements in question covered the areas of trade, economic relations and co-operation, and established a flexible mechanism allowing possible extension of their scope to other areas of common interests.

The first of these agreements - the basic trade agreement with Czechoslovakia and the trade and co-operation agreement with Hungary of 1988 - were soon followed by agreements with Poland, Bulgaria, Romania and the GDR. They set up, in a detailed manner adapted to the situation of each country concerned, a framework for the improvement of Community market access for products originating in those countries, and provided for co-operation in several fields. The Agreement with Hungary was initialled on 30 June 1988, and covered "trade and commercial and economic co-operation", which rendered its scope far broader than those of previous agreements.

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[1] It was formally dissolved on 28 June 1991. However, its *de facto* disintegration began in January 1990, when on the occasion of its 45th Session in Sofia a decision was taken that, as from 1 January 1991, the principle of foreign trade at world prices and in convertible currency would be introduced to intra-CMEA relations. In the course of 1990, a series of bilateral USSR - respective countries of Central Europe agreements was concluded, confirming the new rules, so that the CMEA practically ceased to exist, since its cornerstones - fixed internal prices and clearing in transferrable roubles - were removed. Cf. W. Andreff, "La désintégration économique internationale de l'Europe de l'Est", in: J. - L. Mucchielli, F. Célimène (ed.), Mondialisation et régionalisation. Un défi pour l'Europe, Economica, Paris 1992, p. 329.

[2] Pursuant to the renumbering of the articles of the Treaty on European Union (EU) and of the Treaty establishing the European Community (EC, ex-EEC), brought about by the Treaty of Amsterdam, with effect from 1 May 1999.

It was the first agreement of this kind with a European socialist country and an important milestone in the relations between the Community and countries of Central and Eastern Europe. It contained, at least as far as the trade and co-operation aspects were concerned, clear, precise and legally binding provisions enforceable in the internal legal orders of the parties. Many of the obligations were assorted with deadlines and their non-respect could give rise to actions before the European Court of Justice or national courts.

Those trade and co-operation agreements - as far as Poland and Hungary were concerned - were further complemented by the establishment of the PHARE Programme, representing a practical follow-up to the decisions adopted at the Paris summit of industrialised nations in July 1989. The 24 Western countries, which participated in that summit, requested the Commission of the European Communities to co-ordinate and ensure the day-to-day management of this programme, which was an attempt to provide a concerted support to economic reforms that had recently been undertaken in the countries-beneficiaries. The Community's contribution to that programme took also the form of various measures, such as the liberalisation of access to Community markets, food aid in order to support agricultural restructuring, provision of professional and vocational training, and the setting up of numerous financial instruments ranging from direct budgetary aid to loans by the European Investment Bank.

The creation of PHARE was not the only measure aiming at assisting the Central and Eastern European countries in their reforms. During the same period, the Community also led the establishment, on 29 May 1990, of the European Bank for Reconstruction and Development, the task of which was to provide funds for equity investments and loans for public and (in particular) private sector projects. Further, some unilateral measures were taken in order to complement and even deepen the concessions made by the Community in the trade and co-operation agreements. For example, specific quantitative restrictions, which were supposed to be gradually phased out according to the timetables set out in the additional Protocols to those agreements, were eliminated by the Community on 1 January 1990, while the non-specific measures were suspended for a renewable one-year period.

Since the end of 1988, i.e. from the European summit of Rhodos, the Member States of the Community have attempted to formulate a coherent and comprehensive Community response to the changes in the Eastern part of the continent. In the solutions proposed, particular attention was paid to two principles: conditionality and differentiation. The first principle meant that the nature and intensity of co-operation offered to each country of Central and Eastern Europe would be strictly dependent on a number of criteria: respect of undertakings (especially those in the field of Human Rights) made in the framework of the CSCE (later renamed to OSCE), degree and pace of evolution towards a pluralist democracy and a free market economy. The differentiation, inherently linked with the above, was intended to give the Community a great degree of flexibility, allowing it to take into consideration - on a case-by-case basis - the degree of advancement of reforms, and to adapt its actions accordingly.

Gradually, a complicated web of relations with the countries of Central and Eastern Europe was set up, representing what might later be called an example of a "variable geometry" approach, reflecting the various degrees of advancement of those countries' political and economic reforms, and allowing the Community to respond flexibly to the changing environment in this part of the continent.

This conditional and differentiated approach of the Community found its expression also in the way the PHARE programme was initially shaped. First of all, through the choice of its first beneficiaries - Hungary and Poland - who were therefore encouraged to pursue their economic and social reforms. Secondly, due to the decision - taken at the end of 1989 and subsequently confirmed in July 1990 - to assess the eligibility of future candidate recipients of aid in the light of five requirements: primacy of the law, respect of Human Rights, multiparty democracy, free elections and evolution towards market economy.

The initial policy of the Community towards Central and Eastern Europe was a gradualist one, assuming a lengthy "rapprochement" between the economies and societies spanning over decades. But what seemed at the beginning of "perestroika" in the USSR to be a slow, mutually controlled process, turned to be a revolutionary chain of events, which escaped any attempts of slowing down or directing the change. The mass exodus of Eastern Germans towards the West in the summer of 1989, the fall of the Berlin Wall and the quickly emerging prospect of the reunification of Germany with the ensuing end of division of Europe - all those radical movements on the up-till-then stable political map of our continent - have shattered the Community's hope to fulfil its long-term vision of Europe, while being able to pursue its internal reforms (in the spirit later embodied in the Treaty on European Union) “in peace”.

Consequently, the Community was obliged to rethink its strategy towards the East, in the context of its own future and the future of all-European integration. At first, in view of the temporary parallel existence of the two German States, the EC had to solve the problem of establishing its relationships with the "new" GDR. When, in January 1990, Jacques Delors pleaded for the respect of specificity of East Germany in comparison with other Central and Eastern European States, suggesting a quick process of accession for the former, he was not followed by the Council of Ministers. Instead, an option representing the continuation of the decisions of the Strasbourg European Council was chosen: opening of negotiations on the trade and co-operation agreement, which meant treating the GDR on an equivalent basis as the other countries of the region.

However, the inevitable prospect of German reunification, which seemed just a matter of time after the outcome of March 1990 general elections in the GDR, and the subsequent elaboration of the plan of monetary and economic union between the two German States, soon forced the Community to review its attitude. The debate on future accession of East Germany shifted from the level of principles to the technicalities of the process. The political leaders of the 11 other Member States welcomed with satisfaction the choice of legal grounds for reunification made by the West German authorities.

Indeed, the fact that the relevant provision was Article 23 of the West German Constitution (already used once in the past - when the Federal Republic extended its territory by incorporating the Saarland), instead of Article 46 (which would necessitate a constitutional amendment) greatly facilitated the Community's task. By avoiding accession negotiations, and by the fact that the Federal Republic simply took over the international obligations of the defunct GDR, the territory of which became the territory of the united Germany - member of the European Communities, the Western European Union and the NATO - the Brussels-based organisation could escape the difficult process of enlargement, inevitably accompanied by political tensions and pressures towards internal reform. This, however, offered an only temporary “respite” for the Communities and the Governments of their Members.

For the "new democracies" in Central and Eastern Europe, the European Communities (and later the EU) represented not only an example of economic success, but, above all, an anchor of stability and security in Europe. The governments in this part of the continent fixed the objective of joining the EC (EU) - or "returning to Europe" - as the priority of their policies, and the justification for all the sacrifice asked from their populations. In the economic and political vacuum, in which Central and Eastern Europe had found itself after the collapse of the CMEA and the dissolution of the Warsaw Pact, the membership in the Communities seemed to be the only insurance against not only an economic catastrophe, but first of all – against the return of the "ancien régime" and the demons of the past, which had haunted this region for so long - nationalism and ethnic and religious conflicts.

The present thesis will attempt – taking as example Poland as the largest new EU Member State from the region (as well as one of those that – together with Hungary and then-Czechoslovakia – were the first to undertake steps in this direction) and focussing on one of the most important Community policies – to show how this "return to Europe" was organised by both sides, from the legal and organisational point of view. The policy chosen for this purpose is "anti-trust", understood as the most traditional aspect of competition policy, covering restrictive agreements, abuse of dominant position and mergers. This choice is motivated by the importance of free competition for the success of European integration and especially for the implementation of one of its crucial aspects, namely the common/internal market. Due to the necessity to limit the size of this thesis (and not because of their lesser importance!), the issues of State aid and public monopolies will only be given a marginal and occasional attention.

Chapter I provides a general reminder of the history of legal approximation in the context of relationship between the EC (EU) and the candidate countries, taking as a starting point the signature of the Europe Agreements, which marked the beginning of a new era in the relations between the Community and the countries from Central and Eastern Europe, and provided a decisive impulse for these countries' efforts towards the approximation of laws. The origins and general features of the Europe Agreements (EAs) are presented, and closer attention is paid to the provisions of these Agreements concerning the approximation of laws as well as the anti-trust rules (including the implementing provisions); further, the jurisprudence of the Community Courts concerning the interpretation of the EAs is briefly discussed. This is followed by the presentation of the history, main elements and the legal nature of the Commission's 1995 White Paper, with a closer look at the Paper's chapter on competition. Chapter I goes on to describe the Community's pre-accession strategy (its reasons and origins; the Copenhagen criteria and the strategy's formal introduction in 1994), the "enhanced" pre-accession strategy (Agenda 2000; the Accession Partnerships – with a particular focus on competition; the "enhanced" strategy's official launch in Luxembourg in December 1997), the screening of the *acquis* and further developments until the formal decision to take in ten new EU Member States announced in Copenhagen in December 2002. A separate place is made for the description of the role of the Community's assistance mechanisms (in particular PHARE and TAIEX) in the context of approximation of laws (and especially the anti-trust legislation). Finally, a brief description of the EU – Poland Accession Treaty (especially the safeguard clauses and transitional provisions in the competition field) closes the chapter.

Chapter II sets out the history of approximation of laws in Poland after the fall of communism, focussing on anti-trust. The chapter begins with a presentation of the law approximation process in general (its beginnings in the early 1990s; the successive regulatory mechanisms, structures and procedures; the origins, structure and role of the Committee for European Integration; the National Strategy for Integration (NSI) and subsequent planning documents, such as the 1998 Timetable of Implementation of the NSI; the Programme of Preparation for EU Membership and its subsequent revisions), its assessment from the Community side (as set out in the Commission reports on Poland's progress towards accession) and its final modifications on the eve of accession. This is followed by a more specific description of the history and evolution of the Polish anti-trust legislation, in the context of its approximation to the EC law. The two major consecutive Polish competition acts (from 1990 and from 2000) are presented together with their numerous amendments and implementing regulations, both of a procedural nature and those of the "group exemption" type.

Chapter III is an attempt to present the Polish implementation and enforcement record in the anti-trust field, both as regards the anti-trust authority and the jurisprudence of Polish courts. The chapter begins with the origins, development, structure and powers of the anti-trust authority, and moves on to the Antimonopoly Office's (subsequently the Office for Competition and Consumer Protection – OCCP) enforcement activity, analysed according to the type of anti-competitive practices (restrictive agreements, abuse of dominant position and mergers). Other activities of the Polish anti-trust authority, mainly those policy-related (influencing the process of transformation and restructuring of the economy) are also presented. This is followed by a description of the role played by the Polish courts in the implementation of the anti-trust provisions in the context of approximation and accession process. Some general remarks are made on the issue of the so-called "pro-European interpretation" of the existing law by the Polish courts, more specific comments following on the origins, characteristic features and activities of the successive Polish competition courts (activities divided according to certain areas: definition of the objectives and scope of the protection of competition; definition of restrictive agreements and abuse of dominant position; mergers; procedure and sanctions for violations of anti-trust provisions), in particular as concerns their function of "quality checker" of the work of the anti-trust authority. In the same manner, the jurisprudence of the Polish Supreme Court is looked at.

Chapter IV contains a description of the challenges of integration of the Community anti-trust in Poland, at the moment of the country's accession to the EU – as regards the relative position of anti-trust rules and authorities vis-à-vis other institutions in Poland and at the EU level. It will be maintained that the standing of the OCCP and the competition jurisdictions was quite strong in Poland, especially as compared with similar bodies in other "new" EU Member States. That said, only the practice could really demonstrate to which degree the Polish institutions and legislation contained effective mechanisms for the prevention of conflicts of laws and jurisprudence in the context of the new decentralised EU competition policy (the development of which is described in the chapter – including the Commission's notices on co-operation with national competition authorities and courts, the Regulation No. 1/2003 and the consequent setting up of the European Competition Network). In this context, the reaction of the Polish legislator, competition authority and courts to this new situation is addressed to the degree to which the relevant data is available.

Finally, Chapter V contains a very brief overview of the situation following Poland's entry into the EU. Taking as the main reference the year 2009, illustration is provided of the legislative developments and jurisprudential activity of the Polish competition authorities, showing – in my view – how the above-mentioned challenges have been succesfully addressed.

As regards the sources used in this thesis, they include the relevant legislative, regulatory and other official texts (e.g. Commission notices); the case law (both Community and Polish); various programmes and other strategy papers issued by the Polish Government and the Commission (or other EU Institutions); reports and official commentaries by the Polish competition authority; the literature (books, articles, conference and seminar papers) by international and Polish scholars and specialists; press releases and media articles, etc. The intention was to look at various opinions expressed on the subject and see the law and practice in their light, always having in mind the integration context and focussing on the Polish efforts, difficulties and obstacles on the path towards the said integration. As will be argued in the conclusion to this thesis, these efforts have resulted in a successful transformation of the Polish anti-trust law and policy into one worthy a fully-fledged EU Member State.

CHAPTER I: GENERAL CONTEXT OF APPROXIMATION OF LAWS: EUROPE AGREEMENTS, THE COMMUNITY AND THE CANDIDATE COUNTRIES FROM CENTRAL AND EASTERN EUROPE

A. Europe Agreements

1. Origins and general features

As early as in 1990, the three Heads of State and Government of the then most reform-oriented countries of Central Europe – the Czechoslovak and Polish Presidents Havel and Wałęsa and the Hungarian Prime Minister Antall - visited Brussels and expressed, in the course of a joint meeting with the President of the Commission of the European Communities, Jacques Delors, their countries' will to intensify their relationships with the Organisation, in view of these countries' future membership.

As a response to these calls, the EC undertook the effort of designing the future shape of its relations with the countries of Central and Eastern Europe. Very soon, the EC Member States agreed that the possibilities offered by Article 238 of the EC Treaty (now Article 310 EC) should be examined with particular attention. This Article, allowing the Community to conclude association agreements with any third state, a union of states or an international organisation, in which mutual rights and obligations, as well as common actions and specific procedures, would be defined, seemed to be the best suited for the new kind of relationship which the Communities intended to establish with the countries concerned. It also reflected the special importance which was to be attached to this relationship, in accordance with the jurisprudence of the Court of Justice of the European Communities (ECJ), which had held that association agreements created "special privileged links with a non-member country, which must, at least to a certain extent, take part in the Community system"[3].

In April 1990, the Commission proposed the creation of a new type of association agreement - the so-called "Europe Agreement"[4] - which would reflect this particular relationship based on "geographic proximity, shared values and increase[d] interdependence". The proposed formula, intended to cover relationships with former communist countries in Europe except with the Soviet Union, was based on some essential elements: firstly, creation of a free-trade zone accompanied by enhanced co-operation in numerous fields and backed by important financial aid which could lead to a high level of integration involving reciprocal concessions; secondly, the setting up and the implementation of a political dialogue on issues of common interest; finally, creation of an appropriate institutional framework for the efficient implementation of the whole Agreement.

On the basis of the above-mentioned proposal, negotiations with Poland, Hungary and Czechoslovakia began in December 1990. One of the most difficult parts of these negotiations was the question of whether the future Agreements were to be considered as an intermediate measure, preparing the associated countries for their accession to the EC. Taking into account the difficult history of the EC - Turkey Association Agreement of 1963, the Community was particularly reluctant to insert an explicit allusion to accession in the texts of the future Agreements.

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[3]Case 12/86, ECR [1987] 3719. Cf. also I. Macleod, I. D. Hendry and S. Hyett, *The External Relations of the European Communities*, Clarendon Press, Oxford 1996, at 368.

[4]Cf. also A. Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe*, Cambridge University Press, 1998, pp. 41 – 59.

Finally, a compromise solution was found - the word "accession" appeared only in the Preamble and in the formulation which did not imply any legal or political engagement of the Community (i.e. only as the recognition that accession remained the main objective of the associated countries)[5].

The first Europe Agreements were signed on 16 December 1991 with Hungary, Poland and the Czech and Slovak Federal Republic. In 1993, similar Agreements followed with Romania and Bulgaria, and in 1995 with the three Baltic States, as well as with Slovenia in 1996. These new Agreements - sometimes referred to as "the third generation agreements" - created a novel form of association, which replaced the precedent framework of trade and co-operation between the interested countries and the Community. Although each of these agreements comprised specific provisions adapted to the situation of each particular country, their basic structure and the main characteristics were common, following the drafts elaborated by the Commission.

Concluded for an undetermined duration, the Europe Agreements contained both the innovative elements and the traditional aspects of the Community policy towards third States with which it wished to establish closer ties.

The traditional approach was visible, first of all, in the structure of the Agreements which - like all previous association agreements and the EEA Agreement - were inspired by, and to a large extent incorporated, the relevant provisions of the EEC Treaty (later, the EC Treaty). Further, these traditional characteristics could be seen in the establishment – after a transitional period – of a free-trade area for industrial products, through the gradual and asymmetrical (in favour of the associated countries) dismantling of tariff barriers, retaining nevertheless some instruments allowing the Community to prevent mass importation of certain sensitive products (e.g. agricultural goods, iron and steel, textiles) on its market. As for the quotas and measures having equivalent effect, they were abolished starting from the entry into force of the Agreements on the Community side, and after a pre-established period on the side of the associated countries. These measures were accompanied by financial aid, which had initially been disbursed essentially through the mechanisms of PHARE.

The novelty of Europe Agreements lay in their vast scope and objectives, comprising practically all the areas of Community (European Union) activity. They aimed at the closest "rapprochement" of the economies and societies of the associated countries with the Community's ones, *inter alia* through the encouragement of the approximation of legal systems and laws of these countries to the Community standards.

As for the provisions relating to trade, the main novelty of the Agreements was the aforementioned introduction of asymmetry, which meant that the tariff, quantitative and other restrictions (concerning, for example, the freedom of establishment of foreign companies, of services and of access to public procurement) were to be eliminated faster on the Community side than on the side of the associated countries, in order to help the economies of those countries adapt to the conditions of the Community market, which required a relative protection from immediate competition from the Community industry in the initial phase of transformation.

[5] Cf. also p. 14.

Another - extremely important - novelty of the Europe Agreements was the introduction of regular political dialogue between the Parties on all issues of common interest. It was indeed the first time that such a political dialogue had been foreseen in an association agreement between the Community and a third country, and it necessitated the implication of its Member States, as certain of the areas covered were beyond the strict scope of Community competencies. The purpose of this new mechanism was to achieve a close convergence (although not co-ordination, since the associated countries did not participate in the Community decision process as long as they were not fully recognised as Member States) of positions on the questions of international policy, which in a symbolic manner expressed the return of the associated countries to the European family of nations.

The political dialogue took place on a continuous basis and at several levels - from the highest one (the Heads of State and the Presidents of the European Council and of the Commission), through the level of Heads of Government and the Presidents of the EC Council and Commission, the ministerial level (in the framework of the Association Councils), senior civil servants (in between the sessions of the Association Councils, including in the framework of the Association Committees), the Commission and the civil servants of the countries concerned, on the expert level, and - finally - through the usual diplomatic channels.

The Association Councils, which met at least once a year, had the general responsibility of overseeing the implementation and the functioning of the Agreements, and of solving any problems that might have emerged in this context. They could also examine any questions of mutual interest, including on the issues of international policy. Further, they played an important role in solving possible disputes between the Parties. In their work, they were assisted by the Association Committees, which prepared the Association Councils' meetings, and which could exercise certain powers delegated upon them by the Councils. Finally, there existed Parliamentary Association Committees, composed of Members of the European Parliament and of national Parliaments of the associated countries concerned, which were entitled to receive information and to formulate non-binding recommendations addressed to the other bodies established by the Agreements.

In order to prevent, at least partly, inconveniences caused by inevitable delays in the entry into force of the Europe Agreements, their signature was in each case accompanied by the signature of the so-called "Interim Agreements". These agreements, taking over the "commercial" parts of Europe Agreements, could enter into force very fast, as they were signed by the Community in the framework of its exclusive competence conferred upon it by ex-Article 113 EC (now Article 133 EC) . For instance, the Interim Agreements with Poland and Hungary entered into force on 1 March 1992, while the respective Europe Agreements entered into force only on 1 February 1994.

All Europe Agreements had a very similar structure, which nevertheless did not exclude certain differences in specific issues, such as the timetables of realisation of free trade, financial co-operation or those concerning the implementation of particular sectoral policies. They contained provisions on political co-operation, free movement of goods, workers, services and capitals, as well as on economic, cultural and financial co-operation. They equally set up common institutions.

They were all concluded for an unlimited period, but their objectives were to be reached gradually, following stages varying according to the goods/products concerned. These transition periods were divided in two stages (except for the free movement of goods), the Association Council being obliged to meet in the course of the last year of the first stage, in order to decide on the passage to the second one.

The Europe Agreements - as far as their "literal" content was concerned - established only a very weak link between the association and any prospective accession of the associated countries to the EU. The Preamble of the Agreements stated merely, in very careful words (which did not represent a legally binding statement of the Community, but a declaration of political character) that accession was the ultimate objective of the associated countries, and that, in the opinion of the Parties, the Europe Agreement concerned should have helped the interested country to attain this objective.

One of the most striking characteristics of the Europe Agreements was that they contained provisions referring to the full range of freedoms and common policies found in the EC Treaty, although only with respect to the free movement of goods one could speak of their consequent and integral "take-over". Separate provisions incorporated the main principles of the Community's competition policy, including the rules on anti-trust, State aid and public monopolies.

However, the Agreements did not incorporate the entire *acquis communautaire*, i.e. the whole body of the EC primary and secondary legislation and jurisprudence which had developed over the years and had shaped the Community's legal order[6]. The only manner in which the legal and jurisdictional compatibility between the newly associated countries was to be achieved, was the unilateral (albeit with the declared Community's assistance) approximation of laws. This is why the approximation was of such a fundamental importance for the success of the association project[7].

As can be seen from the above, the Europe Agreements offered many opportunities of development of relations between the associated countries of Central and Eastern Europe and the European Community (Union). They set up a structure allowing the gradual establishment of free trade in industrial goods and even – though at a much slower pace - in steel and textiles.

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[6] For more detailed comments on the notion of *acquis communautaire* and its changing character, cf. C. Delcourt, "The *Acquis Communautaire*: Has the Concept Had Its Day?", CMLR [2001] 38, pp. 829 – 870. The author stressed the complex and difficult to grasp nature of the *acquis*, which rendered the task of associated countries all the more difficult. In her view, it was more appropriate to speak of several types of *acquis*, covering "a plurality of elements, of varying nature and origin, which are assembled and combined", and which were "more or less encompassing, or more or less specific", as well as "more or less essential". In this context, she stressed that the "accession *acquis*" was not the same as the Union's "fundamental *acquis*", even though the former included the latter (as well as e.g. parts of the Council of Europe *acquis*). The enhanced co-operation *acquis*, unlike the Schengen *acquis*, was not part of the common *acquis communautaire* (subsequently also referred to – as if it was not complex enough – as the Union's *acquis*) but it could be included (according to the case) in the *acquis* of particular EU Member States. In conclusion, she suggested that the notion *acquis communautaire* be reserved for this specific part of the Union's *acquis* which represents the "genetic inheritance" of the EU, applicable on a day-to-day basis by all the Member States.

[7] Cf. Chapter I.A.2 and Chapter II, below.

Many of their provisions (especially those relating to trade in industrial goods - elimination of customs duties, quotas and fiscal discrimination, but also those concerning equal treatment of legally residing workers) seemed to be sufficiently precise, clear and unconditional to fulfil the conditions of direct effect in the Community legal order[8].

On the other hand, while requiring the associated countries to undertake an important legal, regulatory and institutional reform, they lacked concrete guidelines as to how this process was to be shaped, neither did they provide for clear, binding and efficient mechanisms of adaptation of these countries' structures to the requirements of the EC internal market. The interested countries, prompted by the prospect of future membership in the EU (which was however not promised to them in the Europe Agreements themselves), took on an impressive effort, without necessarily being offered something really significant in return. As some critics pointed out, the ouvertures on the Community's side in the trade field were sometimes redundant, uncertain or belated, and were moreover restricted through safeguard clauses. The Agreements seemed to represent a consolidation of the Community's commercial policy towards the CEECs, rather than a genuine opening of the internal market towards these countries.

Consequently, the Europe Agreements represented rather an immediate, short or medium term response to the changing environment in Europe, but failed to set out a strategic vision englobing long term measures favourable to the European integration and the modernisation of Central and Eastern part of the continent. Such an approach had to be developed subsequently, on a gradual basis, in the context of the political decisions taken during European summits and in the course of their implementation by the Council and the Commission[9].

2. Provisions concerning the approximation of laws

In the Chapters of the Europe Agreements concerning the approximation of laws, the Parties recognised that the economic integration of the associated countries concerned depended essentially on the approximation of their existing and future laws to the Community law. In particular, the following fields of legislation were enumerated as necessary to be aligned with the Community standards: customs, company law, banking, company accounts and taxes, intellectual property, social legislation, financial services, competition, indirect taxation, consumer protection, technical rules and norms, nuclear legislation, transport and environment. The associated countries promised to engage a unilateral approximation process, in exchange for which the Community declared its readiness to offer technical assistance including the exchange of experts, information, education and translation of relevant Community acts.

The impact of the provisions on approximation of laws could hardly be overestimated. The associated countries had inherited from the previous historical period a body of largely obsolete laws, almost totally unadapted to the requirements of a modern market economy. Those laws had required either a simple abrogation and replacement with the new legislation (as in the case of many of the old socialist-era acts) or substantial modernising amendments (as in the case of certain acts which somehow "survived" from the period before the W.W. II, or some general legislation in the field of civil and criminal law).

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[8] Cf. Chapter I.A.4, below.

[9] Cf. Chapter I.B. to E..

Finally, whole areas of legislation had to be created "from scratch" - securities markets, banking and insurance regulations, competition – to mention only a few of the most important ones. The co-operation in this field with the Community (European Union) has proved not only necessary for the attainment of a minimal degree of legislative and regulatory compatibility between economic sectors in the associated countries and in the Community - with obvious positive impact on the relationships and the economic exchange between the Parties concerned - but has helped in general to modernise the legal systems and the economies of those countries, therefore giving them a better position in the competitive world of the end of the 20th century.

More specifically, unlike in the case of the European Economic Area Agreement – which in addition to reproducing to a significant degree the Community legal provisions foresaw that these rules were to be interpreted in accordance with the established case law of the European Courts concerning these provisions (Article 6 EEA), and provided for arrangements with a view to enabling future developments in such case law to be taken into account in the interpretation of this Agreement (Article 106 EEA) - the Europe Agreements only prohibited trade restrictions which were of discriminatory character.

Therefore, restrictions in trade between the associated States and the EU resulting merely from differences in national rules concerning the production and trade in goods and services, the movement of persons, the establishment and the movement of capital could not in principle be prohibited. This is why a detailed harmonisation of the rules concerned was of such a fundamental importance in the process of integration of the associated countries into the Community's internal market. Harmonisation took place partly in an "involuntary" manner (governed by the provisions in the Europe Agreements which required approximation of laws), but also – to a larger extent – in a "voluntary" way, i.e. through the adaptation of the national rules of the associated countries to the relevant Community rules, which were not yet (at that stage) of a binding character in relation to these States, and in the drafting of which these States had not participated. Such a "voluntary" harmonisation took, in the main, three forms:

a. legislative form – the associated States reproduced the Community legislation in their respective national laws;

b. administrative form – concerning the decision making by the European Commission (as in the field of competition policy); the associated States tried to bring their administrative policies into line with Commission decisions;

c. judicial form – national courts of the associated States took into account the Community law, including the case law of the European Courts, in their jurisprudence.

3. Anti-trust provisions and implementing rules

All Europe Agreements contained anti-trust provisions, worded in an almost identical manner[10]. For example, according to Article 63 of EC - Poland Europe Agreement (EA):

"1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Poland:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Poland as a whole or in a substantial part thereof;

(iii) [paragraph concerning State aid - note by author].

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85 [now 81], 86 [now 82] [...] of the Treaty establishing the European Community.

3. The Association Council shall, within three years of the entry into force of this Agreement, adopt by decision the necessary rules for the implementation of paragraphs 1 and 2.

[...]

5. With regard to products referred to in Chapters II and III of Title III [i.e. agriculture and fisheries - note by author]:

[...]

- any practices contrary to paragraph 1 (i) should be assessed according to the criteria established by the Community on the basis of Articles 42 and 43 of the Treaty establishing the European Economic Community [now Article 36 and, after amendment, Article 37 EC], and in particular of those established in Council Regulation No. 26/62.

[10] Cf. Article 63 of EC - Poland Europe Agreement, O.J. L 348, 31/12/1993; Article 62 of EC - Hungary Europe Agreement, O.J. L 347, 31/12/1993; Article 64 of EC - Czech Republic Europe Agreement, O.J. L 360, 31/12/1994; Article 64 of EC - Slovakia Europe Agreement, O.J. L 359, 31/12/1994; Article 64 of EC - Bulgaria Europe Agreement, O.J. L 358, 31/12/1994; Article 64 of EC - Romania Europe Agreement, O.J. L 357, 31/12/1994; Article 63 of EC - Estonia Europe Agreement, O.J. L 068, 09/03/1998; Article 64 of EC - Latvia Europe Agreement, O.J. L 026, 02/02/1998; Article 64 of EC - Lithuania Europe Agreement, O.J. L 051, 20/02/1998; and Article 65 of EC - Slovenia Europe Agreement, O.J. L 051, 26/02/1999. For an overview of these provisions from the point of view of the European Commission, cf. K. Van Miert, "Competition Policy in Relation to the Central and Eastern European Countries – Achievements and Challenges", Competition Policy Newsletter [1998] 2 – June.

6. If the Community or Poland considers that a particular practice is incompatible with the terms of paragraph 1, and:

- is not adequately dealt with under the implementing rules referred to in paragraph 3, or

- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Association Council or after 30 working days following referral for such consultation.

[...]

7. Notwithstanding any provisions to the contrary adopted in accordance with paragraph 3, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.
[...]".

Identical provisions were set out in the Europe Agreements concluded with Hungary, Bulgaria and Romania. Those with the Czech Republic, Slovakia and Slovenia contained an additional provision stipulating that, until the rules implementing anti-trust provisions of the Europe Agreement were adopted by the Association Council, practices incompatible with these provisions were to be dealt with by the Community and each State concerned according to their respective legislations, without prejudice to the safeguard clause in paragraph 6. This provision could be understood as a mere clarification of the situation prevailing in practice also in other EA States. However, it could also be seen as an argument in favour of those who considered that anti-trust provisions of Europe Agreements had no direct effect (cf. below). In any case, its practical impact ceased to exist as from the entry into force of the implementing rules[11].

By comparison with other Europe Agreements, those concluded with the Baltic States contained two differences in their anti-trust provisions. First, the second paragraph of the principal anti-trust Article stipulated that, in addition to the assessment of practices described as incompatible with the proper functioning of the EA on the basis of the Articles' 81 and 82 EC application criteria, the criteria of application of the corresponding rules of the ECSC Treaty were to be applied for coal and steel products. This in fact was not a substantive change in relation with other EAs, as similar rules were contained in Protocols 2 to these other Agreements[12].

[11] In February 1996 for the Czech Republic, in January 1997 for the Slovak Republic, and in December 2000 for Slovenia.

[12] Besides, this provision was of no practical importance, as following the expiry of ECSC Treaty on 23 July 2002, the rules applicable to products previously covered by this treaty were those of EC Treaty. Cf. also the Commission Communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, O.J. C 152, 26/06/2002.

The second difference was that, in these three EAs, the Association Council was given a fixed deadline (31 December 1997) to adopt the implementing rules referred to in paragraph 3 of the competition provision. Regarding the other EAs, the three-year deadline was somewhat confusing: at first sight, it would seem that it counted from the date of entry into force of the respective Agreements. However, this was further qualified by other provisions of the EAs, specifying what was to be understood by the term "the date of entry into force of this Agreement" in the event of some provisions being put into effect by means of an Interim Agreement[13].

Pursuant to these provisions, the actual deadline was 31 December 1994 for Hungary, Poland, the Czech Republic and Slovakia, and 31 December 1995 for Romania and Bulgaria. In respect of Slovenia, the date was February 2002. It is noteworthy, however, that these deadlines had generally not been respected: for example, the implementing rules in respect of EC - Poland EA were only adopted on 16 July 1996[14].

The anti-trust provisions of the Europe Agreements had obviously been worded in a manner rendering them extremely similar to the analogous provisions contained in the EC Treaty. However, one important difference was that the EA provisions did not foresee any sanction for incompatibility with the proper functioning of the Agreements[15]. Admittedly, this was not really a problem as regards the abuse of dominant position - Article 82 EC also "merely" prohibited such abuse as incompatible with the common market. However, due to the direct effect of this provision, national courts in EU Member States had recourse to national sanctions for breach of statutory duty, which in most of these countries was the sanction of nullity. Nevertheless, Article 81 (2) EC did contain an express sanction for restrictive agreements, rendering them void. A solution to this problem could be found in the wording of paragraph 2 of the competition Article, referring to criteria of application of (in this case) Article 81 EC in assessing practices contrary to the corresponding EA provision.

This brought about another issue, namely the possible direct effect of anti-trust provisions of the Europe Agreements. It seemed at first sight to be an important question, as one could argue that such a direct effect would be a prerequisite for the phasing out of the use of antidumping measures in relations between the EU and the associated countries[16].

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[13] Cf., for example, Article 122 of EC - Poland EA; Article 124 of EC - Hungary, EC - Czech Republic and EC - Slovakia EAs; Article 125 of EC - Bulgaria EA and Article 126 of EC - Romania EA. Cf. also A.-M. Van den Bossche, "The Competition Provisions in the Europe Agreements. A Comparative and Critical Analysis" in: Ed. M. Maresceau, *Enlarging the European Union. Relations between the EU and Central and Eastern Europe*, Longman, London 1997.

[14] O.J. L 208, 17/08/1996. Cf. below.

[15] Cf. A.-M. Van den Bossche, "The Competition Provisions in the Europe Agreements. A Comparative and Critical Analysis" in: Ed. M. Maresceau, *Enlarging the European Union. Relations between the EU and Central and Eastern Europe*, Longman, London 1997.

[16] Cf. G. Marceau, "The Full Potential of the Europe Agreements: Trade and Competition Issues. The Case of Poland", World Competition [1996] 35 - 69, pp. 52 - 53. According to this author, antidumping measures within an agreement of the EA type could be phased out if and when: standards for transnational restrictive practices (RBPs) existed; private firms had legal standing before the courts of the territory where the RBP took place to enforce these standards; and/or when this issue was dealt with before domestic courts (other than that of the territory where the RBP took place), the market of reference was transnational and the domestic courts were entitled to address transnational issues.

In this respect, there were conflicting opinions in the doctrine. One of the strongest arguments against such an interpretation was that, in a joint declaration on Article 63 of the EC - Poland EA, appended to this Agreement, the parties stated that they "may [emphasis added] request the Association Council at a later stage, and after the adopting of the implementing rules [...], to examine to what extent and under which conditions [emphasis added] certain competition rules may be directly applicable [emphasis added], taking into account the progress made in the integration process between the Community and Poland[17]. However, such declarations were not appended to other EAs, which could be interpreted as an "exception confirming the rule" argument.

Another argument against direct effect was that, in the absence of a possibility for courts of associated countries to refer to the Court of Justice for a preliminary ruling under Article 234 EC, there was a danger of diverging interpretations of identically worded provisions contained in the EAs. This could hardly be remedied by the dispute settlement procedure foreseen in the Agreements (e.g. in Article 105 of EC - Poland EA), as this procedure was not available to private parties and the decision belonged to the Association Council and not a judicial body. Such a decision was binding only on the Parties to the Agreement i.e. the State on the one hand, and the Community on the other.

On the other hand, there were representatives of the doctrine[18] who argued that the case law of the Community Courts could provide the basis for an interpretation of anti-trust provisions of the EAs (and of the implementing rules) according to which these provisions would possibly have direct effect. In particular, the line of jurisprudence concerning various association agreements signed between the Communities and third countries, starting from the *Bresciani* case[19] and passing through the judgments in *Kupferberg*[20], *Demirel*[21], *Sevince*[22], *Restamark*[23] and *Regina*[24], was quoted as reference. Among others, the ECJ stated in *Kupferberg* and confirmed in *Demirel* (in paragraph 14 of the judgment) that *"a provision in an agreement concluded by the Community with non-Member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation and effects, to the adoption of any subsequent measure"*. Further, reference was made to the judgment in *Sevince* case, in which the ECJ applied the same criteria to an act of secondary legislation (a decision by the Association Council) adopted pursuant to an association agreement. This reasoning was repeated in *Restamark* (as regards the interpretation of a provision of the EEA Agreement on public monopolies) and in *Regina* (with respect to a provision of the 1977 Protocol to the EC - Cyprus Association Agreement on rules of origin).

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[17] O.J. L 438/180, 1993. This declaration was *inter alia* referred to by P. Holmes and J. Mathis in "Europe Agreement Competition Policy for the Long Term: an Accession Oriented Approach", Legal Issues of European Integration [1998] 17 – 33, pp. 22 – 23.

[18] Such as G. Marceau, cf. above.

[19] Case 87/75, *Bresciani v. Italian Finance Department* [1976] ECR 129.

[20] [1982] ECR 3659.

[21] *Meyrem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.

[22] *Sevince and Staatssecretaris van Justitie* [1990] ECR 3497.

[23] C.M.L.R. [1995] 161.

[24] C.M.L.R. [1995] 569.

Having all these judgments in mind, it was maintained that the anti-trust provisions of EAs - the nature and purpose of which was to accelerate the associated countries' pace towards full EU membership - should be given direct effect. However, even those authors who took such position admitted that, in the light of the above-mentioned joint declaration on Article 63 of EC - Poland EA, the intention of the parties was not to give these provisions immediate direct effect. Nevertheless, it was stressed that the interpretation of the EAs given by the Community Courts and by the national courts of associated countries could prevail over the parties' original intention. It was argued that the obligations mentioned under Article 63 EA were sufficiently clear and precise, since the provision contained references to the criteria developed under the corresponding articles of the EC Treaty. Furthermore, any doubts about the unconditional character of this article should have been dissipated with the adoption of the implementing rules, and in particular the "positive comity" Article 2 (2) of these rules (cf. below). Under this approach, a private company would be able to force the anti-trust authority of its party to the EA to intervene if it estimated itself to be a victim of anticompetitive behaviour of another company, located on the territory of the other party to the agreement. Admittedly, whatever the outcome of this discussion could eventually have been (and the author of this thesis tends to agree with the defenders of a possible direct effect of anti-trust provisions in the EAs), its interest is now – after the associated countries have become EU Member States – of a rather theoretical interest.

The implementing rules to the anti-trust provisions followed a very similar pattern in all the Europe Agreements; therefore, the ones issued by the EC - Poland Association Council (Decision No. 1/96) will be commented upon as example of such rules. The basic approach chosen for these rules was a two-pillar one: cases relating to restrictive agreements and to abuses of dominant position were dealt with by the European Commission on the one hand, and by the Polish competition authority (Office for Competition and Consumer Protection, formerly Antimonopoly Office), on the other.

According to Article 1 of the rules, the competences of these respective authorities "shall flow from the existing rules of the respective legislation of the Community and Poland, including where these rules are applied to undertakings located outside the respective territory. Both authorities shall settle the cases in accordance with their own substantive rules, and having regard to the provisions set out below." The relevant substantive rules were identified as the EC Treaty (and, until its expiry, the ECSC Treaty), including the competition-related secondary legislation, for the Commission, and the Polish Antimonopoly Law (subsequently, the Act on Competition and Consumer Protection) for the Office for Competition and Consumer Protection (OCCP).

The above approach was different from that adopted under the EEA Agreement, which had as its basis the idea of establishing a "homogeneous integrated system based on common rules"[25]. In the case of the EAs, the implementing rules merely referred to the existing internal legislation as the substantive rules for dealing with particular cases. Thus, the position of those analysts who considered that the anti-trust provisions of the EAs did not have direct effect was considerably strengthened.

[25]Cf. A.-M. Van den Bossche, "The Competition Provisions in the Europe Agreements. A Comparative and Critical Analysis" in: Ed. M. Maresceau, *Enlarging the European Union. Relations between the EU and Central and Eastern Europe*, Longman, London 1997.

The implementing rules did not introduce a separate sanction of nullity, which was missing in the anti-trust provision of the EAs (cf. above). Furthermore, they did not contain an equivalent of Article 82 (3) EC, either. At the same time, in Article 6, they confirmed that "the competition authorities shall ensure that the principles contained in the block exemption regulations in force in the Community are applied in full". This was quite obvious insofar as the application of the EC law by the Commission was concerned.

However, it is noteworthy that the competition authority of the associated country concerned was obliged, by virtue of this provision, to take on a significant part of the Community's *acquis* in the field of competition policy, and that the manner in which this was supposed to happen was merely via the provision (by the Commission) of information about "any procedure related to the adoption, abolition or modification of block exemptions by the Community".

The possible conflict of laws situations in such cases (i.e. when the national competition law contained different - or did not contain equivalent - grounds for block exemptions) were dealt with by the following provisions: "Where such block exemption regulations encounter serious objections on the Polish side, and having regard to the approximation of legislation as provided for in the Europe Agreement, consultations shall take place in the Association Council [...]. The same principles shall apply regarding other significant changes in the Community or Polish competition policies".

The Article 6 provision had also another, related aspect. The manner in which it was worded seemed to aim at the national competition authority (in the case of Poland: the OCCP). However, under the Polish competition law, the competent courts[26] also played an important role in the implementation and enforcement of relevant rules. This raised two issues: the extent to which the Polish courts were bound by the "principles contained in the block exemption regulations in force in the Community", and the possibilities for these courts (deprived, as already mentioned above, from the possibility of requesting the Court of Justice for a preliminary ruling) to clarify any doubts regarding the application of these block exemptions (thus, ultimately, preventing diverging interpretations of the EA provisions). According to some experts[27], the consultation procedure referred to in Article 6 of the implementing rules could not be invoked to deal with this sort of difficulties.

Unlike the EEA Agreement[28], the competition provisions in Europe Agreements referred expressly only to the corresponding provisions of the EC Treaty, and not to the EC secondary legislation adopted pursuant to these provisions. Thus, one of the important aspects of the EC competition policy applicable to undertakings - namely the control of concentrations based on the merger Regulation No. 4064/89[29] - was not explicitly included into the scope of the competition provisions of the EAs.

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[26] Cf. Chapter III.B, below.

[27] Cf. *inter alia* A.-M. Van den Bossche, "The Competition Provisions in the Europe Agreements. A Comparative and Critical Analysis" in: Ed. M. Maresceau, *Enlarging the European Union. Relations between the EU and Central and Eastern Europe*, Longman, London 1997.

[28] Cf. Article 6 EEA.

[29] Council Regulation No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. L395/1, 1989; corrected in O.J. L 257/13, 1990. The regulation entered into force on 21 September 1990. It was replaced by a new Merger Regulation on 1 May 2004 (Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O. J. L 24, 29 January 2004, pages 1 – 22).

This meant that the Commission was in principle free to apply the merger regulation to all concentrations with a Community dimension, even if the national legislation of the associated country concerned (i.e. Title III of the Polish Act on Competition and Consumer Protection) also applied. Furthermore, the "one-stop-shop" rule of the merger regulation, according to which the EU Member States' national legislation could not be applied to concentrations with a Community dimension, did not - in principle - apply in relations with the associated countries.

One could think that this important *lacuna* would not be addressed in the implementing rules, which only concerned the competition provisions contained in the EAs. Nevertheless, the approach adopted by the Commission while drafting these rules (i.e. referring also to Article 235 EC - now Article 308 EC - as a legal basis for the decision on the Community side) allowed it to include merger control. For example, Article 7 of the Implementing rules to the competition provisions set out in EC - Poland EA stipulated that "with regard to mergers which fall within Council Regulation (EEC) No. 4064/89 [...] and have significant impact on the Polish economy, the [Polish competition authority - the OCCP] shall be entitled to express its view in the course of the procedure taking into account the time limits as provided for in the abovementioned Regulation. The Commission shall give due consideration to that view". However, it was clear that the Commission was not bound by the opinion of (in this case) OCCP; possible conflicts of jurisdiction were thus not entirely excluded. This approach was different from that adopted in the EEA Agreement, under which the Commission was the only body competent to deal with all concentrations falling within the scope of the merger regulation.

As regards the procedure for co-operation between the Commission and the national competition authorities, the implementing rules made a distinction between cases falling under the competence of both competition authorities and those under exclusive competence of one of them. The issue of whether a given authority was competent in a given case was dealt with pursuant to the respective rules applicable to each authority (i.e. the EC law and, in the case analysed here, the Polish law). In situations when, under these rules, both authorities appeared to be competent, the implementing rules foresaw (Article 2 (1)) a notification procedure, by which a given authority informed the other one about a case it was dealing with, and which appeared to it "also to fall under the competence of the other authority". As it was explained in Article 2 (1) 2 of the rules, such a situation "may arise in particular in cases concerning activities that: - involve anticompetitive activities carried out in the other authority's territory; - are relevant to enforcement activities of the other competition authority; - involve remedies that would require or prohibit particular conduct in the other authority's territory". Notification was to include sufficient information to permit an initial evaluation by the recipient party of any effects on its interests. Copies of the notifications were to be submitted on a regular basis to the Association Council. Notification should have been made in advance, as soon as possible and at the latest at the stage of an investigation still far enough in advance of the adoption of a settlement or decision, so as to facilitate comments or consultations and to enable the proceeding authority to take into account the other authority's views, as well as to take such remedial action it may have found feasible under its own laws, in order to deal with the case in question.

In addition to this procedure, Article 2 (2) of the implementing rules foresaw the possibility of one authority requesting consultation with the other authority, whenever it considered that "anticompetitive activities carried out on the territory of the other authority are substantially affecting important interests of the respective Party". Further, it could also request that the other competition authority initiate "any appropriate procedures with a view to taking remedial action under its legislation on anticompetitive activities". This, as it was stressed expressly, did not prevent the requesting authority from taking action under its own law, although such an action should not "hamper the full freedom of ultimate decision of the authority so addressed". In any case, as stipulated in Article 2 (3) of the rules, the objective was to "endeavour to find a mutually acceptable solution in the light of the respective important interests involved". To this end, the requested authority "shall give full and sympathetic consideration to such views and factual materials as may be provided by the requesting authority and, in particular, to the nature of the anticompetitive activities in question, the enterprises involved and the alleged harmful effects on the important interests of the requesting Party".

According to Article 3 of the implementing rules, the above-mentioned approach should have been applied also in cases falling under the exclusive competence of one competition authority only. In particular, whenever one of the competition authorities initiated an investigation or proceeding in a case "which is found to affect important interests of the other Party", the proceeding authority should have notified this case to the other authority, without formal request by the latter.

Of course, whether one competition authority considered a case as affecting "important interests of the other Party" was up to the discretion of the former, which left a certain degree of uncertainty about the criteria to be applied in practice. It was also of importance in the context of the information procedure set out in Article 4 of the rules, which allowed one authority to request information about a case dealt with by another authority, if this case "appears to affect important interests of the first Party". Information was to be provided "to the extent possible and at a stage of its proceedings far enough in advance of the adoption of a decision or settlement to enable the requesting authority's views to be taken into account".

One very important point that must again be stressed is that, in the absence of common and unified competition rules, the implementing provisions to the competition article of the EAs could only to a limited extent prevent a situation, in which each respective Party applied primarily its own anti-trust rules. All these rules did was thus little more than diminishing the risk of flagrant conflicts of interpretation and implementation of competition provisions. Naturally, in practice, the danger of conflicting decisions has diminished considerably with the progress of approximation of anti-trust law in the candidate countries (on the Polish law - cf. Chapter II.B). Furthermore, the footing of the national competition authorities in these countries was not, realistically speaking, exactly equal with the Commission. In fact, the national competition bodies (for example the OCCP, cf. Chapter III.A) have tended to align their jurisprudence with that of the Commission to the highest extent possible.

All that explains why there has been hardly any conflicts of law and jurisprudence in practice during the period when the EC – Poland EA was in force. The Commission tended to interpret the scope of application of the EC competition rules quite widely (so as to include all cases with a Community element, i.e. also involving a Community company operating partly on the Polish market) and the Polish competition authority and courts have generally tried to follow the Community law and jurisprudence in their activities[30].

4. Jurisprudence of the Community Courts

The Community Courts have not had an opportunity to interpret anti-trust provisions of the Europe Agreements. However, a number of judgments have been issued, in which the question of interpretation of other EA provisions appeared as one of their elements. In these cases, the Community judges have generally followed the line of jurisprudence on association agreements, mentioned above[31].

The first occasion for the ECJ to express its view on the Europe Agreements came in 2001, with a series of cases[32] concerning the right of establishment of, respectively, Polish, Czech and Bulgarian nationals within the Member States of the EU. The Court interpreted the provisions of the EAs prohibiting discrimination on grounds of nationality against citizens of Poland, the Czech Republic and Bulgaria, who were self-employed workers or persons setting up and managing companies. All three cases originated in the United Kingdom, which had - in the 1994 Immigration Rules - defined special conditions governing the leave to reside in the United Kingdom for persons intending to carry on an activity pursuant to the EAs.

In the *Gloszczuk* case, two Polish nationals had entered the UK as tourists and remained in the country after their visas expired. Their applications to regularise their stay on the basis of the fact that they were self-employed persons was rejected by the Secretary of State, who took the view that the EA applied only to persons lawfully present in the United Kingdom.

The facts in the *Barkoci and Malik* case were similar: the two Czech nationals (of Roma origin) had attempted to remain in the UK after their asylum applications had been rejected, stating as grounds for their residence that, under the relevant EA, they would be allowed to remain as, respectively, a self-employed gardener and a provider of domestic and commercial cleaning services. The UK authorities considered that these plans would not be financially viable, and therefore dismissed their applications. Finally, in *Kondova*, the facts involved a combination of both above-mentioned cases (entry on a basis of a visa excluding long-term stay and employment, subsequent unsuccessful asylum application, attempt to legalise the residence in the UK on the basis of the establishment provisions of the EA).

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[30] Cf. S. Woolcock, "International Competition Policy and the World Trade Organization", Paper for the LSE (London School of Economics and Political Science) Commonwealth Business Council Trade Forum in South Africa (2003), http://www.lse.ac.uk, p. 22. Cf. also Chapter III.

[31] Cf. page 20.

[32] Case C-63/99, *The Queen v. Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk et Elzbieta Gloszczuk*, judgment of 27 September 2001; Case C-257/99, *The Queen v. Secretary of State for the Home Department, ex parte Julius Barkoci et Marcel Malik*, judgment of 27 September 2001; Case C-235/99, *The Queen v. Secretary of State for the Home Department, et parte Eleanora Ivanova Kondova*, judgment of 27 September 2001.

The English High Court of Justice requested the ECJ to clarify the issue of direct applicability and scope of the right of establishment provided for under the respective EAs. In its response, the ECJ first recalled the purpose served by the EAs: to promote trade and harmonious economic relations so as to foster the development of prosperity in the associated States and facilitate their future EU accession. The Court then stressed that the authorities of the EU Member States remained competent to apply, within the limits set by those agreements, their own national laws and regulations regarding entry, stay and establishment.

However, the ECJ stated that the principle of non-discrimination, from which nationals of associated countries - who wished to pursue, within the territory of a given Member State, economic activities as self-employed persons or to set up and manage undertakings which they effectively control – had to benefit, was directly applicable. Thus, it considered that the principle set out in the relevant provisions of the EAs was sufficiently operational and unconditional to be applied by national courts called to rule on the legal position of the individuals concerned.

The ECJ concluded that the Europe Agreements conferred on nationals of associated countries a right of establishment i.e. a right to take up activities of an industrial or commercial character, activities of craftsmen, or activities of the professions, and to pursue them in a self-employed capacity. While confirming that the EC Treaty implied that rights of entry and residence were conferred, as corollaries of the right of establishment, on nationals of the EU Member States, the ECJ stressed that these rights were not absolute privileges granted to Polish, Czech and Bulgarian nationals, and that the exercise of those rights may be limited by the rules of the Member States. That said, those domestic immigration rules could not nullify or impair the benefits accruing to such nationals under the right of establishment provided for by the agreements.

The Court went on to establish the following principles which the national immigration legislation of EU Member States had to fulfil in order to be compatible with the Europe Agreements:

- a Member State could not refuse entry or residence to a national of one of the associated States, with a view to his establishment, on grounds of his nationality or his country of residence, or because a general limitation on immigration was provided for, not could it make the right to take up an activity as a self-employed person subject to economic considerations relating to the labour market;

- it was necessary to determine whether the activity contemplated in the host Member State by persons entitled under the provisions of the EAs was indeed an activity pursued in a self-employed capacity and not an activity carried out in an employed capacity. Implementation of a national system of prior control as to the exact nature of the activity contemplated (an evaluation of adequate financial resources and reasonable chances of success carried out through detailed investigations) was thus compatible with the Europe Agreements;

- in contrast, a national of an associated country who made false representations and circumvented the relevant controls by asserting that he wished to enter an EU Member State for purposes of tourism, although in fact intending to take up an economic activity, placed himself outside the sphere of protection recognised by the EAs: a Member State could in that case reject his application and insist that he submit a new application in due and proper form by applying for an entry visa to the competent authorities in his State of origin or another, provided that this did not prevent him from having his situation reviewed at a later date;

- the measures taken by the national authorities could not, however, adversely affect the very substance of the rights of entry, stay and establishment of those nationals, who also enjoyed fundamental rights (such as the right to respect for family life and the right to respect for property) which followed from the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As can thus be seen, the ECJ expressly stated that, provided certain requirements were fulfilled, the EA provisions (in this case, those on establishment) could have direct effect. This jurisprudence was further developed in *Jany* case[33], which involved Polish and Czech nationals who had invoked, respectively, Articles 44 and 58 of the EC - Poland EA and Articles 45 and 59 of EC - Czech Republic EA, in order to obtain residence permits in the Netherlands and to be allowed to work as self-employed prostitutes.

As in the previously cited cases, the Court pointed at the aims of the Europe Agreements and confirmed that, in this context, Articles 44 (3) of EC - Poland EA and Article 45 (3) of EC - Czech Republic EA had to be interpreted as having direct effect. Further, it considered that the expression "economic activity as self-employed persons", used in Article 44 (4) (a) (i) of EC - Poland EA and in Article 45 (4) (a) (i) of EC - Czech Republic EA, should be interpreted in the same way as the analogous expression from Article 52 EC, adding that "there is nothing in those Agreements to suggest that the Contracting Parties intended to limit the freedom of establishment which they conferred on Polish and Czech nationals to one or more categories of activities pursued in a self-employed capacity"[34]. The Court continued by confirming that, in its view, prostitution pursued in a self-employed capacity could be regarded as a service provided for remuneration and was therefore covered by the above provisions.

Based on the observation that prostitution was tolerated, and even regulated, in the Netherlands as regards Dutch nationals, the Court rejected the argument of the Dutch authorities arguing their right to prohibit entry of prostitutes from associated countries solely on the public order grounds, stating that the applicability of public policy derogation from Article 53 of EC - Poland EA (and Article 54 of EC - Czech Republic EA) was subject to the condition that the State concerned had adopted effective measures to monitor and repress activities of that kind when they were also pursued by its own nationals. Thus, the ECJ referred to the non-discrimination principle.

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[33]Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, judgment of 20 November 2001.
[34]Recital 39.

The same principle was invoked in the *Pokrzeptowicz-Meyer* case[35], concerning the interpretation of Article 37 (1) of EC - Poland EA on the treatment of workers of Polish nationality legally employed on the territory of a EU Member State. In this case, the applicant was a language teacher who argued that the German legislation according to which foreign language teachers from non-EU countries could only be offered fixed-term contracts (unlike the EU nationals, in respect of whom the offer of a fixed-term contract had to be individually justified) violated the non-discrimination principle set out in Article 37 of EC - Poland EA.

The ECJ first of all considered the issue of direct effect of the first indent of paragraph 1 of this article, and replied in the affirmative i.e. that Polish nationals legally employed in a Member State of the EU could invoke it before a national court as regards non-discrimination with respect to their conditions of employment, remuneration and dismissal. In the Court's opinion, this interpretation was not affected by the fact that, according to the wording of the provision in question, the principle set forth in the first indent of paragraph 1 was put into effect "subject to the conditions and modalities applicable in each Member State". The ECJ explained that this proviso "may not be interpreted in such a way as to allow the Member States to subject the principle of non-discrimination [...] to conditions or discretionary limitations. Such an interpretation would render that provision meaningless and deprive it of any practical effect"[36].

The Court added that, unlike some other provisions of the EA (including those on anti-trust - remark by the author), implementation of the first indent of Article 37 (1) of EC - Poland EA was not subject to the adoption by the Association Council of any additional measures to define the modalities for its application. As regards the meaning of this provision, the Court considered that - based on the comparison of the aims and context of the EA with the EC Treaty - there is no ground for giving it a meaning different from that, confirmed in the ECJ's jurisprudence[37], of Article 48 (2) of EC Treaty. In practice, it confirmed that, once they were legally employed within the territory of an EU Member State, Polish nationals had the right to equal treatment as regards conditions of employment of the same extent as that conferred in similar terms by Article 48 (2) EC on Member State nationals. In the case concerned, the German legislation in question was thus found to be inapplicable to Polish nationals.

In a subsequent case[38], the ECJ interpreted, within the area of sport, the principle of non-discrimination on grounds of nationality set out in EC - Slovakia EA. The applicant was a Slovak national, legally employed in Germany in a handball team. The German national handball federation (DHB) issued him with a player's licence marked with the letter A on the ground that he was a national of a non-member country whose citizens did not benefit from the equal treatment provisions under the EC Treaty or, in identical terms, under the Agreement on the European Economic Area (EEA). Under the rules drawn up by DHB, teams in the federal and regional leagues could, in league or cup matches, field no more than two players whose licences were marked with the letter A. Mr Kolpak – the applicant – claimed that the DHB had thus violated the non-discrimination principle from the Europe Agreement.

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[35]Case C-162/00, *Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer*, judgment of 29 January 2002.
[36]Recital 24.
[37]Case C-272/92, *Spotti* [1993] ECR I-5185.
[38]Case C-438/00, *Deutscher Handballbund e.V. v Maros Kolpak*, Judgment of 8 May 2003, Press Release No 35/03.

The ECJ referred to its judgment in *Pokrzeptowicz-Meyer* case and reaffirmed that the provision of the Europe Agreements laying down the principle of non-discrimination on grounds of nationality was directly applicable. It then went on to point out that, according to the principles which it set out in *Bosman*[39], the analogous provision of the EC Treaty applied not only to measures of public authorities but also to rules drawn up by sporting associations which determined the conditions under which professional sportsmen could engage in gainful employment.

The Court considered that the EA should be interpreted in the same way, although it stressed that the non-discrimination principle in the EA context applied only to workers from associated countries who were already lawfully employed in the territory of an EU Member State and solely with regard to conditions of work, remuneration or dismissal. That scope did not extend to national rules dealing with access to the labour market. In the case concerned, the Court found that a rule such as that drawn up by the DHB related to working conditions and that a limited opportunity for Slovak players, in comparison with players who were nationals of the EEA Member States, to take part in certain matches involved discrimination prohibited by the EA. It stressed that such discrimination could not be justified on sporting grounds (in contrast, it found that it might be the case with regard to matches between national teams excluding foreign players for exclusively sports-related reasons).

As can be seen, in the cases which the ECJ had the occasion to deal with in respect of the Europe Agreements, the Court made clear that certain provisions of the EAs could have direct effect, in the light of the aims of the agreements and provided that the provision concerned passed the direct effect "test" pursuant to the criteria elaborated in the Community Courts' jurisprudence as regards the Community acts.

In this connection, it could be argued that either the anti-trust article or at least certain of the provisions from the implementing rules might be directly invoked by individuals before national courts in the EU Member States. Furthermore, at least as regards Poland, the legal doctrine did not exclude direct applicability of certain provisions of international treaties (such as the Europe Agreements), provided that these provisions were precise, unambiguous and unconditional[40]. Thus, there would be no theoretical obstacle to such a direct applicability also before the Polish courts[41].

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[39] Case C-415/93, [1995] ECR I-4921.

[40] Cf. F. Hoffmeister, "International Agreements in the Legal Order of the Candidate Courtiers", in: A. Ott and K. Inglis (eds.), *Handbook on European Enlargement*, T. M. C. Asser Press, The Hague 2002, p. 215. As to decisions of the Association Council, the Polish doctrine held that they could likewise be directly applicable if the EA foresaw such a possibility. Cf. W. Czapliński, "L'intégration européenne dans la Constitution Polonaise de 1997", RMC [2000] 436, pp. 168 - 170, as well as C. Mik, *Europejskie prawo wspòlnotowe. Zagadnienia teorii i praktyki*, Vol. I, C. H. Beck, Warszawa 2000, p. 791. However, some authors stressed that, as executive acts based on the EA, such decisions required publication in "Monitor Polski" (the official journal for publication of Government acts of executory - or sub-legal - rank) in order to be formally introduced to the legal system. Cf. C. Banasiński, "Charakter prawny decyzji Rady Stowarzyszenia", Unia Europejska Nr 2 - 3/1996, p. 45; and A. Łazowski, "International Agreements in the Legal Orders of the Candidate Countries - Poland", in: A. Ott and K. Inglis (eds.), *Handbook on European Enlargement*, T. M. C. Asser Press, The Hague 2002, p. 303.

[41] Naturally, Poland's accession to the EU in May 2004 basically rendered these considerations "historical", and the question of direct applicability of competition provisions of the EA's has remained unsolved. Cf. also A. Evans, "Competition and Other Economic Provisions", in: A. Ott and K. Inglis (eds.), *Handbook on European Enlargement*, T. M. C. Asser Press, The Hague 2002, pp. 568 - 569.

B. The Commission's White Paper

Among the most difficult and important challenges facing the European (Community) Union, once the decision-as-to-principle had been taken that the associated countries from Central and Eastern Europe would be allowed to join the Western European "15", was to develop a framework under which those countries would gradually become truly integrated into the internal market[42], to the extent possible, prior to their accession. This necessitated a very large programme of approximation of these countries' legislation with the Community law. In order to make this possible, the European Commission elaborated and presented to the 1995 Cannes European Council the "White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union"[43].

This large document (480 pages) contained the Commission's proposals for organisational measures to be taken in order to enable such a large harmonisation programme to go through. The scope of the White Paper was very broad, ranging from the idea of setting up a special information office dealing with technical and administrative advice to the presentation of a detailed "harmonisation guide", i.e. a catalogue of the most important items of Community legislation, which should have been incorporated by the associated countries into their national laws. From the legal point of view, this was the real beginning of the process of preparation of the candidate countries for their accession to the EU, as their successful legal harmonisation was a *conditio sine qua non* of the success of the forthcoming enlargement. The issue was of the most complex nature, in particular as a full harmonisation would not only require a simple transposition of the relevant texts, but above all an adaptation of the legal culture, and upgrading of the indispensable legal infrastructure (institutions, procedures, and legal education)[44].

The White Paper was, strictly legally speaking, another in a series of unilateral Community acts, without any contractual commitment to accept an associated State as a member if the recommended approximation measures were taken. However, in the new political context after the Copenhagen summit[45], it was clear that the conformity of the conduct of an associated State with those recommendations could not be disregarded when it came to accession negotiations[46].

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[42]Defined in the Conclusions of the Presidency after the Cannes summit as "an area within which free movement of goods, individuals, services and capital is ensured and in which a system of transparent competition is guaranteed. It requires a high level of mutual trust and equivalent regulatory approaches", EU Bull 6/1995, p. 17. Such an internal market entailed the elimination of physical, technical, fiscal and tariff barriers between participating States, which could either be achieved through introducing common rules and regulations, or (less time-consuming, costly and complex) through enforcing the principle of mutual recognition (as established by the Court of Justice in the *Cassis de Dijon* case in 1979), according to which all goods lawfully manufactured and marketed in one Member State should be accepted also in other Member States (exceptions being only possible for reasons of public health, the fairness of commercial transactions and defence of consumers). Cf. S. Senior Nello, K. E. Smith, *The Consequences of Eastern Enlargement of the European Union in Stages*, EUI Working Papers, Florence 1997, p. 14.

[43]10 May 1995, COM (95) 163 final. This document was preceded by the Commission's Communication of 16 September 1994 on the follow-up of the Copenhagen Summit on approximation of laws, COM (94) 391 final. Cf. also the analysis in A. Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe*, Cambridge University Press, 1998, pp. 208 – 219.

[44]Cf. M. Maresceau, "Het nieuwe juridische kader van de betrekkingen tussen de Europese Unie en de landen van Centraal- en Oost-Europa...", Gandaius 21 - Thorbeke 20, Antwerpen 1995, p. 20 – 21; and M. Maresceau & E. Montaguti, "The Relations Between the European Union and Central and Eastern Europe: a Legal Appraisal", CMLRev. [1995] 1327 – 1367, p.1335 – 1337.

[45]Cf. Chapter I.C., below.

[46]Cf. P.- C. Müller-Graff, "Legal Framework of the Relations Between the European Union and Central and Eastern Europe: General Aspects", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the*

The White Paper did not in any way replace the obligations and agenda set by the Europe Agreements (as it was a non-binding unilateral policy document), neither did it represent merely a detailed guide to the implementation of the Agreements (as it concerned only one of the two aspects of integration covered by the Europe Agreements, namely the approximation of laws, leaving aside the issue of market access). The way the Commission selected the measures in the White Paper, and the manner in which it established priorities among them, were more the function of the logics of particular sectors than of the economic costs or benefits of their adoption. Priority was given to measures providing an overall framework, addressing fundamental principles or setting up basic procedures. This logic was however only followed within particular sectors; the choice of priorities between sectors was left up to the associated States, according to national specificities and conditions. Moreover, both the Commission and, subsequently, the European Council[47] stressed that it was for the associated countries themselves, in the light of the White Paper and their national contexts and priorities, to define and implement their own programmes for preparing for integration into the internal market, taking into account the general framework defined in the Europe Agreements.

As for its specific contents, the White Paper began with a comprehensive presentation of the general aspects of the internal market and of its requirements. This introductory part was followed by a detailed appendix, listing a wide range of very concrete measures that were recommended to be taken by the candidate countries in order to approximate their legislation to the Community internal market law – although these recommendations were not individualised according to the different countries concerned, therefore leaving the specific measures to each particular candidate, as appropriate.

The provisions listed in the appendix comprised those on the free movement of capital, on the free movement and safety of industrial products, on competition, on social policy, on agriculture, on transport, on audio-visual sector, on environment, on telecommunications, on direct taxation, on the free movement of persons, on public procurement, on financial services, on protection of personal data, on company law, on accountancy rules, on civil law, on the mutual recognition of professional qualifications, on intellectual property, on energy, on customs and excise, on indirect taxation and on consumer protection. The annex was very detailed, listing in every area concerned the respective EC regulations and directives, describing their objectives, their contents and implementation problems, and recommending key measures to be taken. Each area (or chapter) was divided in three parts: general introduction, conditions necessary for the effective operation of legislation in a given area, and suggestions of concrete approximation scenarios[48].

EU and Central and Eastern Europe, Longman, London 1997, at 39. This was true even though the Commission expressly stressed that the White Paper was not part of the accession negotiation process and could not prejudice the conduct and the outcome of such negotiations.

[47]Cf. the Conclusions of the Presidency after the Cannes summit, in particular item I.34. EU Bull. 6/1995, p. 18.

[48]Cf. M.-A. Gaudissart and A. Sinnaeve, "The Role of the White Paper in the Preparation of the Eastern Enlargement", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997, pp. 46 - 47.

For each area, the White Paper proposed a logical sequence in which the approximation could be carried out; in particular, the key measures were divided in two stages[49]. Stage 1 measures had been selected according to one or more of the following criteria:

- the measures concerned provided an overall framework for more detailed legislation;

- they addressed fundamental principles or provided basic procedures governing the given sector;

- they were a precondition for the effective functioning of the internal market in that sector;

- in some cases, they required a particularly long period in order to ensure their full implementation.

Bearing in mind the need to ensure appropriate enforcement and implementation of the approximated internal market rules, the White Paper described the structures set up by the EU and the Member States to this effect. These structures included:

- bodies empowered to control, supervise and regulate on behalf of the public institutions, such as those which supervised the solvency of insurance companies or controlled the daily operation of credit institutions;

- bodies verifying that products comply with technical standards, such as testing laboratories and certification bodies;

- bodies empowered to survey the free movement of goods, such as veterinary inspections or trading standards offices;

- technical and professional organisations responsible for the definition of standards;

- consumer, worker, professional and trade organisations that monitored compliance with the legislation;

- judicial and quasi-judicial bodies empowered to enforce the legislation, such as specialised courts and ombudsmen.

[49]However, in some cases, there was no distinction between stages, due to the character of legislation in which it was impossible to distinguish between more and less important/urgent measures. In other areas, a third stage was introduced, usually reflecting the sensitive nature of the topic concerned - the Commission preferred to add a third stage rather than risking the failure of approximation due to a too quick pace of it (e.g. in the road transport sector). Cf. M.-A. Gaudissart and A. Sinnaeve, "The Role of the White Paper in the Preparation of the Eastern Enlargement", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Cantral and Eastern Europe*, Longman, London 1997, p. 49.

Recognising the complexity and the scope of the task facing the associated countries, the White Paper declared the Community's and the Members States' willingness to provide necessary support, which would be better co-ordinated in order to avoid duplication[50]. It is noteworthy that the Commission did not suggest a temporal order of priorities between the 23 chapters set out in the White Paper, leaving the decision as to which measures to introduce first - and in which order - to the associated countries themselves, in the light of their own situation and strategy (including the cost-benefit related considerations)[51].

As regards competition – i.e. the chapter on which this thesis focuses in the main – the purpose of the White Paper was declared to be not as much the laying down of foundations of an effective competition policy in the candidate countries, but rather the strengthening and reinforcing of the existing policies with a view to preparing these countries for their effective integration into the Community internal market[52]. In this context, the Commission stated that "each individual country should prepare for the successful enforcement of competition policy by stepping up its efforts of approximation of legislation, institution building and enforcement and executing at an accelerated pace the obligations that are contained in the Europe Agreements"[53].

The Commission stressed that competition policy was fundamental to the establishment of the internal market. It added that an active competition policy helped create healthy economic structures and avoid "abnormal profits". In the Commission's view, competition was essential for the creation of the internal market in policy sectors such as energy, transport and telecommunications. In this context, the Commission expressed the view that competition policy was of particular importance during the period of economic transition, as it was the case for the candidate countries. Furthermore, it stressed that introducing a competition policy and effectively enforcing it had to be considered as a precondition for the opening of the wider internal market or ultimately for the accession of these countries to the EU.

Further on, the Commission explained the importance for the economies of the candidate countries of functioning within an acceptable regulatory framework, in order to prevent markets developing in a way contrary to their own interests by leading to monopolised and inefficient market structures. Even more important was the allusion to the need to create a "climate of confidence" comparable to that which existed between the EU Member States.

For these reasons it was of utmost importance to ensure that the approximation process, already put in place under the Europe Agreements, be continued in all the areas of competition policy. In this context, the Commission stated that it was not necessary to adopt all the details of the *acquis* in this field; candidate countries could limit themselves to taking over the principles within the appropriate structural framework. Each country could decide that particular forms of laws or guidelines were the most suitable in its individual situation and that a particular monitoring and enforcement structure served the purpose best.

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[50]Cf. "The European Union's Pre-Accession Strategy for the Associated Countries of Central Europe", European Commission's Directorate-General for Enlargement's website.

[51]Cf. M.-A. Gaudissart and A. Sinnaeve, "The Role of the White Paper in the Preparation of the Eastern Enlargement", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997, p. 50.

[52]Cf. M.-A. Gaudissart and A. Sinnaeve, "The Role of the White Paper in the Preparation of the Eastern Enlargement", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997, p. 63.

[53]Cf. "Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union - White Paper", COM (95) 163, 10 May 1995. Annexes: Part Three: Competition, Social Policy and Action.

In order to help the candidate countries in the fulfilment of this task, the White Paper gave a brief overview of the four fundamental branches of the EC competition policy (i.e. State aid, merger control, anti-trust and public monopolies) and presented, in respect of each of them, the key substantive and procedural rules which the candidate countries had to take into account. The substantive rules - already to a large extent covered by the Europe Agreements[54] - were placed by the Commission among the Stage 1 approximation measures, with the exception of the introduction of competition to sectors dominated by public monopolies. At the same time, the Commission stressed the essential importance of actual implementation of these rules, which implied the setting up of appropriate monitoring and enforcement bodies. It was considered extremely important to have an authority which would possess the necessary powers to ensure an efficient implementation of the rules, and to create a well-functioning court system, both with sufficient expertise in the area.

In particular, as regards restrictive agreements and abuse of dominant position, the Commission pointed out that such an authority would have to have the power to investigate alleged violations (including the right to request information and the right to undertake on-the-spot investigations), the power to impose fines of up to 10% of the concerned undertakings' turnover, to impose periodic penalty payments, to take provisional measures, to impose conditions and to establish cease and desist orders. At the same time, the rights of the undertakings had to be safeguarded. This related to the rights of defence, comprising the right to be heard, third party rights, provisions on prescription, the protection of business secrets and confidentiality a well as the right to judicial review.

The Commission added that competition policy had to be made widely known and accepted by all economic agents involved i.e. by governments, companies and by the workforce. As it formulated it in the Annex to the White Paper[55], "the law must not only exist but it must also be applied and – above all – be expected to be applied. Economic agents must take their decisions under the assumption that the policy will be applied. Only then will the market generate the full potential of its benefit". Besides, this was the necessary precondition for the abandoning, on the Community side, of "classical" tools of industrial policy - such as anti-dumping - in respect of the candidate countries.

When attempting to assess the strengths and the weaknesses of the White Paper, one should start by saying that its very existence helped structure the candidate countries' approximation efforts[56] and added an EU accession-oriented dimension to the framework of relationships between the EC/EU and the associated countries shaped by the Europe Agreements which, as already stressed before, were not initially foreseen to serve as accession preparation instruments[57]. Further, the White Paper went beyond just indicating the legislation to be taken over by the candidate countries and provided a basis for the reorientation of the Community's assistance to these countries, aiming at helping them ensure effective implementation and enforcement of the new legislation.

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[54] Cf. Chapter I.A.3., above.

[55] Cf. above.

[56] On the impact of the White Paper on Polish approximation efforts, cf. M. Gòrka, "Realizacja Białej Księgi Komisji Europejskiej w porządku prawnym Rzeczpospolitej Polskiej jako element procesu dostosowania prawa polskiego do standardów Unii Europejskiej", *in: Polska w Unii Europejskiej, perspektywy, warunki, szanse i zagrożenia*, TNOiK, 1997.

[57] Cf. M.-A. Gaudissart and A. Sinnaeve, "The Role of the White Paper in the Preparation of the Eastern Enlargement", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997, p. 66.

However, the White Paper also had a number of weaknesses[58]. One of them was that the concept of the "internal market" used in the White Paper was somewhat different (i.e. narrower) than that applied traditionally in the Community context. This was due to the Commission's initial assumption that the White Paper should only cover measures which "directly affect the operation of the Single Market[59]". Moreover, the White Paper was almost exclusively (save a few references to the EC Treaty provisions and judgments of the Community Courts) based on the Community's secondary legislation. This represented a major weakness of the instrument, as it provided a sometimes incomplete and even deformated picture of the Community legal order, based primarily on the general principles enshrined in the founding Treaties. Another problem was the absence of reference to the role of the jurisprudence of the Community courts in the legal systems of the associated countries in the pre-accession phase. This was a consequence of the absence in the Europe Agreements of a provision (present, for example, in the EEA Agreement) that decisions of the ECJ and the CFI are to be taken into account in interpreting the Community law[60]. Finally, the somewhat static character of the White Paper failed to take into account the ongoing evolution of the *acquis*, although this problem was later addressed by the Community in the framework of its pre-accession strategy.

[58]Cf. M.-A. Gaudissart and A. Sinnaeve, "The Role of the White Paper in the Preparation of the Eastern Enlargement", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997, p. 68.

[59]I.e. measures "without which obstacles to the free movement would continue to exist or would reappear". Cf. point 3.5 of the Introductory Part of the White Paper, as well as M.-A. Gaudissart and A. Sinnaeve, "The Role of the White Paper in the Preparation of the Eastern Enlargement", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997, p. 69.

[60]Cf. also Chapter I.A.2.

C. Pre-accession strategy

It might seem paradoxical that the Europe Agreements - originally designed by the Community rather as an alternative to quick accession of the associated countries[61] - have finally become one of key elements of the process of preparation of these countries for future membership in the EU. This was, to some extent, a result of the political strategy of the interested countries, which refused to negotiate any future agreements - such as that which established the European Economic Area between the EFTA countries and the EC - as an intermediate stage preceding the conclusion of accession treaties. The reason of this attitude was the associated countries' fear that an EEA-like agreement might postpone the actual enlargement of the EC/EU until a very distant date. Therefore, they preferred to work on the basis of the existing Europe Agreements, supplemented with new forms of co-operation[62].

Further, almost simultaneously with the conclusion of Europe Agreements, it became apparent also on the Community side that the Agreements alone could not meet the requirements of the EC/EU policy towards the Central and Eastern Europe, and that they needed to be reinterpreted and complemented by a set of decisions and mechanisms reflecting the permanently changing political environment[63]. In particular, one major issue had to be added - this time expressly - to a number of other issues treated more or less satisfactorily in the Europe Agreements: the future accession of the associated countries to the European Union. These decisions and mechanisms have, since 1992, been taken/created on the occasion of the European Council meetings (the so-called "European Summits")[64].

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[61] As already mentioned earlier in this text, legally speaking, the Preambles of the Agreements stated merely that (1) the EC/EU was aware of the associated countries' intention to join, but (2) did not incur any corresponding contractual commitment, and (3) the Parties only assessed the Agreement as being helpful for the achievement of the objective of the associated countries. Clearly, at no point was there a mention of any accession or pre-accession strategy on the part of the Community. Cf. P.-C. Müller-Graff, "Legal Framework for Relations Between the European Union and Central and Eastern Europe: General Aspects", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997.

[62] Cf. M. Maresceau, "Het nieuwe juridische kader van de betrekkingen tussen de Europese Unie en de landen van Centraal- en Oost-Europa...", Gandaius 21 - Thorbeke 20, Antwerpen 1995, p. 19 - 20. This pushed Hungary, Poland and the then- Czecho-Slovak Federal Republic to formally request in a joint petition that accession negotiations begin with each of them by 1996, in anticipation of membership no later than 2000. *Cf. Agence Europe, Europe Documents* No. 1802, 8 October 1992.

[63] According to some experts, the Europe Agreements could not provide a sufficient response to the new challenges, as they represented, after all, a continuation of the traditional Community approach towards countries which wished to establish closer relations with the EC: a combination of relatively modest aid, technical assistance, gradual implementation of a customs union with protection in the sensitive sectors, and non-binding efforts at coordinating policies in non-trade areas, very much like in the case of the EC-Turkey Association Agreement. Cf. D. Kennedy, D. E. Webb, "The Limits of Integration: Eastern Europe and the European Communities", CML Rev. [1993] 1095 - 1117, p. 1103.

[64] Cf. M. Maresceau, E. Montaguti, "The Relations Between the European Union and Central and Eastern Europe: a Legal Appraisal", CML Rev. (1995) 1327 - 1367, p. 1332. For a detailed and interesting presentation of the complex and delicate process of reaching decisions concerning the Eastern enlargement of the EU, especially in the context of the European Summits, cf. J. I. Torreblanca, *The Reuniting of Europe. Promises, Negotiations and Compromises*, Ashgate, Aldershot 2001, in particular pp. 303 – 330.

Many of these decisions had their direct or indirect bearing on the process of approximation of laws in the associated countries. The whole process was quite unique in the up-till-then history of enlargements of the EU (and, before that, of the European Communities), as the "pre-accession" policies played such a predominant role in it; in previous enlargements, pre-accession strategies had been virtually lacking and necessary legal (and other) adaptations of candidate countries had often taken place after their entry to the EU (EC), via a set of transitional periods[65].

1. First response to the new challenge

As early as in 1991, at its meeting in Maastricht on 9 and 10 December, the European Council asked the Commission to examine the implications of the future accessions of the (first of all) EFTA countries, Cyprus and Malta, and (in a longer perspective) the "new democracies" of Central and Eastern Europe, to the EC. In the report[66] subsequently presented to the Lisbon European Council (held on 26 and 27 June 1992), and accepted by the latter as a basis of the future Union's policy in this field, the Commission refused to define geographical limits of the prospective enlargement, while setting out the conditions and criteria which the prospective new Member States would have to satisfy in order to make their accession possible. These conditions/criteria included the acceptance of the Community system and the capacity to implement it, presupposing a functioning and competitive market economy, and an adequate legal and administrative framework in the public and private sectors.

Further, the Commission clarified the concept of the Community's *acquis*[67] and stated that "the assumption of these rights and obligations by a new member may be subject to such technical adaptations, temporary (not permanent) derogations, and transitional arrangements as are agreed in accession negotiations"[68]. While declaring the Community's "understanding" for the problems of adjustment which the new members might face, the Commission stressed the importance of the principle of acceptance of the *acquis* by any candidate country. Finally, the new conditions, different from those in which past accessions had taken place, were briefly described (completion of the single market - which limited to a strict minimum the possibility of maintaining frontiers between the old and the new members –, realisation of the economic and monetary union - the new members being eventually obliged to fulfil the economic convergence criteria –, and the inclusion of the *acquis* in the field of foreign policy and security).

The Commission pointed at the fields in which the Europe Agreements, "with their dynamic and evolutionary nature"[69], could be exploited more fully or even improved. Those fields included, *inter alia*, the development of the administrative and legislative infrastructure necessary for the functioning of the market economy, and the fixing of a calendar for the adoption of the Community's *acquis*.

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[65] Cf. M. Maresceau, "Pre-accession", in: M. Cremona (ed.), *The Enlargement of the European Union"*, Oxford University Press, 2003, pp. 9 -10.

[66] "Europe and the challenge of enlargement", EC Bull., Supplement 3/92.

[67] In the Commission's view, the elements of this *acquis* were:
* the contents, principles and political objectives of the Treaties, including the Maastricht Treaty;
* the legislation adopted in implementation of the Treaties, and the jurisprudence of the Court;
* the declarations and resolutions adopted in the Community framework;
* the international agreements and the agreements between the Member States linked with the Community's activities.

[68] Cf. "Europe and the challenge of enlargement", para 12.

[69] Cf. "Europe and the challenge of enlargement", para 38.

The Conclusions of the Presidency at the European Council in Lisbon[70] took to a large extent account of the aforementioned Report. The Commission was asked to evaluate progress made in this respect and report to the European Council in Edinburgh, suggesting further steps as appropriate. The report in question, prepared in December 1992[71], *inter alia* enumerated a series of conditions which both the candidate countries and the Community would have to fulfil before any discussion about enlargement.

The report mentioned the following conditions, according to which the application of each particular country would be evaluated: capacity to assume the Community's *acquis*, stability of democratic institutions, respect of law, Human Rights and the rights of minorities, existence of a functioning market economy, acceptance of the objectives of political, economic and monetary union, and the capacity to cope with the competitive pressure and the market forces within the EU.

2. The Copenhagen criteria

The first important political reorientation of the European Agreements took place at the Copenhagen European Council of 21 - 22 June 1993[72], where it was openly accepted that the associated countries of Central and Eastern Europe could apply for membership of the European Union[73]. Even more importantly, it was admitted that accession was not only the objective of those countries, merely recognised by the Community without any legal or political commitment, but one of the objectives of the Community as well[74]. Therefore, it was no longer a matter of "wishful thinking" of the associated countries. Instead, the Community engaged into a complex and challenging process of preparing itself - and helping prepare the candidate countries - for the future enlargement towards Central and Eastern Europe.

In the Conclusions of the Presidency adopted at the end of the Copenhagen summit, the conditions which would have to be satisfied by the applicant countries before their accession would be possible were first officially enumerated[75].

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[70] Cf. Conclusions of the Presidency, pp. 21 - 24.

[71] Cf. *Towards an ever-closer association with the countries of Central and Eastern Europe. Report from the Commission for the Edinburgh European Council*, 11 - 12 December 1992, Agence Europe, 9 December 1992.

[72] Cf. *inter alia* C. Goybet, "Copenhague ou le sommet des bonnes intentions", RMC [1993] 609 - 611.

[73] Bull. EC 6/1993, pt. I. 13.

[74] Although also this statement was merely - in purely legal sense - a unilateral act of the European Council without any contractual commitment to accept an associated State as a member if the criteria set out were met. Cf. P.- C. Müller-Graff, "Legal Framework for Relations Between the European Union and Central and Eastern Europe: General Aspects", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997.

[75] Cf. P.-C. Müller-Graff, "East Central Europe and the European Union: From Europe Agreements to Member Status", in: (ed.) P.-C. Müller-Graff, *East Central Europe and the European Union: From Europe Agreements to Member Status*, 1997, pp. 17 - 22; and, of the same author: "Legal Framework for Relations Between the European Union and Central and Eastern Europe: General Aspects", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997, pp. 34 - 37. P.-C. Müller-Graff stressed again that the Copenhagen criteria were, from a legal standpoint, a purely unilateral act of the European Council, without any contractual commitment to accept an associate State as EU Member if the criteria - which were anyway open to interpretation - were met. However, as he noted, a refusal to admit such a State would be quite inconceivable politically.

Those conditions were reformulated more clearly as follows: "stability of institutions guaranteeing democracy, the rule of law, Human Rights and respect for and protection of minorities", "the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union", and "the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union".

As far as the third condition was concerned, it was at the same time obvious (as similar conditions had been imposed on all new Member States on the occasion of previous accessions) and very demanding for the associated countries, since the existing *acquis* was far more developed than during prior enlargements and the Central and Eastern European States all had to cope with the legacy of their recent past. Moreover, it was not at all clear whether the entire body of Community's primary and secondary legislation, as well as the jurisprudence of the Community's courts, should be accepted and fulfilled by all the prospective new Member States at the same time and in the same way, especially since there existed precedents (the famous "social chapter" and the provisions on EMU) of different approach with respect to the "old" Member States.

However, it was feared that extending these precedents to the new members would create a lasting differentiation between different types of participation in the EU, with the inevitable impact on the Union's coherence. Therefore, the option of accession with the acceptance of the full *acquis* but with eventual transition periods was chosen as a more favourable one.

The Copenhagen Conclusions of the Presidency stipulated "that the future co-operation with the associated countries had to be geared to the objective of membership". Consequently, they indicated the direction in which further initiatives were to be developed i.e. organising structured relationships with EU Institutions within the framework of a multilateral dialogue, accelerating trade liberalisation, providing the necessary financial resources (in particular, though PHARE), participating in Community programmes and supporting the approximation of law[76].

At the Corfu European Council (24 - 25 June 1994)[77], the Presidency recalled that both the Copenhagen Conclusions and the Europe Agreements constituted the framework for deepening relations with the associated countries and creating the context which would enable the Copenhagen conditions to be met. It was stressed that the further implementation of those Agreements and decisions was one of the essential conditions for accession. The Presidency invited the Commission to make specific proposals as soon as possible for the further implementation of the EAs and the Copenhagen decisions.

The Presidency and the Commission were also asked to report for the subsequent meeting "on progress made on this basis, on the process of alignment since the Copenhagen European Council, and on the strategy to be followed with a view to preparing for accession". As could be seen from the above, the Europe Agreements acquired a new role - that of one of the key instruments of the strategy to prepare the associated countries for their future EU membership - in the light of the Presidency decisions[78].

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[76] Cf. M. Maresceau, "Pre-accession", in: M. Cremona (ed.), *The Enlargement of the European Union"*, Oxford University Press, 2003, p. 14.

[77] Cf. Press Release No 00150/94, Brussels, 24 June 1994; http://ue.eu.int

[78] It is noteworthy that this reorientation was not accompanied either by amendments to the already existing EAs or - even more interestingly - by any significant modification (as compared with the earlier Agreements) in the

Consequently, the Europe Agreements' institutions and procedures became increasingly involved in the pre-accession activities, used as a "ready-made channel for communication"[79] by the sides of the accession preparation process.

3. The Pre-Accession Strategy formally introduced

During the Essen European Council of 9 - 10 December 1994[80], in which (during a certain part of the proceedings) the Heads of State or Government of the then-six associated countries participated, the "Copenhagen conditions" were further developed into what was for the first time formally referred to as the "pre-accession strategy"[81]. The term was mentioned in a Council policy paper[82], the text of which was attached as Annex to the Presidency Conclusions. The paper in question stressed the need to develop "structured relations" with the associated countries, in order to encourage mutual trust and offer a framework for addressing issues of common interest. Further, as one of the priority actions within the framework of the pre-accession strategy, the integration of the countries concerned into the Community's internal market was pinpointed; this implied a gradual adoption of the internal market *acquis* by these countries. To this effect, both short- and medium-term objectives were identified, the former mostly related with trade matters, the latter - approximation of laws. The Essen European Council pursued this thinking and decided to develop the framework of relationships between the Central and Eastern European countries and the EU by adding to the existing instruments - the Europe Agreements and the PHARE Programme - a new concept, which took its concrete expression in the development by the European Commission of the so-called "White Paper" - a kind of reference book, setting out (in order of their importance) the legislative measures that the countries concerned would have to take while preparing their economies for the burden of joining the Union's economic area[83].

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texts of the EAs signed after Copenhagen.

[79]Cf. M. Maresceau, "Pre-accession", in: M. Cremona (ed.), *The Enlargement of the European Union"*, Oxford University Press, 2003, p. 17.

[80]Bull. EU 12/1994, pt. I. 54.

[81]It is very difficult to give a precise description of what the "pre-accession strategy" meant, at least in the legal sense. In general, it referred to the set of EU initiatives aiming at preparing both the candidate countries and the Union for the prospective enlargement, so as to avoid any possible dramatic consequences of an unprepared, abrupt entry of the candidates into the EU. This seemed all the more necessary to the EU as the countries of Central and Eastern Europe required important political, economic and legal adaptations before accession and, furthermore, because of the much more complex character of the *acquis communautaire* (including the second and third pillar) as compared with the previous enlargements. Cf. M. Maresceau, "Pre-accession", in: M. Cremona (ed.), *The Enlargement of the European Union"*, Oxford University Press, 2003, p. 11. Cf. also H. Grabbe and K. Hughes, *Enlarging the EU Eastwards*, Chatham House Papers, The Royal Institute of International Affairs, London 1998, pp. 29 – 40; and A. Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe*, Cambridge University Press, 1998, pp. 161 – 178.

[82]Which drew much inspiration from two preparatory studies of the Commission, sent in the form of Communications to the Council: "The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession", COM (94) 320 final, 13 July 1994; and a Follow-up to this Communication, COM (94) 361 final, 27 July 1994. The latter document set out specific proposals for implementation of the strategy to prepare for accession, including a framework for the deepening of relationships with the associated countries, the creation of an appropriate legal and institutional environment for economic development and integration, the increase of trade opportunities, the macro-economic and structural changes, and the Community assistance to integration and reform.

[83]The Commission's White Paper on the approximation of laws was described in Chapter I.B., above. In April 1995, in the framework of the pre-accession strategy, a meeting took place between the foreign ministers of the then six associated countries, their counterparts from the EU and the Presidents of the Council and the Commission. During that meeting, the acting President of the Council, French PM Alain Juppé, said that the objective of the White Paper *"n'est ni d'anticiper l'adhésion elle-même, ni de fixer de nouvelles conditions pour l'adhésion, ni de donner à son contenu un quelconque caractère juridique avec force contraignante (...) Non, le Livre Blanc*

Further, the European Council requested the Commission to report annually to the General Affairs Council on the progress of implementation of the accession preparation strategy that had been adopted, in particular on the gradual adoption of the internal market rules[84].

On competition policy, the Presidency stressed the special importance of its satisfactory implementation in the associated countries, in the context of future accession to the EU. It estimated that work in this area was well advanced in most of the associated countries in terms of the adoption of competition policy legislation and the setting up of competition offices. The Commission was to set up a competition policy training programme which would draw on the expertise and experience of the Commission and Member State competition authorities. The Presidency stressed that – as soon as satisfactory implementation of competition policy together with the application of those parts of Community law linked to the internal market are achieved, providing a guarantee against unfair competition comparable to that existing inside the internal market - the Union should be ready to consider refraining from using commercial defence instruments for industrial products.

As already mentioned, one of the decisions taken at the Essen summit was the setting up of the so-called "structured dialogue" between the associated countries and the EU, the objective of which was to allow the countries concerned to become gradually familiar with the Union's activities and modes of functioning in various areas. This was implemented by means of joint meetings regularly held at different (mostly ministerial) levels[85]. However, it soon turned out that, in practice, these meetings were not always well prepared and - in particular - did not allow a real exchange of views, due to shortage of time (as they were usually held on the occasion of EU Council of Ministers' meetings) or a poorly prepared agenda. Furthermore, the associated countries were quite disappointed that the "structured dialogue" did not allow them to become involved in the EU decision-making process[86]. Thus, the only real positive contribution of this initiative was probably that the EU ministers and officials could "get to know" their counterparts in the candidate countries and establish contact channels which proved useful in the later stages of accession preparations, where the focus shifted from multilateral to country-by-country approach.

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constituera un guide destiné à faciliter l'intégration des Pecos au Marché intérieur". The then-EC Commissioner responsible for the relations with the Countries of Central and Eastern Europe, Hans van den Broek - also present at the meeting - added that *"Il n'est pas question d'y mettre l'ensemble de l'acquis communautaire; le Livre Blanc indiquera les exigences minimales à respecter pour participer au Marché unique, pour assurer les quatre libertés de circulation..."*. He stressed that the White Paper would not replace accession negotiations, but simply serve as an "orientation guide". Cf. "Europe" N° 6459, 10 & 11 April 1995, p. 5.

[84]Cf. Essen European Council, Conclusions of the Presidency, Bull. EU 12/1994, pt. I. 13.

[85]On the EU side, care was given to stressing that these meetings would be "of an advisory nature" and that "no decisions would be taken". Cf. Annex II to the 1993 Copenhagen Presidency Conclusions.

[86]Cf. Lippert and Becker, "Structured Dialogue Revisited: the EU's Politics of Inclusion and Exclusion", European Foreign Affairs Review [1998] 341; cf. in particular p. 358: "The first hopes of the CEECs of becoming involved into the EU policy cycles, of becoming "pre-members" or "almost members" were necessarily disappointed. The EU never intended and never attempted to cross the institutional and legal boundaries of granting some kind of membership in the club. There were no second-class membership options, no attempt to develop flexible options for integrating the associated candidate countries into the internal policy processes at a level lower than the threshold of membership".

At the Cannes European Council (26 - 27 June 1995), the Presidency stressed again the importance it attached to preparing the accession of the candidate countries and approved the Council's conclusions on the White Paper on integrating those countries into the internal market, as well as the Council's report on implementing the strategy of preparing accession. It further invited the Commission to report back to its next meeting on progress in implementing the White Paper. In this respect, the Presidency stressed that the White Paper was a "useful guide for those countries, in the context of the process of reform already initiated and of implementation of the Europe Agreements"[87]. Further, it was stated that the preparation of the associated countries for integration into the internal market was, as had been affirmed by the Essen European Council, the main element of the strategy of preparation for accession.

In this context, "without anticipating or prejudging the future negotiations on accession and without laying down further conditions for those negotiations", the White Paper was described as "intended to guide and assist the efforts already undertaken by the associated countries by outlining the measures, implementation of which is regarded as essential by the Commission, with a view to integration into the internal market, and the structures necessary to that end". It was stressed that it is only "when they accede that those countries will - subject, if need be, to transitional periods - adopt the whole *acquis* covered by Community legislation and policies"[88].

However, it was clear that the main reason and objective for the candidate countries to align their legislation with the Community law - a process which, despite the appearances, had the character of a strict and compulsory adjustment for the associated countries - was to create an irreversible legal framework for their integration into the EU[89].

The European Council further agreed with the Council's approval of the emphasis placed by the White Paper on the implementation and control structures, establishment of which was found to be necessary to accompany the adoption of legislation on the internal market.

The Commission was invited to hold consultations with the associated countries on their national programmes for implementing the recommendations in the White Paper, as well as to provide appropriate assistance to those countries, in co-ordination with the EU Member States. Finally, the associated countries were invited to equip themselves with the internal structures necessary to make a full use of the facilities offered to them, as well as to strengthen co-operation between them in this field.

[87]Cf. EU Bull 6/1995, at I. 31, p. 17. What was striking in this formulation was that it remained silent over the consequences of completing the legal harmonization task by the associated countries. In other words, the EU did not make any legal commitment on its part in the event that an associated country accomplished the whole program of the White Paper (e.g. did not promise an earlier start of accession negotiations).

[88] Cf. above, at I. 32, p. 17.

[89]Cf. M. Maresceau, "Pre-accession", in: M. Cremona (ed.), *The Enlargement of the European Union"*, p. 22.

4. The Madrid Summit – decision on accession negotiations

The following European Summit, which took place in Madrid on 15 and 16 December 1995, brought about as one of its effects the first clear definition of geographical limits of the future Eastern European enlargement of the EU. Not surprisingly, the limits drawn were identical with those of the association partnerships between the Union and the Central and Eastern European countries. The countries added to the list of then-associated partners, i.e. the three Baltic States and Slovenia, were soon to join the above-mentioned group[90].

The prospective members were to be treated equally, as far as the negotiation process was concerned. Therefore, it was decided that the beginning of the accession negotiations with all those countries would "coincide" with the start of similar talks with Cyprus and Malta[91] (i.e. six months after the end of the Intergovernmental Conference, which was – in pursuance of the provisions of the Maastricht Treaty – convened in order to assess the functioning of the Union and to eventually prepare its reform via the amendment of the said Treaty). The European Commission was invited to prepare its opinions on the official candidate members, from the standpoint of the degree of their preparedness to take on all the rights and especially obligations of the future membership[92].

As a follow-up measure to the Conclusions of the Madrid European Council, the Commission prepared and sent to the nine officially designated membership candidates (the tenth prospective member - Slovenia - had not yet, at that time, submitted its official application for joining the EU, pending the resolution of its divergences with Italy, but was nevertheless treated in an analogous manner "informally") a 165-page questionnaire, covering 23 areas of EU activity. The questionnaire, which was handed on 30 April 1996 and completed by the interested countries by the end of July the same year, was intended to serve as the basis for the Commission's *avis* (opinion) on the applicant States' suitability for membership of the Union. While the questionnaires were broadly similar, they had nevertheless been adapted in order to reflect each candidate's specific circumstances[93].

Besides their - sometimes disputed - value as to the merits of the answers provided (it was argued that the data presented by the applicant countries might suffer either from unreliability of some statistics or lack of novelty for the Commission[94]), the Questionnaires had a highly symbolic function of, on the one hand, giving the countries interested an impression that they were seriously consulted by the Commission in the process of preparation of its *avis* and, on the other hand, setting in motion the next stage of the enlargement procedure which would give a new impetus to the whole process.

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[90] All countries enumerated on this list applied formally for EU membership between 1994 and 1996.

[91] Although the formulation contained in the Conclusions of the Presidency was somewhat less explicit, stating that "following the conclusions of the Intergovernmental Conference and in the light of its outcome and of all the opinions and reports from the Commission [...], the Council will, at the earliest opportunity, take the necessary decisions for launching the accession negotiations", and that "the European Council hopes that the preliminary stage of negotiations will coincide with the start of negotiations with Cyprus and Malta".

[92] Cf. F. de la Serre, "L'Elargissement aux PECO : Quelle différentiation?", RMUE [1996] 642 - 647, p. 643. These opinions were to be provided by the Commission by the end of 1997, cf. "Europe" N° 6629, 17 December 1995.

[93] Cf. T. Klau, "Questionnaire paves road towards enlargement east", "European Voice", 2 - 8 May 1996. There were, broadly speaking, two sets of questions: the first one, in which the Commission wanted to receive general background information (including in statistical form) about each country's demography, production, trade, employment, health care, economic growth, school population, etc. In the second set of questions, precise information about each sector falling within the EU activities was requested, with a strong emphasis on the legal and administrative framework, as well as on the state of implementation and enforcement of the existing rules.

[94] Cf. above.

The Florence European Council of 21 and 22 June 1996 confirmed the acceleration of the enlargement process. It stressed again the importance of pre-accession strategy (into which Slovenia was, this time, officially incorporated) and reiterated the need for the Commission's opinions and reports on enlargement as called for in Madrid to be available as soon as possible after completion of the Intergovernmental Conference, so that the initial phase of negotiations with countries of Central and Eastern Europe would coincide with the beginning of negotiations with Cyprus and Malta six months after the end of the IGC, taking its results into account.

D. "Enhanced" pre-accession strategy

1. Amsterdam and Agenda 2000

At the Amsterdam European Council (16 - 17 June 1997), the Presidency invited the Commission to present, until mid-July 1997, its opinions on the membership applications and, moreover, a detailed communication (the so-called "Agenda 2000") on the development of the Community, including *inter alia* on the questions linked with the future enlargement. The Commission was to formulate in this document its main conclusions and recommendations drawn from the opinions, and to express its point of view on the launching of the enlargement process. In particular, the Commission was to make proposals on the reinforcement of the pre-accession strategy and on the future evolution of the Community's assistance, taking into account the modifications made to the PHARE programme. The purpose of such a reinforced or "enhanced" pre-accession strategy was to offer the candidate countries, regardless of their degree of preparedness and the foreseen date of opening of the accession negotiations, a concrete support to the necessary reforms, following the priorities set out by the Commission in its opinions.

The "Agenda 2000" (prepared as a Commission communication "For a stronger and wider Union") outlined in a single document the broad perspectives for the development of the Union and its policies, the horizontal issues related to enlargement, and the future financial framework beyond the year 2000, taking account of the prospect of the enlargement of the Union[95]. Among other issues, the Commission assessed the progress so far made by the associated States of Central and Eastern Europe under the bilateral agreements in force at the time of drafting of the "Agenda 2000", i.e. the Europe Agreements and (in the case of the Baltic States) the trade and co-operation agreements. In addition to this evaluation, an analysis was made of the expected progress over the medium term, as far as the economic criteria and the countries' ability to implement the *acquis* were concerned. The Commission also anticipated the future development of the Union's policies.

Assessing the progress in the adoption and implementation of the *acquis*, the Commission took into account the applicant countries' performance in carrying out obligations under the Europe Agreements (or other contractual agreements with the Union), in the transposition of Community legislation as set out in the White Paper, and in the areas not covered or only partly covered by the White Paper. In its conclusion, the Commission stated that if the observed trends were reinforced, Hungary, Poland and the Czech Republic would be able in the medium term to take on the major part of the *acquis* and to establish the administrative structure to apply it, while Slovakia, Estonia, Latvia, Lithuania and Slovenia would be able to do so only if there was a considerable and sustained increase in their efforts[96].

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[95]Cf. "Agenda 2000. For a stronger and wider Union", EU Bull., Supplement 5/97, p. 18.
[96]Cf. above, p. 44 - 47.

The document "Agenda 2000" contained also proposals for a new strategy for enlargement. The Commission stated that, as in the past, negotiations would define the terms and conditions on which each of the applicant countries would accede to the Union. The basis for accession would be the *acquis* as it existed at the time of enlargement. While transition periods "of definite and reasonable duration" might be necessary in certain justified cases, the objective of the Union would be that the new members apply the whole *acquis* on accession.

According to the Commission, the future members would have to accept the basic obligations on accession, otherwise their right to participate fully in the decision-making process might be put in question. The Union would not envisage any kind of second-class membership or opt-outs. That was why a good preparation for membership, on the part of all the applicant countries, was considered to be of fundamental importance. The Commission further stated that the actual timetable for accession would depend primarily on the progress made by individual countries in adopting, implementing and enforcing the *acquis*. This would continue, and accelerate, in parallel with accession negotiations. Therefore, a successful strategy for enlargement would have to combine, on the one hand, negotiations based on the principle that the *acquis* would be applied on accession, and - on the other hand - a reinforced pre-accession strategy, for all applicant countries, designed to ensure that they take on as much as possible of the *acquis* in advance of membership.

As to the accession negotiations, the position to be presented by the Union to the applicant countries would be based on the following principles:

- new members would take on the rights and obligations of membership on the basis of the *acquis* as it existed at the time of accession;

- they would be expected to apply, implement and enforce the whole *acquis* upon accession; in particular, measures necessary for the extension of the single market would have to be applied immediately;

- transition measures - but not derogations - might be agreed in the course of negotiations in duly justified cases; they would ensure the progressive integration of the new members into the Union within a limited period of time;

- during the accession negotiations, the applicants' progress in adopting the *acquis* and in other preparations for membership would be regularly reviewed on the basis of reports from the Commission.

As already mentioned above, accession negotiations were to be accompanied by measures forming part of the reinforced ("enhanced") pre-accession strategy. This strategy had three main objectives: firstly, to bring together the different forms of support provided by the Union within a single framework i.e. the Accession Partnerships; to work together with the applicants, within this framework, on the basis of a clearly defined programme to prepare for membership (involving commitments by the applicants to particular priorities and to a calendar for carrying them out); and to familiarise the applicants with the Union's policies and procedures, through the possibility of their participation in Community programmes.

The Accession Partnerships were to involve:

- precise commitments on the part of the applicant countries contained in national programmes for the adoption of the *acquis* with precise timetables, focussing on the priority areas identified in each opinion;

- a mobilisation of all resources available to the Community for preparing the applicant countries for accession (first of all, through PHARE, but also through any new forms of assistance; other resources could be mobilised from international financial institutions - such as the European Investment Bank, the EBRD and the World Bank).

Programmes for adopting the *acquis* were to be drawn up by the Commission in partnership with each of the applicant countries. The priorities would initially correspond to the sectors identified as deficient in the Commission's opinions on each applicant's progress in preparations for EU membership. Work towards the objectives would be covered by indicative timetables[97].

The granting of assistance - on the basis of annual financing agreements - would be conditional on achieving these objectives and on the progress made. Implementation of the programme would thus depend on the strict "accession conditionality" based on suitable evaluation mechanisms and a continuous dialogue with the Commission. The Commission would regularly report to the European Council; the first report was scheduled for the end of 1998, the next ones would follow on an annual basis. If an applicant country would be judged to have fulfilled the necessary conditions, the Commission would recommend to the Council to launch accession negotiations with that country (unless this had already been done).

In the light of its analysis, the Commission recommended to the Council that EU accession negotiations be opened with Hungary, Poland, Estonia, the Czech Republic and Slovenia. It also pointed at the areas where particular efforts would still be necessary in respect of each of the five countries in question.

As far as the legal instruments were concerned, the Commission proposed that, in addition to the Accession Partnerships, better use of the existing procedures, especially the Europe Agreements, be made. In this context, work carried out in particular in the framework of sub-committees for monitoring of the approximation of laws, as well as the exchange of information on the evolution on the *acquis* were mentioned. This meant *inter alia* the reinforcing and extending of the brief given to TAIEX (Technical Assistance and Information Exchange Office[98]), which had been set up under the White Paper. In this framework, TAIEX would provide information on the entire *acquis* and would also broaden the scope of its activities in the applicant countries, not only in respect of Governments but also companies, in order to prepare them for the discipline of the single market.

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[97] Cf. J.- L. Sauron, "Elargissement à l'Est : 1848 - 1998. Le printemps des peuples", Europe N° 10/ 1997, pp. 6 - 7. Cf. also M. Maresceau, "EU - Central and Eastern Europe Relations at a Turning Point", Revue des Affaires Européennes [1997] 263 - 267, p. 264.

[98] Cf. Chapter I.D.7.b.

The progressive integration of the applicant countries in the different Community programmes, and in particular in those concerned with administrative co-operation and application of the *acquis*, would - according to the Commission - enable them to obtain accurate information about Community law, would let them benefit from the experience of the "old" Member States and help increase confidence between national public administrations. The aim was not to give decision-making powers to countries which were not yet members of the Union, but primarily to associate them in Community procedures through giving them an observer status as they transposed the *acquis*, policy by policy, sector by sector[99].

Very important proposals were made by the Commission with respect to the rules on competition. The Commission stressed again that the application prior to accession of some of these rules was necessary, and stated that it should be asked to approve or, in any event, be consulted on national decisions by the authorities in the applicant countries. This was indeed a very far-reaching expectation, giving the Commission in a certain way the powers of scrutiny normally reserved for higher level administration bodies and for courts in the countries concerned.

The approximation of legislation in the field of anti-trust was found to be progressing satisfactorily in most candidate countries, and competition authorities had been set up to enforce the law. However, beyond approximation, the Commission considered that a "competition culture" was necessary. In the event that such a competition culture would not have been fully achieved upon accession, problems could arise in enforcement. Also, enlargement could prove a challenge to the Commission's attempt to further decentralise competition policy enforcement to the Member States while ensuring its uniform character[100].

The Commission focussed in length on risks from possible late or inadequate adaptation to the Community *acquis* in the candidate countries. It admitted that availability of necessary (considerable) resources for adoption of the *acquis* was a major bottleneck in the whole process. Also, costly adaptation of these countries in some areas could be delayed by considerations on competitive advantages and protection of domestic industries.

In the light of these findings, the Commission concluded that, in most cases, a gradual process of adaptation of candidate countries to the *acquis* would appear to be the only realistic path, given the complex character of the process, its cost, and the need to alleviate related adjustments strains. The bulk of this effort would have to be deployed during the period leading to accession, when progress would also be linked to the further gradual opening of the Community markets. Were this not to happen, the Union would - according to the Commission – face difficult options: the need for transitional periods after accession would increase, to the detriment of the normal functioning of the internal market; the risks of inadequate implementation of the *acquis* would multiply. In areas where there were dangers of destabilisation of the internal market or of serious prejudice to EU consumers and citizens, obstacles to accession could become prohibitive.

[99] Cf. "Agenda 2000. For a stronger and wider Union", EU Bull., Supplement 5/97, p. 88 - 89.
[100] Cf. Chapter IV.B.

2. Luxembourg 1997 – first Commission's Opinions on EU membership applications and the "enhanced" pre-accession strategy officially launched

Following the publication of the Agenda 2000, an important next step towards accession of the ten associated countries of Central and Eastern Europe to the EU was taken in December 1997, at the Luxembourg European Council, during which the Commission's initial opinions on the membership applications of these countries (the so-called "avis") were presented. In their light, the Presidency decided that accession negotiations would open with all applicant countries[101] (including Cyprus). The option chosen reflected the "differentiate without discriminating" approach: all the applicant countries would be expected to participate according to the same rules in the accession negotiations, and they would be called to join on the basis of the same criteria. However, the whole procedure would be carried out in stages, in a rhythm specific to each candidate country, depending on its degree of preparedness.

In the Presidency Conclusions, the term "enhanced" pre-accession strategy was for the first time officially consecrated. The Presidency made clear that the new strategy would be applied to all EU applicants, irrespective of whether they had received a positive opinion from the Commission[102]. The process was launched on 30 March 1998, with the objective of allowing all the applicant countries to become, in due course, members of the EU. The three key elements of the new "enhanced" pre-accession strategy were the Accession Partnerships, the annual assessment of the progress achieved by each candidate country (carried out by the Commission) and increased pre-accession assistance.

The accession negotiations with Hungary, Poland, the Czech Republic, Estonia and Slovenia (as well as Cyprus[103]), i.e. the countries identified by the Commission in the "Agenda 2000" as having the strongest chances to meet the criteria of membership in the short and medium term, were formally opened with a bilateral intergovernmental conference on 31 March 1998. Other applicant countries were not to be forgotten – the Commission was to report each year on their situation and they were to be invited to join the first group as soon as the Council estimated that their progress was sufficient[104].

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[101] The decision to start accession talks with all these countries was taken under pressure of the Nordic Member States (fearing a possible exclusion of Lithuania and Latvia from the first wave of accessions) and of Spain and Portugal (which wanted to prove that the financial framework foreseen by the Commission for the future enlargement would be insufficient to cover the needs of the new Member States, were the existing level of the Community's aid to poorer regions of the Union to be maintained). Cf. C. Goybet, "L'union se lance pour la 5ème fois dans l'aventure de l'élargissement", RMUE [1998] 5 - 7, p. 5.

[102] Cf. M. Maresceau, "Pre-accession", in: M. Cremona (ed.), *The Enlargement of the European Union"*, Oxford University Press, 2003, p. 27. Cf. also H. Grabbe and K. Hughes, *Enlarging the EU Eastwards*, Chatham House Papers, The Royal Institute of International Affairs, London 1998, pp. 55 – 69.

[103] Cyprus was added to the first group of countries with which the EU would negotiate the terms of accession under the pressure of Greece, which threatened with boycotting the whole enlargement process if this country were to be left behind the first wave of accession (despite the failure to reach a solution to the conflict opposing the Turkish-occupied Northern Cyprus and the Greek-speaking, internationally recognized Republic of Cyprus in the south of the island, and the rejection by the Parliament of the self-proclaimed Turkish Republic of Northern Cyprus of the proposal to take part in the accession negotiations in a common delegation with the Cypriot Government). Cf. Reuters, "EU to Start Membership Talks with 6 Countries", 10 July 1997.

[104] This decision provides a good illustration of the typical way of reacting of the European Union to the demands of the candidate countries of Central and Eastern Europe. The EU tended to treat all these countries, with all their differences, in a broadly analogous manner, according to a "good average transforming country" model. This led to, on the one hand, slowing down of accession process with the leading countries of the region and, on the other hand, speeding up this process as far as the countries lagging behind in the transformation process were concerned. As a result, the whole process was being slowed down, the EU adopting a very cautious attitude, not shedding light to

3. Screening of the *acquis communautaire*

As from April 1998, a special "Enlargement Task Force", set up within the European Commission's Directorate General I A (which later evolved into the special Enlargement Directorate General), undertook an analytical examination of the *acquis communautaire* (the so-called "screening") with the six applicant countries of the first group of accession negotiations; subsequently, such a screening was also initiated with the other candidates for EU membership.

The screening began with the "easier" sectors[105], in which no major contentious issues were expected, so as to enable the Task Force and the applicant countries to gain some work experience before tackling the really difficult and delicate sectors. In concrete terms, the bilateral screening meetings were constructed around two fundamental questions that the Task Force asked each of the applicant countries concerned: "Do you accept the existing *acquis communautaire* in the chapter in question?" and, if so: "Do you have the necessary legislation and institutions to implement the *acquis*?".

At the first stage, the Commission declared that it would be satisfied with a positive answer to the first question without the country concerned requesting transitional arrangements. As to the second question, it would be dealt with little before the Council's final decision on membership of the applicant countries[106]. At that moment, the question whether an applicant country had the means to implement the *acquis communautaire* properly would become of crucial importance.

Each time the screening of a specific chapter was over, the Task Force submitted individual reports to the Council for each of the applicant countries. These reports were of a purely factual nature - they could contain some Commission's comments but no recommendations whether genuine detailed negotiations should be opened, as this decision was up to the Member States or the EU Presidency. On the basis of these reports, the Presidency was able to reach the conclusion as to whether there was enough substantial information to start formal accession negotiations. The total duration of the screening, which initially should have ended in 1998, was extended to July 1999. This was not due to any problems or difficulties but to a change in the Commission's approach: the initial approach had as effect that the parties were only able to begin examining in detail the contentious issues in respect of each country in 1999. This method would delay the start of detailed discussions and negotiations until the second half of 1999. However, with the new approach, combining ministerial meetings with bilateral screening meetings, the Commission was able to close chapters one after the other and to report on them regularly to the Council, which in general helped speed up the whole process.

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the whole process but indicating only the next few steps. At the Luxembourg summit, the "homogenizing" approach towards the candidate countries seems to have clashed with the one presented initially by the Commission, suggesting to pass on to the next stage of the relationships with the five best performing countries. The outcome was, as it is so often the case with the European summit decisions, a sort of amalgam of the two approaches, all applicant countries being formally treated in the same way but with a possibility open to go ahead in accession talks faster with some of them. Cf. P. Balasz, "The "Globalisation" of the Eastern Enlargement of the European Union: the Political, Economic and Legal Dimension", in: M. Maresceau (ed.), *Enlarging the European Union. Relations Between the EU and Central and Eastern Europe*, Longman, London 1997.

[105] Science and research, telecommunications, education and training, culture and audio-visual policy, industrial policy, small and medium-sized enterprises, common foreign and security policy, and company law.

[106] Cf. "Europe" n° 7235, 5 June 1998, p. 11.

While carrying out the screening with the countries of the first group, the European Commission's services continued their separate screening of the remaining five applicant Central and Eastern European countries: Romania, Bulgaria, Slovakia, Lithuania and Latvia. The screening began on 27 April 1998 with the examination of the *acquis communautaire* relating to the internal market, subsequently extended to cover other issues, including competition policy. The whole procedure was completed by autumn 1999, after which the Commission drew up a report for the Council on the outcome of the screening.

As regards Poland and competition policy, the first multilateral screening meeting took place on 9 October 1998, followed by a bilateral screening session with the European Commission on 16 October 1998. The Polish side was represented by Mrs Elżbieta Modzelewska-Wachal, Deputy President of the Office for Competition and Consumer Protection (OCCP) and member of the Polish accession negotiation team[107]. Poland's negotiating position on competition policy was presented at the meeting of 29 January 1999, with negotiations on this issue opened formally on 19 May 1999[108]. The Polish side declared its readiness to adopt and implement the entire competition *acquis* as from the moment of accession, with the exception of certain forms of State aid applied in the Special Economic Zones, for which it applied for a transitional period until 2017. In its reply, the EU side rejected this request, pointing at the fact that these forms of State aid were contrary to the applicable provisions of the Europe Agreement already at the time of their adoption[109].

The first stage of the screening of Polish legislation was finished in November 1999[110]. Before that, in October 1999, the Polish negotiation team prepared a response to the EU position on competition policy. The second stage of the screening exercise, aimed mainly at the new *acquis* adopted after the start of the screening (i.e. after April 1998) began in the spring of 2000. In this context, the Commission presented to the Polish authorities its revised opinion on Poland's negotiating position in the competition policy field[111], with *inter alia* critical remarks to the draft amendment to the Act on Special Economic Zones (which did not guarantee a quick halt to issuing new investment authorisations in SEE) and several comments on the draft State aid law; the Polish side replied in June 2000.

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[107] Cf. *Sprawozdanie z działalności Pełnomocnika Rządu do Spraw Negocjacji o Członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej za okres od 5 lutego do 31 grudnia 1998 roku* (Report on the Activity of the Government Plenipotentiary for Poland's EU Accession Negotiations, for the period 5 February - 31 December 1998), http://www.negocjacje.gov.pl/neg/arch/arch1c.pdf, p. 23.

[108] Cf. *Sprawozdanie z działalności Pełnomocnika Rządu do Spraw Negocjacji o Członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej za okres od stycznia do czerwca 1999 roku* (Report on the Activity of the Government Plenipotentiary for Poland's EU Accession Negotiations, for the period January - June 1999), http://www.negocjacje.gov.pl/neg/arch/arch1d.pdf, p. 6.

[109] Cf. also Chapter I.E.

[110] Cf. *Sprawozdanie z działalności Pełnomocnika Rządu do Spraw Negocjacji o Członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej za okres od 1 lipca do 31 grudnia 1999 roku* (Report on the Activity of the Government Plenipotentiary for Poland's EU Accession Negotiations, for the period 1 July - 31 December 1999), http://www.negocjacje.gov.pl/neg/arch/arch1e.pdf, p. 5.

[111] Cf. *Sprawozdanie z działalności Pełnomocnika Rządu do Spraw Negocjacji o Członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej za okres od 1 stycznia do 30 czerwca 2000 roku* (Report on the Activity of the Government Plenipotentiary for Poland's EU Accession Negotiations, for the period 1 January - 30 June 2000), http://www.negocjacje.gov.pl/neg/arch/arch1f.pdf, p. 7.

The screening demonstrated - to no big surprise - that although there was generally no problem in accepting the *acquis communautaire* by applicant countries, there were nonetheless clear difficulties in implementing it. Therefore, the Commission stressed the need for the applicant countries to make additional efforts with a view to giving themselves the means to ensure that the *acquis* is correctly transposed and that it is really applied and respected.

4. Accession Partnerships

Following the conclusions of the Luxembourg Presidency, the Commission adopted, in February 1998, a draft decision establishing the principles, priorities, intermediate objectives and conditions of the Accession Partnerships (AP)[112]. As already mentioned, the AP's brought the priorities for each candidate country and the various forms of EU assistance into one single framework. Though being the result of intensive consultations with the candidate countries, the AP's were - from the legal point of view - not agreements but unilateral Community acts[113], the basis of which was provided by the Regulation No 622/98 of 16 March 1998, and the specifics for each country concerned - in decisions adopted on 30 March 1998.

The APs were more comprehensive as regards their content than the Europe Agreements. They included all areas of the EC and EU *acquis*, including those not touched upon by the EAs and even those which (especially in the case of the earlier Agreements) had not existed at the time when they were signed[114]. The short- and medium-term priorities proposed for each candidate country were based on the extensive analysis contained in the Commission's 1997 Opinions and aimed at helping each candidate identify where further work was needed in its preparations for membership. The Accession Partnerships were based on a strict conditionality, making assistance dependent on the fulfilment of each country's obligations under the Europe Agreement and the Copenhagen criteria.

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[112]The Council agreed on a draft Article 235 Regulation that would serve as legal base to the AP's on 26 January 1998 and, pending the positive outcome of consultations with the European Parliament, adopted the principles, priorities, intermediate objectives and conditions of the Accession Partnerships in March 1998. On this occasion, the European Parliament reiterated its dissatisfaction with the insufficient degree of involvement of this Institution in the enlargement process. On 11 March 1998, the Parliament threatened that, if it was not to be consulted (as opposed to being merely informed) by the Council and the Commission on important enlargement decisions, the Parliament would slow down the whole process by sending all the documents relating to Accession Partnerships to its committees. Cf. "Życie Warszawy", 11 March 1998.

[113]Cf. K. Inglis, "The Europe Agreements Compared in the Light of their Pre-Accession Reorientation", CMLRev. [2000] 1173, at 1184. Being unilateral decisions of the Council, the Accession Partnerships bound, in the legal sense, only the Council and the EU Member States. However, each candidate country adopted, in response to the AP, its own National Plan for the Adoption of the *Acquis* (NPAA, cf. Chapter II.A.10), using the AP priorities as guidance and utilising the financial allocations (through appropriate financial instruments) foreseen in the relevant AP accordingly. Thus, the AP's and the NPAA's could be considered as mutually complementary. If either the EU or the candidate countries failed to fulfil their obligations under the AP's, the NPAA's or the EA's, the matter was to be resolved using the channels foreseen by the Europe Agreements i.e. mainly the Association Councils. This solution was chosen for practical reasons, in order to avoid possible constitutional problems in certain of the candidate countries (as it had been the case e.g. with the adoption of implementing competition provisions within the EC-Hungary Association Council) if the AP's had been adopted as bilateral acts by means of a decision of the Association Councils. Cf. also K. Inglis, "The Pre-Accession Strategy and the Accession Partnerships", in: A. Ott and K. Inglis (eds.), *Handbook on European Enlargement*, T. M. C. Asser Press, The Hague 2002, p. 108.

[114]Cf. K. Inglis, "The Pre-Accession Strategy and the Accession Partnerships", in: A. Ott and K. Inglis (eds.), *Handbook on European Enlargement*, T. M. C. Asser Press, The Hague 2002, p. 108.

The AP's were subsequently regularly updated, through Council decisions, in respect of each country concerned. These updates reflected the Commission's findings in regular reports on progress in accession preparations in the candidate countries, as well as the experience gained on the Community side from the participation in the work of EA bodies, especially those focussing on the adoption of the *acquis*. Permanent adjustment of the AP priorities was necessary in light of the dynamics of accession negotiations and of the very nature of the *acquis*.

The EU - Poland Accession Partnership was adopted on 13 October 1999 and revised in 2000 and in 2001 (13 November). In the 2000 version[115], the adoption of State Aid Act and provision of adequate resources for the State aid monitoring authority; the complete preparation of a State aid inventory; the continuation of annual State aid reports; and the adoption and implementation of the programme for alignment of Special Economic Zones were mentioned as short-term objectives. In the medium term, the Polish Government was to reinforce the anti-trust and State aid authorities and procedures, improve the transparency and flow of data as well as the coordination and training at all levels. In the 2001 version, the improvement of transparency and flow of data especially with regard to information on State aid (so as to ensure a credible enforcement record) was mentioned as an objective in need of a particularly urgent action. Other objectives (partly taken over from the previous versions of the Accession Partnership) were as follows:

- to adopt and implement the programme for alignment of existing State aid in Special Economic Zones;

- to analyse in depth and realign with the obligations under the *acquis* the State aid granted to the sensitive sectors, in particular the automotive and steel industries;

- to reinforce the anti-trust and State aid authorities and procedures and ensure co-ordination and training at all levels;

- to ensure the enforcement of the anti-trust and State aid rules;

- to increase awareness of the rules among all market participants and State aid grantors;

- to intensify the training of the judiciary in the specific fields of anti-trust and State aid.

The first of the series of annual (published each year in October/November) Commission reports on the candidate countries' progress in their EU membership preparations was issued in 1998. All country reports were published on the same day and accompanied with a "Composite Paper", renamed starting from 2000 as a "Strategy Paper", containing a synthesis of the country reports, the Commission's recommendations concerning the candidates as well as updated information about the progress of accession negotiations and of the pre-accession strategy. As for the progress reports, they focussed mainly on efforts made by each country concerned with respect to the transposition of the *acquis* and building up the administrative and judicial capacity necessary to implement and enforce it.

[115] Cf. the European Commission's D.G. for Enlargement's website.

The impact of this method of assessment on the candidate countries cannot be overemphasized: in the context of ongoing accession negotiations, the countries concerned were put under enormous pressure to step up and maintain the pace of transformation, especially in anticipation of a (possibly) critical Commission's review in the forthcoming report. This method later proved to be very efficient, at least from the EU point of view[116]. However, the legal approximation proved in practice to be less problematic for prospective new EU Member States than building the necessary administrative and judicial capacity (including in the competition field)[117].

5. Helsinki 1999 – a new stage in the enlargement process

After the publication of the first series of regular reports, it gradually became clear to the Commission that the actual distance in accession preparations between the first and the second group of EU candidates was beginning to narrow. The idea of "upgrading" some of the countries of the second group (e.g. Latvia, Lithuania and - after the post-1998 election government had taken office - Slovakia) and incorporating them into the first group started gaining ground in Brussels[118]. However, both the Commission and the Council were reluctant to "leave behind" Bulgaria and Romania; this partly explained why the 1998 Vienna European Council limited itself to welcoming the progress in accession preparations of all the candidate countries, including those not yet involved in accession negotiations. Nevertheless, the Commission continued working in the direction of a shift of approach, which found its expression in the President Romano Prodi's October 1999 speech before the European Parliament in Brussels[119], during which he proposed that accession negotiations be opened with all the candidates, including with those who did not fully meet the economic criteria. This was to be accompanied by a greater differentiation between the applicants, implying that a detailed account of each candidate's progress would be made, and that accession negotiations would advance and would eventually be concluded on a case-by-case basis. In addition, greater attention was to be paid to the link between the progress of accession negotiations and of the approximation, implementation and enforcement of the *acquis*.

The European Council in Helsinki (10 and 11 December 1999), took a number of decisions marking a new stage in the EU enlargement process, largely in line with these proposals[120]. It reaffirmed the inclusive nature of the accession process, which would comprise all candidate countries within a single framework. The European Council also welcomed the substantive work undertaken and progress which had been achieved in accession negotiations with Cyprus, Hungary, Poland, Estonia, the Czech Republic and Slovenia, and announced that accession negotiations would begin in February 2000 with the remaining group of candidate countries – Romania, Slovakia, Latvia, Lithuania, Bulgaria and Malta.

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[116]Cf. M. Maresceau, "Pre-accession", in: M. Cremona (ed.), *The Enlargement of the European Union"*, Oxford University Press, 2003, p. 33. However, the author points at the fact that the bulk of the information on which the Commission based the drafting of its reports was provided by the candidate countries themselves, which could raise some doubts as to the accuracy and objectivity of the information concerned.

[117]This is why the Commission announced, in its 2001 Regular Report, the launching of a special action plan in this area, cf. pp. 25 - 26 of the Report.

[118]Cf. M. Maresceau, "The EU Pre-Accession Strategies: a Political and Legal Analysis", in: M. Maresceau (ed.), *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis*, Palgrave, New York 2001, pp. 8 - 9.

[119]On 13 October 1999, cf. the EU's website.

[120]Cf. "Presidency Conclusions Helsinki European Council 10 and 11 December 1999", document Conseil/99/999 dated 13 January 2000, the European Commission's D.G. for Enlargement's website.

In this context, it was again stressed that each candidate would be judged on its own merits – a principle which would apply both to the opening of various negotiating chapters and to the conduct of the negotiations. The Presidency reassured the countries from the second negotiating group that "cumbersome procedures" would be avoided, and that these countries would have the possibility to "catch up within a reasonable period of time" with those from the first group, provided they had made sufficient progress in their preparations. The Presidency followed this declaration by a reminder that progress in negotiations must go hand in hand with the progress in incorporating the *acquis* into the legislation and actually implementing and enforcing it.

At the Santa Maria da Feira European Council, held in June 2000, the Portuguese Presidency was able to announce[121] that accession negotiations had formally been launched in February 2000 with Romania, Slovakia, Latvia, Lithuania, Bulgaria and Malta. Thus, as from the negotiating rounds at Ministerial level held on 13 and 14 June 2000, the separation of accession applicants into two groups had been formally finished. As regards the actual progress of negotiations, these were carried out on the basis of a new, modulated approach, taking into account the situation of each applicant country and based on the Commission's proposal following consultations with the Member States.

A year later - in June 2001 - the Göteborg European Council was in a position to confirm[122] that significant breakthroughs had been achieved during that period in the accession negotiations, which even allowed for the objectives set out at Nice for the first half of 2001 to be surpassed. More than two thirds of the negotiating chapters had been closed provisionally with some of the candidate countries, and all chapters were to be opened with some of the candidates that had started negotiations only a year before.

The European Council noted that the applicant countries had continued progress in transposing, implementing and enforcing the *acquis* and stressed that particular attention had now to be paid to putting in place adequate administrative structures, to reforming judicial systems and the civil service. Further, the principle that each candidate country would be judged solely on its own merits (i.e. the principle of differentiation) was confirmed. The Presidency also stressed that agreements - even partial – reached in the course of negotiations would not be considered final until an overall agreement had been drawn up. Finally, the Presidency declared that, provided the progress of the candidate countries continued at an unabated pace, it should be possible to complete negotiations by the end of 2002 for those candidate countries that would be ready. The objective was that these countries would participate in the European Parliament elections of 2004 as members.

At the Laeken European Council[123], the Presidency concluded that further considerable progress had been made in the accession negotiations and that certain delays had been made good. The European Council agreed with the report of the Commission, which considered that, if the existing rate of progress of the negotiations and reforms in the candidate countries was maintained, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, the Czech Republic and Slovenia could be ready for accession in 2004.

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[121]Cf. Annex II to the Presidency Conclusions, European Parliament's website.
[122]Cf. "European Council Göteborg. Conclusions of the Presidency. 15 and 16 June 2001", Bulletin of the European Parliament No PE 305.844 of 18 June 2001.
[123]14 and 15 December 2001, cf. "Conclusions of the Presidency", Bulletin of the European Parliament No PE 313.424 of 17 December 2001.

As to Bulgaria and Romania, their efforts were "appreciated" but the only hope they were given was that negotiations on all chapters would be opened with them in 2002. The Presidency stressed that all candidate countries had to continue their efforts energetically, in particular to bring their administrative and judicial capacities up to the required level. The Commission was to submit a report on the implementation of the plan of action for strengthening institutions in candidate countries to the Seville European Council in June 2002.

After the European Council had met in Seville[124], it declared *inter alia* that a decisive progress had been made in the accession negotiations in the preceding six months, and that the negotiations were entering their final phase. As regards compliance with the accession criteria, the European Council stressed that it was important that the candidate countries would continue to make progress in the implementation and effective application of the *acquis*. It reaffirmed that, provided the pace of preparations was maintained in the countries concerned, the 10 candidates enumerated at the Laeken summit would be able to join the EU by 2004. It added that the signing of the Treaty of Accession could take place in the spring of 2003, although it warned that the objective of the new Member States to participate in the 2004 elections to the European Parliament was only attainable "if each candidate country adopts a realistic and constructive approach".

The European Council also commented on the situation of Bulgaria and Romania, which were praised for having achieved a considerable progress over the preceding few months. In order to encourage them to continue their efforts despite the lack of hope for entry to the EU in 2004, the Presidency promised them a "revised and enhanced pre-accession strategy", accompanied with an increase of pre-accession aid, and a perspective of setting a more precise timetable for accession by the end of 2002, provided the existing pace was maintained.

6. Copenhagen 2002 – ten new members welcome to the EU

The December 2002 European Council in Copenhagen could declare in its Conclusions[125] that "an unprecedented and historic milestone" had been reached in completing the accession preparation process with the conclusion of accession negotiations with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. The EU now looked forward to welcoming these States as members from 1 May 2004. The Presidency noted that the agreement reached would provide the acceding States with the necessary transitional arrangements to cope successfully with all obligations of membership, at the same time ensuring the continued functioning of the internal market as well as the various EU policies. It stressed that the commitments undertaken by the acceding States would be monitored by the Commission, and that safeguard clauses would provide for measures to deal with unforeseen developments that might arise during the first three years after accession. Further, the Presidency declared that all efforts would now be directed at completing the drafting of the Accession Treaty so that it could be submitted to the Commission for its opinion and then to the European Parliament for its assent, and to the Council with a view to signing the Treaty in Athens on 16 April 2003.

[124]On 21 and 22 June 2002. Cf. "European Council Seville. Conclusions of the Presidency. 21 and 22 June 2002", Bulletin of the European Parliament No 320.285 of 24 June 2002.
[125]Cf. EUROPA website, http://europa.eu.int/european_council/conclusions/index_en.htm.

7. The role of Community assistance mechanisms

As already mentioned, the Luxembourg European Council (December 1997) decided that the "enhanced" pre-accession strategy would link the EU's financial assistance with the implementation, by the candidate countries, of a programme for the adoption of the *acquis.* Besides, assistance mechanisms were to be used for the reinforcement of administrative and judicial capacities.

In both these aspects, the assistance was to be channelled through the programming framework of the Accession Partnerships, in the respect of the principle of equal treatment (i.e. the same approach to all candidates, regardless of whether accession negotiations have been opened with them or not) and taking into account each country's specific needs. It is also noteworthy that, for the first time in the history of EC (EU) enlargements, the aforementioned framework comprised a clearly worded, also in legal terms, element of conditionality of aid.

The Community's assistance to the candidate countries has relied primarily on three financial instruments: PHARE, ISPA (Pre-Accession Structural Instrument)[126] and SAPARD (Structural Adjustment Programme for Agriculture and Rural Development)[127]. The 1999 Berlin European Council decided to offer a financial perspective for the years 2000 - 2006, with the budgetary means foreseeing these three accession-oriented instruments, coordinated by the European Commission[128].

a. PHARE

As concerns the oldest of these instruments, namely the PHARE Programme[129], it was originally created to assist Poland and Hungary in 1989. Gradually, it was extended to cover the ten candidate countries from Central and Eastern Europe (the other 3 candidates - Cyprus, Malta and Turkey - benefited from separate pre-accession funding). Following the 1993 Copenhagen European Summit, PHARE support was reoriented, including an expansion in support to infrastructure investment. As from the 1997 Luxembourg European Summit, PHARE has focussed entirely on the pre-accession priorities highlighted in each applicant country's Accession Partnership.

Over time, PHARE's management was integrated into applicant country government structures through the creation of the National Funds and a limited number of implementing agencies. This reflected the new guidelines for PHARE, set out in the 1997 Commission Decision entitled "New Phare Orientations for Pre-Accession Assistance" including the principle of accession-led programming on the basis of the Accession Partnership (AP), the National Programmes for the Adoption of the *Acquis* (NPAA) and the Commission's Regular Reports.

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[126] Based on Council Regulation No 1267/99 and focussed *inter alia* on the financing of large infrastructural projects.

[127] Cf. Council Regulation No 1268/99 on Community support for pre-accession measures for agriculture and rural development in the applicant countries of Central and Eastern Europe in the pre-accession period, O. J. L 161/87.

[128] Cf. Regulation No 1266/99 on co-ordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation No 3906/89, O. J. L 161/68.

[129] Information on the PHARE Programme is based to a large extent on the European Commission's D. G. for Enlargement's website. Cf. also A. Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe*, Cambridge University Press, 1998, pp. 132 – 156.

These guidelines also foresaw the setting up of new instruments and structures, in order to tackle the lack of impact and sustainability of PHARE projects (highlighted in the Commission's evaluation reports), to prepare for implementation structures needed after accession and to reduce the high backlog of budgetary commitments that had been criticised by the Court of Auditors and the European Parliament.

All ten candidate countries from Central and Eastern Europe set up their PHARE management structures, based on National Funds, Central Financing and Contracting Units (CFCUs) and Implementing Agencies. This *inter alia* resulted in improved budgetary coordination, increased Government responsibility for the use of the PHARE funds and higher flexibility of the programme. Consequently, it was possible to refocus PHARE in 2000 on institution building, on investment to promote compliance with the *acquis* and on economic and social cohesion.

For the period 2000 - 2006, the basic focus of PHARE was defined as: addressing the main priorities identified in the Accession Partnerships, the National Programmes for the Adoption of the *Acquis* and the Commission's Regular Reports. Increasingly, PHARE orientations were determined by the problems emerging in the course of EU accession negotiations.

One of the Commission's main goals was to prepare the candidate countries, with the help of PHARE, to functioning - as future EU Member States - in the framework of the Community's Structural Funds. In order to reach this goal, the Commission progressively reinforced Structural Fund approaches and procedures in PHARE's economic and social cohesion support, moved national PHARE programmes to multi-annual programming on a differentiated basis for all support, including institution building, and familiarised - by means of extended decentralisation - the applicant countries with the joint responsibility principles that underpinned the implementation of the Structural Funds. Further, the support to PHARE implementing authorities set up by each candidate country was reinforced.

The issue of law approximation and legal reform was dealt with in a major part of PHARE projects, including sector-specific projects on a regional level[130]; in addition, sector-specific law approximation projects were carried out at the level of each candidate country concerned. PHARE programmes in the legal approximation area were, as a rule, implemented by private companies (mostly law firms), as well as experts from universities, national Ministries and central administration from EU Member States, and members of the judiciary.

[130]Cf. H. - H. Herrnfeld, *European by Law. Legal Reform and Approximation of Law in the Visegrád Countries*, Bertelsmann Foundation Publishers, Gütersloh 1996, p. 146.

As regards PHARE assistance provided to Poland, a detailed review and evaluation of the achievements and challenges in this respect was carried out in May 1999[131]. During the years 1990 - 1997, PHARE funds allocated to Poland reached a total of 1.534 billion EUR. Out of this sum, some 3% of funding was allocated for approximation of legislation; *inter alia*, 4.350.000 EUR was provided for horizontal projects aiming at assisting the efforts of the Polish authorities to approximate the Polish law to the EC legislation, some 470.000 EUR was made available to cover the costs of translation of the EC legal acts into Polish language, and most of the remaining sum was directed towards sectoral projects.

Concerning horizontal programmes, general support for the development of law approximation was chiefly provided in the framework of the Sierra and Fiesta II Programmes. The former programme supported the implementation of a great number of activities that was crucial for Poland's accession to EU. It focussed on institution building and upgrading of skills of officials from the main Ministries and Central Government Agencies. One of the intentions of the Sierra programme was to strengthen the programming and implementation skills of the Committee for European Integration[132], partly in order to prepare their staff for the future Structural Funds.

The financial aspect of co-ordination and channelling of Community assistance (including PHARE) for Poland was the task of the Co-operation Fund (Fundusz Współpracy)[133], set up in 1990 by the Polish Government (and, more precisely, by the Treasury Ministry) and, subsequently, managed by the Committee for European Integration. One of the most important PHARE programs dealt with by the Fund was called "European Integration 1997"[134]. Preparing Polish institutions for functioning within the EU was an important element of this programme.

In this framework, PHARE participated, as part of the Fiesta II programme, in the strengthening of the capacity of the Office for Competition and Consumer Protection (OCCP)[135]. This included *inter alia* the supply of necessary IT technology and software, training materials, organisation of staff training and study visits, holding of international seminars and conferences on competition law in Poland and covering the cost of participation of OCCP staff in similar events in EU Member States, etc. These activities continued to be co-financed by PHARE also in the framework of the 2001 and 2002 versions of the Programme[136].

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[131]Cf. "Evaluation of Phare Programmes in Support of EU Integration and Law Approximation. Poland. Final Report. May 1999", Produced by Euroservices Developments (Belgium) for the Evaluation Unit of the Joint Relex Service (JCR) of the European Commission, cf. the European Commission's D. G. for Enlargement's website.

[132]Cf. Chapter II.A.3.

[133]Cf. more information on http://www.cofund.org.pl.

[134]Cf. http://www.cofund.org.pl/integracja/pol/146detail.html.

[135]Cf. Chapter III.A.

[136]Cf. more information in the document *"Bilans otwarcia w sprawach integracji Polski z Unią Europejską"* ["Stock-taking in matters related with the integration into the EU"], adopted by the Preparatory Team of the Committee for European Integration on 15 February 2002.

In October 2000, an international conference (financed by PHARE) on competition policy and consumer protection took place in Warsaw, *inter alia* with the participation of the OCCP experts, representatives of the European Commission, competition authorities of the EU Member States and candidate countries, as well as independent experts in the field. In 2001, PHARE funds were used to finance training sessions for the OCCP staff, including in the framework of the Trier Academy of European Law[137].

Further, PHARE funds were used to prepare studies of the degree of concentration of the Polish economy (in different sectors) as well as to carry out analyses of the process of restructuring and privatisation. In addition, market monitoring mechanisms and procedures were set up, including the creation of a relevant database; this in turn was meant to facilitate the elaboration of concrete sectoral policy objectives. It is also noteworthy that PHARE funds were used to partially cover the costs of preparation of the reports on the level of competition and concentration in Poland for the years 1997 and 1998. These reports focussed, among others, on the situation on the capital markets (especially investment funds and listed companies) and in the insurance sector.

PHARE also helped finance translation into Polish language of relevant EC and Member States' legislation, as well as the translation of Polish acts from the area of competition law into foreign languages (mainly English). In 2003, PHARE co-financed publication by the OCCP of materials on EC competition law and jurisprudence (including on restrictive agreements, abuse of dominant position and mergers).

It is also noteworthy that, in some cases, PHARE assistance was used to help draft legislation (e.g. executory regulations to the 2000 Act[138], especially as regards individual and group exemptions) and amend the existing one; this has been the case in the framework of PHARE 1999 (with the period of actual implementation extending till mid-2002)[139].

Summing up, PHARE provided an important support to the Polish Government's policy of developing a strong network of institutions to manage EU affairs, including in the area of competition policy and legislation. As to the legal advice programmes, the provision of legal advice to speed up law approximation was crucial, in particular in the early stages of the implementation of the Europe Agreement, when the relevant capacities in Ministries were weak. The use of EU funding to contract Polish law firms and academic institutions for the provision of legal advice, though in most cases together with EU-based law firms, proved to be a good choice, assuring the combination of both relevance and high quality of the legal advice provided. Thus, in general, it could be said that PHARE funding in the area of law approximation and European Integration was generally used to support the development of local capacities in Poland.

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[137] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

[138] Cf. Chapter II.B.5 and following.

[139] Cf. http://www.uzp.gov.pl/PHARE/europeaid_115450sv_pl.html.

However, this generally positive evaluation does not mean that the implementation of PHARE assistance in respect of Poland was entirely problem-free. In particular, the Polish side experienced recurring difficulties with presenting sufficiently good projects to utilise all PHARE funds set aside for this country, the worst situation having occurred in respect of PHARE 1999[140]. In 2002, there was a serious risk that as much as 50 mln EUR from the PHARE 2000 Programme would be lost. However, the amount "lost" was finally smaller - only some 24 mln EUR - and, according to the Polish authorities, it was largely due to the fact that many of the projects turned out to be cheaper than initially expected[141].

Subsequently, on the eve and in the aftermath of Poland's accession to the EU, PHARE has played another important (though already final – in this context) role, under the Transition Facility 2004 heading. As regards competition, the above-mentioned Transition Facility contained a specific chapter devoted to competition, in the framework of which a twinning agreement was signed between the Polish competition authority (the OCCP) and the German Federal Ministry of Economy and Labour[142]. The agreement had as its declared objectives the improvement of the level of qualifications of the staff of the OCCP, *inter alia* via consultations with experts from other EU countries; the awareness raising of competition law among the administration, companies and the general public; and ensuring a uniform implementation of the competition law by judges (via theoretical and practical training). Further, PHARE funds continued to be involved in the organisation of scientific conferences on competition law and policy[143], as well as workshops and training sessions for the OCCP staff and judges[144]. Thus, one can say that the PHARE's input went beyond just assisting Poland's preparations for EU membership (in particular, in the field of competition policy) and extended into helping the country come to grips with the duties and requirements of being a Union's Member State.

b. TAIEX

The Community assistance to candidate countries did not only consist of financial instruments. Pre-accession aid for the adaptation of these countries' legal systems to the requirements of the *acquis* was also provided through the Technical Assistance Information Exchange Office (TAIEX), set up in January 1996 following a proposal made by the Commission in the White Paper. The scope of TAIEX assistance covered the entire *acquis* (estimated by TAIEX itself to contain more than 80.000 pages of legal texts divided into 31 chapters) and extended to all levels of public and semi-public administrations, as well as to private sector associations.

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[140]Poland lost over 90 mln EUR from this programme because of failing to prepare necessary projects on time. Cf. J. Bielecki, "Wszystko na ostatnią chwilę", "Rzeczpospolita", 30 October 2002.

[141]Cf. APA, "Nie straty, tylko oszczędności", "Rzeczpospolita", 31 October 2002.

[142]Contract N° PL2004/IB/FI/02 (with a budget of 745,000 EUR), approved by the Polish side on 24 August 2005. Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2005 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2005], the OCCP's website (http://www.uokik.gov.pl).

[143]E.g. a conference on the current problems of the Polish and European competition law, held at Poznań University on 28 October 2005.

[144]In the course of 2005, such training sessions were organised both for the judges of the specialised competition court (cf. Chapter III.B.2) and other courts (general jurisdiction and administrative courts). Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2005 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2005], the OCCP's website (http://www.uokik.gov.pl).

TAIEX was set up as a Commission Office supported by a PHARE multi-country programme and was part of the D. G. for Enlargement. Its services were complementary to the services already offered by other relevant PHARE and other assistance programmes. It was specialised in providing short term technical assistance on approximation/implementation and enforcement of the *acquis*, including the necessary administrative infrastructures.

TAIEX saw its special function as the one of a broker for the transfer of expertise drawn from EU Member States' officials in all public and semi-public bodies to their counterparts in the candidate countries. The TAIEX Office has established over the years an extensive network of contacts between the EU Member States, the Commission Services and other EU Institutions such as the European Parliament, the Committee of the Regions (COR) and the European Economic and Social Committee (ECOSOC) and the relevant bodies in the candidate countries.

TAIEX was structured according to various services following the priorities as defined by the "enhanced" pre-accession strategy, in particular the Accession Partnerships, the National Programmes on the Adoption of the *Acquis* and the objectives laid down in the Europe Agreements. It was run by officials drawn from various Commission services with the help of officials detached from the EU Member States' administrations and with a network of contacts in the key services of the Commission and the Member States.

The main tasks of the TAIEX Office were defined as:

- providing technical assistance and advice on transposition, implementation and enforcement of the *acquis* in the form of expert missions, seminars, workshops, study visits, evaluation and analysis reports;

- being an information broker for the candidate countries by gathering and making available information on the Community's *acquis*;

- providing database tools to the candidate countries for facilitating and monitoring the approximation progress as well as identifying technical assistance needs.

The TAIEX Office provided assistance for any stage in the legislative approximation and implementation process in the Beneficiary Countries. The main target groups of TAIEX were administrators from the public administrations in the candidate countries; civil servants working in Parliaments and Legislative Councils; professional and commercial associations representing social partners, as well as representatives of trade unions and employers' associations; civil servants working in administrations at sub-national level and in associations of local authorities; judges and lawyers; interpreters, revisers and translators of legislative texts. The Office did not provide advice to private citizens, nor to individual companies. Requests for advice and assistance could be either sent directly to the office by mail or fax or channelled through a co-ordinating Ministry, the countries' Missions or Representations in Brussels.

The workshops/seminars organised by TAIEX focussed on the transposition and implementation of the EC legislation and the setting up of the necessary administrative and organisational structures which were required to ensure enforcement and an effective application of the legislation. Speakers were recruited from the Commission services, public and semi-public institutions, administrations of the EU Member States and the social partners.

By means of an example, the following training events could be mentioned: in the course of 2001, TAIEX organised a training session on the EC competition law for officials from competition authorities of the candidate countries in Lisbon. Further, a seminar was held in Vilnius on "aid for regional development and structural funds" (the participants in which included representatives of different Ministries, agencies, counties, municipalities, regions and of competition authorities). In October and November 2002, a two-day seminar on the EC competition policy (for five judges per candidate country active in competition cases) and a seminar on the EC competition law jurisprudence (for officials of candidate countries' Ministries of Justice, competition authorities, EU integration offices, Parliamentary legal affairs Committees and magistrates) were organised. Later on, in February 2004, TAIEX held in Brussels a two-day seminar on State aid for judges of the candidate countries[145].

Along with the progress of the candidate countries in their preparation for EU membership, the number and the range of beneficiaries of TAIEX activities gradually increased[146]. There was also a tendency for shifting the TAIEX events towards the sub-national level, as well as towards higher involvement of national Parliaments and private sector associations. Furthermore, the main focus began to move from the approximation of laws *sensu stricto* to the issues related with implementation and enforcement of these newly-adopted laws.

The setting up and the activity of TAIEX received much praise from some experts[147], who stressed its contribution to providing a better insight for candidate countries into the complex network of various assistance programmes, experts and know-how available; this became increasingly important as the focus began shifting from simple transposition of basic Community legal principles towards the detailed legislative work (as well as practical implementation of the new laws).

c. Efficiency of PHARE and TAIEX – the Commission's assessment

In 2000, the European Commission carried out an assessment of the framework for Community assistance to candidate countries in respect of institution building[148]. The Commission concluded that the existing mechanisms (i.e. PHARE and TAIEX) generally fulfilled their role correctly; however, there was the need to devise a medium term instrument, placed half way between the long-term twinning in the framework of PHARE and short-term TAIEX activities. Such medium-term projects (referred to by the Commission as "Twinning light") were later introduced in the PHARE 2001 programmes.

In the 2002 edition of the "Enlargement Strategy Paper"[149], the Commission set out its views on the future of (among others) the PHARE and TAIEX mechanisms in the context of the forthcoming first wave of the eastern enlargement of the EU.

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[145]Cf. http://taiex.be/Information/TAIEXevents/taiexevents.asp?eventtype=999.

[146]Cf. "The Phare Programme. Annual Report 2000", European Commission's D. G. for Enlargement's website, p. 10.

[147]E.g. H. - H. Herrnfeld, *European by Law. Legal Reform and Approximation of Law in the Visegrád Countries*, Bertelsmann Foundation Publishers, Gütersloh 1996, p. 148.

[148]Cf. "The Phare Programme. Annual Report 2000", European Commission's D. G. for Enlargement's website.

[149]Cf. "Towards the Enlarged Union. Strategy Paper and Report by the European Commission on the progress towards accession by each of the candidate countries", COM (2002) 700 final, Brussels, 9.10.2002, especially pp. 87-88.

The Commission stressed that the future Accession Treaty would need to provide for the rules applicable to the management and phasing out of the pre-accession funds. Altogether, some 5 billion EUR of funds under PHARE, ISPA and SAPARD programmes would have been committed for the new Member States by the end of 2003, but the Commission stressed that these funds would have to be contracted or at least paid until the end of 2006. Whereas assistance in the framework of ISPA and SAPARD would be continued in a similar setting under the cohesion and rural development funds, PHARE funding would need to be phased out by 2006. Central transitional arrangements, comprising rules related to the further transfer of responsibility in the management of pre-accession aid to the new Member States in an extended decentralised implementation system (EDIS) - including human resources and conditions for the release of funds - would need to be included in the Accession Treaty. The Commission also stated that the release of PHARE funds would have to be made conditional on the implementation of the extended decentralised system by the acceding countries.

Further, the Commission pointed at the need to define more closely the envisaged transition facility for certain institution building actions. In order to implement these actions (and since these actions were to be a continuation of activities under PHARE programme), the Commission proposed to use the established structures for the years 2004 - 2006 i.e. the PHARE Committee, and the competent bodies in the new Member States. To avoid overlap with the type of action which could in the future be financed by Structural Funds, the Commission suggested - at that stage - to limit institution building actions to certain fields, e.g. strengthening of the judicial system, internal market administrative capacity building, and general public administration reform and horizontal technical assistance via TAIEX/Statistics. The Commission stressed, however, that other actions might need to be foreseen at a later stage, in particular to take into account the results of the accession negotiations.

* * *

To sum up, the Community assistance mechanisms (in particular, PHARE and TAIEX) have played an undoubtedly positive role in helping Poland harmonise its law, build institutions and train the professionals required to apply the new law, in a manner that has brought the country closer to its objective of becoming a member of the EU. It is noteworthy that, perhaps more than the money, it was the know how of the Community Institutions, experts and – especially at a later stage – analogous administrations from the EU Member States that could be channelled and transmitted to the Polish counterparts thanks to the above-mentioned mechanisms. The role of PHARE and TAIEX did not, by the way, cease at the moment of accession; pursuant to the Commission's plans, they also performed an important transitional function in the first months and even years following the accession, aimed in particular at ensuring Poland's capacity to absorb structural funds and – more generally – to function as a fully-fledged Member State.

E. Accession Treaty

The Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (the Accession Treaty) was signed in Athens on 16 April 2003[150]. Article 2 of the Act of Accession (which set out the conditions of admission and the adjustments to the Treaties on which the Union was founded - entailed by such admission - and which, pursuant to Article 1 (2) of the Accession Treaty, formed an integral part of the Accession Treaty)[151], stated as a general rule that:

"From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions [of the European Union - note by author] and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act."

Thus, the leading principle was to be the full application of the *acquis communautaire* as from the date of accession. In order to ensure the correct implementation of this rule (subject to certain temporary derogations accorded to the new Member States on the basis of Article 24[152]), the Act of Accession contained "safeguard clauses" in case that the new entrants would fail to respect their obligations and commitments undertaken in the process of accession negotiations. This reflected a certain degree of suspicion of the Brussels Institutions and of the "old" Member States as regards the actual ability of the "new" Member States to keep their promises[153].

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[150] Cf. the European Commission's D.G. for Enlargement's website. For an overview of the main consequences of the Accession Treaty for Poland, cf. C. Herma, "Traktat dotyczący przystąpienia do Unii Europejskiej – struktura, charakter prawny i najważniejsze postanowienia dokumentów związanych z przystąpieniem Polski do UE", Biuletyn Analiz UKIE, April 2003, pp. 3 – 29; and A. Wyrozumska, "Charakter prawny Traktatu o Przystąpieniu do Unii Europejskiej z 2003 r.", in: S. Biernat, S. Dudzik, M. Niedźwiedź (ed.), *Przystąpienie Polski do Unii Europejskiej. Traktat Akcesyjny i jego skutki*, Zakamycze, Kraków 2003, pp. 13 – 45.

[151] Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union is Founded, cf. the European Commission's D.G. for Enlargement's website.

[152] Article 24 formed part of Title I ("Transitional Measures") of Part Four ("Temporary provisions") of the Act of Accession. It stipulated that "The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes."

[153] The inclusion of these clauses reflected the Commission proposals, endorsed by the European Councils in Brussels (24 and 25 October 2002, cf. point I.5.8 of the Presidency Conclusions: "Moreover, the Union endorses the Commission proposals for providing in the Accession Treaty, besides a general economic safeguard clause, two specific safeguard clauses concerning the operation of the internal market, including all sectoral policies which concern economic activities with a cross-border effect, and the area of justice and home affairs. For a duration of up to three years after accession, a safeguard clause may be invoked upon a motivated request by any Member State or on the Commission's initiative. Measures under the general economic safeguard clause could concern any Member State. Measures under the two specific safeguard clauses can only be addressed to new Member States that have failed to implement commitments undertaken in the context of the negotiations. A safeguard clause may be invoked even before accession on the basis of the monitoring findings and enter into force as of the first day of accession. The duration of such measures may extend beyond the three-year period. The competent bodies will draw up the Union's position on this matter in the accession negotiations. The Commission will inform the Council in good time before revoking safeguard measures. It will duly take into account any observations of the Council in this respect.") and in Copenhagen (12 and 13 December 2002, cf. point I.3.5 of the Presidency Conclusions: "Safeguard clauses provide for measures to deal with unforeseen developments that may arise during the first three years after accession.").

The safeguard clauses, available until three years after accession, were meant to allow the EU to exert pressure on the new Member States in case of serious shortcomings threatening the functioning of the internal market[154]. Their inclusion to the text of the Act of Accession was met with a quite reluctant reaction in the acceding countries, in particular in Poland. For example, at the 19th Meeting of the EU-Poland Joint Parliamentary Committee in Warsaw (held on 28 and 29 April 2003), the Polish representatives insisted on inserting a sentence in the final declaration to the effect that "the safeguard clauses should be understood as instruments designed to limit the possible risk of disruption of the Internal Market and not as a means of unfair competition, or a sign of mistrust in relation to future Members"[155].

The safeguard clauses were contained in Articles 37 and 38 of the Act of Accession. The former provision stipulated that:

> "1. If, until the end of a period of up to three years after accession, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a new Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market. In the same circumstances, any present Member State may apply for authorisation to take protective measures with regard to one or more of the new Member States.
>
> 2. Upon request by the State concerned, the Commission shall, by emergency procedure, determine the protective measures which it considers necessary, specifying the conditions and modalities in which they are to be put into effect.

[154]Of course, parallel to these clauses, the Commission had at its disposal, for the period after accession, the standard infringement procedures the Commission could launch as « guardian of the Treaty » if Member States did not fulfil their obligations. Cf. Leopold Maurer, "The legal status regarding the accession in 2004: Transition period, temporal mechanism of surveillance, transposition of the acquis, last minute problems.", Master in European Integration and Regionalism, Bozen/Bolzano, 25 August – 05 September 2003. Cf. also S. Richter, "The Accession Treaty and Consequences for New EU Members", The Vienna Institute for International Economic Studies, April 2003, http://wiiwsv.wsr.ac.at.

[155]Furthermore, Poland (together with the Czech Republic, Estonia, Lithuania, Slovakia and Slovenia) attached a Declaration to the Final Act (forming part of the Accession Treaty), which stated the following:

"1. The Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic understand that the notion "has failed to implement commitments undertaken in the context of the accession negotiations" only covers the obligations that are arising from the original Treaties applicable to the Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, under the conditions laid down in the Act of Accession, and the obligations defined in this Act. Therefore the Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic understand that the Commission will consider application of Article 38 only in cases of alleged violations of the obligations referred to in the preceding paragraph.

2. The Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic understand that Article 38 is without prejudice to the jurisdiction of the Court of Justice as defined by Article 230 of the EC Treaty on actions taken by the Commission pursuant to Article 38.

3. The Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic understand that the Commission shall, before deciding on whether to apply the measures provided for in Article 38 against them, give the Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic an opportunity to express their view and position in accordance with the Declaration by the Commission of the European Communities on the general safeguard clause, the internal market safeguard clause and the justice and home affairs safeguard clause, annexed to this Final Act."

In the event of serious economic difficulties and at the express request of the Member State concerned, the Commission shall act within five working days of the receipt of the request accompanied by the relevant background information. The measures thus decided on shall be applicable forthwith, shall take account of the interests of all parties concerned and shall not entail frontier controls.

3. The measures authorised under paragraph 2 may involve derogations from the rules of the EC Treaty and from this Act to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market."

As to Article 38, it stipulated that:

"If a new Member State has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after the date of entry into force of this Act, upon motivated request of a Member State or on its own initiative, take appropriate measures.

Measures shall be proportional and priority shall be given to measures, which disturb least the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms. Such safeguard measures shall not be invoked as a means of arbitrary discrimination or a disguised restriction on trade between Members. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and enter into force as of the date of accession. The measures shall be maintained no longer than strictly necessary, and, in any case, will be lifted when the relevant commitment is implemented. They may however be applied beyond the period specified in the first paragraph as long as the relevant commitments have not been fulfilled.

In response to progress made by the new Member State concerned in fulfilling its commitments, the Commission may adapt the measures as appropriate. The Commission will inform the Council in good time before revoking safeguard measures, and it will take duly into account any observations of the Council in this respect."

It is noteworthy that the above-mentioned provisions were formulated in a manner that rendered their invoking and application in practice quite difficult, due to the number of conditions that had to be met prior to this. It is thus hard to avoid the impression that their significance was more political and “mediatic” than *stricto sensu* legal.

Regarding Poland, all the agreed exceptions to the rule of full applicability of the *acquis* as from the date of accession were set out in Annex XII to the Act of Accession.

As concerns competition policy, the list reflected Poland's negotiating position[156], according to which Poland was to accept and implement the entire anti-trust *acquis* (i.e. rules concerning anti-competitive behaviour of undertakings), while requesting transitional periods for certain forms of State aid: corporate tax exemptions in Special Economic Zones granted before 1 January 2001 (up till 2011) and various forms of aid for environmental protection.

In addition[157], Poland obtained a transitional period for the conversion of incompatible fiscal aid for large companies into regional investment aid; aid was limited to a maximum of 75% of the eligible investment costs if a company had started the investment/obtained the entitlement for the tax exemption before 1 January 2000, and to 50% if the company had started the investment/obtained the entitlement for a tax exemption after 1 January 2000. A transitional period was agreed with the Commission for the conversion of incompatible fiscal aid to beneficiaries in the motor vehicle manufacturing sector into regional investment aid; such aid was to be limited to 30% of the eligible costs, regardless of the regional aid ceiling for other types of investment. There was also a transitional arrangement Poland whereby restructuring of the Polish steel industry was to be completed by 31 December 2006.

Further, the Accession Treaty set out rules dealing with the so called existing State aid measures in several new Member States - including Poland[158] - with separate rules applicable to the State aid provided in the transport sector as well as to activities linked to the production, processing or marketing of agricultural products listed in Annex I to the EC Treaty, with the exception of fisheries products and products derived of such products.

[156]Cf. http://www.negocjacje.gov.pl/neg/stne/pdf/stne6pl.pdf.

[157]Cf. "Report on the results of the negotiations on the accession of Cyprus, Malta, Hungary, Poland, the Slovak Republic, Latvia, Estonia, Lithuania, the Czech Republic and Slovenia to the European Union prepared by the Commission's departments", which could be found on the European Commission's D.G. for Enlargement's website. The report was intended to provide a comprehensive guide to the draft Accession Treaty. It covered all negotiating chapters, and contained a summary of the issues set out in the draft Accession Treaty for each of them.

[158]The following State aid schemes and individual State aid put into effect in a new Member State before the date of accession and still applicable after that date were to be regarded upon accession as existing State aid within the meaning of Article 88 (1) of the EC Treaty:
(a) State aid measures put into effect before 10 December 1994; or
(b) State aid measures listed in an Appendix to the Accession Treaty; or
(c) State aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the *acquis*, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market.
All measures which constituted State aid and which did not fulfil the conditions set out above were to be considered as new State aid upon accession for the purpose of the application of Article 88 (3) of the EC Treaty.

CHAPTER II: APPROXIMATION OF ANTI-TRUST LAW IN POLAND

As already stated[159], Poland is the largest of the former communist economies of Central and Eastern Europe to have joined the EU internal market. It also one of those (together with Hungary and former Czechoslovakia) where preparations for this huge and complex operation have begun the soonest. That is why this thesis – and this chapter in particular – focus on the Polish example. The following chapter is divided in two parts: the first one (A) consecrated to the presentation of the manner in which Poland has tackled the issue of legal approximation in the context of European integration; and the second (B), describing in more detail the history of approximation of Polish anti-trust legislation.

A. Polish law approximation structures and procedures as they have developed since the Europe Agreement

1. The beginnings of approximation process

Before turning to a more detailed description of the history of approximation of the Polish competition law[160], it is useful to present here the legal approximation issue in Poland in broader lines.

At the outset, it should be stressed that the process of approximation of laws in Poland started well before the ratification of the Europe Agreement[161]. As early as in May 1991, the Secretary of the Council of Ministers issued a circular requesting all the Ministries to consult draft laws with the recently appointed Government Plenipotentiary for European Integration and Foreign Assistance[162] from the standpoint of their conformity with the provisions of the EA. During the period of existence of his Office, the Plenipotentiary issued such position documents with respect to approximately 150 drafts of legal acts of various ranks, forwarded to the Council of Ministers by the Ministries concerned. However, the circular in question did not create a systemic solution to the need for approximation of laws and, in practice, it was not systematically followed.

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[159] Cf. page 8.

[160] Cf. Chapter II.B.

[161] For more information on this issue, as well as on the general framework of EC/EU - Poland relations, cf. J. Menkes, "Problemy prawne przystąpienia Polski do UE", *in:* Kontrola Państwowa, No 2/1998, p. 48 - 69. Cf. also S. Biernat, "Kilka uwag o harmonizacji polskiego prawa z prawem Wspòlnoty Europejskiej", *in:* Przegląd Legislacyjny, No 1-2/1998, p. 20 - 31; C. Mik, "Problemy dostosowania polskiego systemu prawnego do europejskiego prawa wspòlnotowego (w kontekście przyszłego członkostwa Polski w Unii Europejskiej)", *in:* Przegląd Legislacyjny, No 1-2/1998, p. 68 - 86; S. Sołtysiński, "Dostosowanie prawa polskiego do wymagań Układu Europejskiego", *in:* Państwo i Prawo, No 4-5/1996, p. 31-43; P. Saganek, T. Skoczny, *Selected Issues and Areas of Adaptation of Polish Law to the Law of the European Union*, Warsaw University Centre for Europe, Warsaw 1999; A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, Sussex European Institute Working Paper No 45, May 2001, p. 7 - 24; J. A. Wojciechowski, "Dostosowanie prawa polskiego do prawa europejskiego - proces bez końca", *in:* Przegląd Prawa Europejskiego, No 1/1996, p. 7 - 10.

[162] Cf. below.

The approximation process was given a new framework at the moment of ratification of the Europe Agreement, i.e. on 4 July 1992. Pursuant to the resolution of the Sejm (the lower chamber of the Polish Parliament) which accompanied the Act of ratification, the Council of Ministers was obliged to present two programmes: the first one, on the adjustment of the Polish economy to the requirements of the Europe Agreement (the deadline set was 30 November 1992), and the second, on the approximation of the Polish legal system (to be presented to the Sejm by 30 January 1993). Both programmes, representing a complex and binding agenda for all Government institutions, fixing particular tasks and time limits for their implementation, were prepared within the set deadline[163].

On 29 January 1993, in order to respond to the above-mentioned resolution of 4 July 1992, the Polish Council of Ministers adopted a "Programme of Actions Adapting the Polish Legal System to the Requirements of the Europe Agreement". The programme envisaged the drafting or amending of 130 legal acts (laws, regulations[164], ordinances) during the period 1993 – 1994. The programme was of a preliminary nature; consequently, the Council of Ministers subsequently decided to supplement it by adding a "Timetable of Actions Adapting the Polish Economy and the Legal System to the Requirements of the Europe Agreement during 1995 and 1996". According to the Timetable, the Polish Antimonopoly Office (AMO)[165] prepared draft laws on the prevention and elimination of unfair competition, drafted harmonising national regulations in the areas of mergers and acquisitions, technology licenses, as well as cooperation and exclusive distribution agreements[166].

2. Resolution No. 16/94

On 29 March 1994, the Council of Ministers issued a Resolution No. 16/94 "On Supplementary Requirements for Action with respect to Government Drafts of Normative Legal Acts due to the Necessity to Fulfil the Condition of Compatibility with the EC Law"[167]. This resolution entrusted the Government Plenipotentiary with the task of providing final opinions on the compatibility of draft normative legal acts (produced by the Ministries and other Central Offices) with the EC law. The procedure was a two-stage one: the first stage, the so-called "preliminary opinion", concerned the Ministry level and included suggestions to the Ministry concerned on how to eliminate any possible incompatibilities, together with the deadline for such action. The preliminary opinion had to also take into account the economic aspect of implementation of the proposed draft (with due attention being paid to the requirements stemming from the Europe Agreement).

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[163]Cf. J. Stefanowicz, "Polish Implementation Programmes for the Europe Agreement: a Preliminary Record", *in:* B. Lippert, H. Schneider (eds.), *Monitoring Association and Beyond. The European Union and the Visegrád States*, Europa Union Verlag 1994.

[164]In the Polish legal system, regulations (also referred to as "executory regulations") are subordinate to Acts (or Laws, or Statutes) and have an executive character. They can be issued by the President, the Council of Ministers, the Prime Minister, Ministers as well as National Council of Radio Broadcasting and Television. They can only be adopted on the basis of an explicit statutory delegation and in order to enforce the Law (Act). Cf. A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, Sussex European Institute Working Paper No 45, May 2001, p. 15. For additional information on the hierarchy of laws and the legislative procedure in Poland in the context of approximation, cf. M. Anati, "Legal instruments employed by applicant countries in the approximation of their national legal systems with the *acquis communautaire*", Brussels 1998, http://cadmos.carlbro.be/Library/LegalInst/LegalInst.html, especially pages 11 and 32 – 35.

[165]Cf. Chapter III.A.

[166]Cf. Chapter II.B.

[167]Cf. also E. Piontek, "Central and Eastern European Countries in Preparation for Membership in the European Union - a Polish Perspective", *in:* Yearbook of Polish European Studies, No 1/1997, p. 73 - 87.

The second stage of the procedure was the Plenipotentiary's final opinion on the definitive draft as forwarded to the Council of Ministers. The Government was not bound by such opinions and could bypass a negative opinion, which had only an advisory value.

However, due to informal arrangements between the Head of the Office of the Council of Ministers and the Head of the Chancellery of the Sejm, all definitive opinions were communicated as a rule to the Parliament at the same time as the Government's draft was transferred to the Sejm. Therefore, the Plenipotentiary's opinions were becoming public documents and the MP's could consult them. Furthermore, the established practice was for the Prime Minister, in his letter transmitting a draft law to the President of the Sejm, to inform the latter of the degree of compatibility of a draft with the EC law.

According to the official data[168], between 29 March 1994 (i.e. the date of issue of the Resolution No 16/94) and 15 October 1996[169], the Government Plenipotentiary assessed 1288 draft legal acts, out of which, in his final opinions, 9 draft laws and 2 draft regulations were found to be incompatible with the Europe Agreement, and 12 draft laws and 5 draft regulations were considered incompatible with the EC law.

Between 1991 and October 1996, the co-ordination of all approximation efforts, as well as of the overall process of integration of Poland with the EU, was the task of the aforementioned Government Plenipotentiary for European Integration and Foreign Assistance. The post of Government Plenipotentiary was created by Resolution of the Council of Ministers of 26 January 1991[170], and his duties were identified as follows:

- harmonisation and co-ordination of adaptation and integration processes of Poland with the European Communities as well as supervision over these processes;

- initiating and organising work and actions aiming at creating the conditions favourable to the integration of Poland and the European Communities, in particular in the economic, legal and institutional or organisational sphere;

- co-ordination of actions aiming at obtaining and using foreign assistance.

While carrying out these tasks, the Plenipotentiary was supposed to (in particular):

- initiate actions aiming at preparation of integration processes, from the information, conceptual and human resources standpoint;

[168]Cf. "Report on the Execution of the Action Plan for the Adaptation of the Polish Economy and the Legal System to the Requirements of the Europe Agreement and of the Future Membership of Poland in the EU, in the period 1992 – 1996", Warsaw, 20 May 1997, p. 36.

[169]As from 16 October 1996, opinions on the compatibility of draft legal acts with EC law were issued by the Office of the Committee for European Integration (cf. below), based on the same Resolution No. 16/94. The latter Resolution was replaced by the Resolution of the Council of Ministers No. 13/97 of 25 February 1997, which incorporated the procedure of issuing opinions on compatibility of draft legal acts with EC law into the Internal Regulations of the Council of Ministers (as their Chapter IV).

[170]Resolution of the Council of Ministers No. 11/91.

- draft the structural and organisational concept for integration and adaptation works, taking into account the State bodies, research institutions and interested other institutions and social circles;
- present to the Council of Ministers his proposals and suggestions as well as, if needed, proposals of drafts of appropriate laws and regulations;

- after consultation with competent Ministers, submit to the Council of Ministers draft decisions as to the use to be made of the received foreign assistance, and supervise their execution.

Subsequently, in order to better monitor and co-ordinate all adaptation efforts, an Interministerial Team for the Europe Agreement was set up on 10 December 1994[171]. The team was composed of staff from all Ministries and Central Offices. It served mostly as a forum for interministerial co-ordination on the eve of the meetings of the EU-Poland Association Committee. However, very quickly, there appeared a need to better co-ordinate the day-to-day work on concrete projects between the Government bodies directly involved in the fulfilment of such tasks, i.e. in particular, the Ministries of Foreign Affairs and of Foreign Economic Co-operation, as well as the Government Plenipotentiary. Therefore, as from the end of 1994, a so-called "K-3 Committee" was created. The above Committee met several times, on an irregular basis, between 1994 and 1996 on an Under-Secretary of State and Directors of Departments level. Its activity was particularly intense when it was required to elaborate a common position before important meetings or political events, or to prepare documents for the meetings of the Poland – EU Association Council or Committee. Both the Interministerial Team and the K-3 Committee ceased to exist in 1996.

3. Committee for European Integration

The above-mentioned structures were replaced with the Committee for European Integration (CEI)[172], which became the main Polish administrative body, programming and co-ordinating Poland's integration policy with the EU. The CEI was composed of its President (the Prime Minister), the Secretary and the following Ministers: of Foreign Affairs, of the Interior and Administration, of Economy, of Finance, of Environment Protection, of Labour, of Agriculture, and of Justice. Further, the Presidents of the National Bank of Poland (the central bank) and of the Government's Centre for Strategic Studies had the right to participate in the Committee's meetings.

The mandate of the CEI included preparing the process of integration with the EU, presenting to the Council of Ministers programs of EU adaptation and integration actions as well as draft laws in this field and decisions on the use of foreign assistance. The CEI was to submit to the Council of Ministers reports on the realisation of programs of adaptation of the Polish economy and the legal system to the requirements of the future EU membership.

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[171] For a detailed analysis of the administrative structures and procedures for law approximation following the December 1994 decisions, cf. D. Pyszna and K. Vida, "The Management of Accession to the European Union in Poland and Hungary", Hungarian Academy of Sciences, Institute of World Economics, Working Papers No 128, October 2002, especially pp. 20 – 30. D. Pyszna stresses two main weaknesses of the Polish approximation structures (in the context of EU accession process), namely problems in coordination of EU- related decision-making between the Chancellery of the Prime Minister, the Ministry of Foreign Affairs and the Committee for European Integration, and poor inter-ministerial co-operation. That said, her overall assessment is rather positive.

[172] Set up pursuant to the Act of 8 August 1996.

The priority task of the Committee was the preparation of Poland's EU accession negotiations, through co-ordination of work carried out by the Ministries and other central Government bodies in this area. The preparations included defining problem negotiating areas, ensuring an appropriate expert and organisational support for the negotiation process, as well as drafting the negotiation mandate. The executive body of the CEI was its Office, whose terms of reference were issued by the Prime Minister on 2 October 1996.

The Office was chaired by the Secretary of the CEI and had the following departments: the Law Harmonisation Department (which initiated and co-ordinated approximation work among the State administration bodies concerned, as well as drafted opinions on compatibility of Polish existing and new legal acts with the EC law, in co-operation with competent services of Ministries and Central Offices, and with the Parliament's legal services; it also provided explanations as to the interpretation of the EC law to various State administration bodies and to the Sejm's Committee for the Europe Agreement); the Treaty Department (controlling *inter alia* the correct implementation of the Europe Agreement); the Economic Department; the Co-ordination Department (dealing with co-operation and co-ordination of adaptation efforts between the Ministries and Central Offices concerned as well as co-ordinating the Polish side of activities of the bodies created by the Europe Agreement); the European Institutions and Planning Department; the European Education and Information Department; the Foreign Assistance, Funds and Community Programmes Department (dealing with the utilisation and reception of multilateral – PHARE – and bilateral assistance from EU Member States); and the European Documentation Department.

This structure was subsequently reorganised, so that the Committee had the following Departments: the Law Harmonisation Department; the Integration Policy Department; the European Legislation Department; the European Documentation Department; the Translations Department; the Department for Analyses of European Relations; the European Information and Training Department; the Foreign Assistance Co-ordination and Monitoring Department; the Institutional Development Programmes Department, and the Department of Servicing of Accession Negotiations.

The role of the Integration Policy Department merits particular mention. Its main task was to co-ordinate the work of Ministries and Central Offices as regards preparations for EU membership which was done *inter alia* through: drafting programmes, timetables and reports on adaptation efforts, and in particular the annual updates of the National Programme of Preparation for Membership as well as reports to the Polish Parliament and to the European Commission on the implementation of that Programme; running the Secretariat of the EC - Poland Association Committee and co-ordinating the activity of Ministries and Central Offices with those of the relevant EU Institutions; providing opinions on draft negotiating positions of the Polish Government and making proposals for action in the context of accession negotiations; issuing opinions on draft laws and regulations as concerns their compatibility with EU integration policy; co-ordinating the co-operation between the Polish administration and the Office of TAIEX.

The Act on the Committee for European Integration put in place a new procedure for scrutiny of draft legal and sub-legal acts originating in the Council of Ministers as regards their conformity with EC law[173]. Under this procedure, all such draft legal and sub-legal acts were checked for their conformity with Community law during the co-ordination part of the legislative procedure.

The initial draft had to contain an enclosed statement of reasons (explaining the purposes of the new act, financial consequences of its adoption, etc.) and a preliminary opinion on its conformity with the EC law. Subsequently, the draft was transmitted to relevant institutions as well as to the CEI, which assessed the draft's EC-conformity. The opinion was then appended to the draft; no draft act could be subject to further examination by the Council of Ministers without such an opinion. After adoption by the Government, the draft Act was communicated to the Parliament together with the appended CEI opinion (or, if it was an executory regulation, published in the Polish Official Journal - "Dziennik Ustaw").

This procedure was the only one applied in Poland for the scrutiny of draft acts from the standpoint of their EC conformity until March 1999. Because of its limited scope (applying only to acts adopted by the Government), it did not ensure compatibility with the Community law of drafts introduced by other competent State bodies. This was of particular concern as, according to the official Parliamentary statistics, 819 draft Acts had been considered by the Polish Parliament during the period 1993 - 1997, out of which only 314 had been submitted by the Government. In other words, almost 58 % of all the acts submitted had not been subject to any formal check as to their conformity with the EC law. During the same period, the number of non-scrutinised acts adopted by the Parliament amounted to 320 (244 acts on the initiative of groups of MPs, 57 on the initiative of Parliamentary Commissions, 7 acts originating from the Senate and 12 from the Presidential Office)[174].

Another *lacuna* of this procedure was that it was relatively "weak". The CEI opinions were not of a binding nature; consequently, it was still possible for the Government to disregard them and go ahead with drafts not compatible with the EC law. Moreover, even a scrutinised draft could subsequently be modified during the parliamentary work, and the finally adopted text could be incompatible with the Community's *acquis*.

4. Resolution No. 133/95 – response to the Commission's White Paper

As a direct consequence of the publication of the European Commission's White Paper[175], the Council of Ministers issued, in November 1995, a Resolution No. 133/95, which obliged the Government Plenipotentiary (and, as from 15 October 1996, the Secretary of the Committee for European Integration) to elaborate and to co-ordinate the implementation of the programme of adaptation of Polish law to the European legal standards. The main State administrative bodies were given the obligation to collaborate in these actions. The Resolution specified that the future programme was to be based on the Community acts enumerated in the White Paper.

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[173]Dz.U. Nr 106/1996, poz. 494. Cf. A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, Sussex European Institute Working Paper No 45, May 2001, p. 15-17. The procedure was further precised in the Council of Ministers Rules of Procedure, Monitor Polski No. 15/1994, item 144, with subsequent amendments.

[174]Cf. A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, Sussex European Institute Working Paper No 45, May 2001, p. 16.

[175]Cf. Chapter I.B.

The timetable of adaptations of the Polish legal system to the EC legislative standards was later incorporated as an Appendix into the Resolution No. 133/95. The scope of the envisaged approximation work had been set by Article 69 of the EC – Poland EA, as well as by the necessity to eliminate obstacles in trade between Poland and the EU and to create a coherent set of rules facilitating the development of that trade. The Polish Government considered that, taking into account the needs of the Polish economy, the most important were the norms regulating the financial situation and functioning of economic entities, and those regulating economic relations. The former included, *inter alia*, competition law.

As the Polish Government itself acknowledged[176], the elaboration of the above-mentioned timetable was not an easy task for the State administration, due mainly to the lack of experience in this sort of exercise and to the limited circle of persons, both in the State administration organs and in the relevant academic institutions, possessing the necessary knowledge of the EC law and Institutions. Many difficulties were caused by the necessity to translate the Community legal acts into Polish as well as to identify the scope of competence of particular State administrative organs with respect to these acts – an uneasy task because of certain differences between the Polish law and the EC law.

The timetable identified approximation tasks for the 19 Ministries and Central Offices, contained in appropriate chapters. Each Ministry/Office was responsible for the drafting of particular acts and their implementation including the setting up of necessary structures and procedures to safeguard the implementation and enforcement. The intention of the Government was to create a document which could serve as a "measuring rod", to help analyse the degree of approximation of the Polish law with particular EC acts and to serve as a basis for the annual report of the Government to the Sejm on the approximation issues.

Further, all administrative bodies involved in the process were to use the assistance of the Experts Team on the Harmonisation of Polish Law with the Law of the European Union, appointed in February 1994 and made up of leading experts in various areas of law. The expert team identified 23 areas of law (i.e. more than in the Europe Agreement), the Polish legal acts concerned, estimated their degree of EC compatibility and produced drafts of necessary amendments, together with Polish translations of relevant EC acts.

5. National Strategy for Integration (1997)

The timetable attached to Resolution No. 133/95 was complemented and partly amended through the adoption, in January 1997, of the National Strategy for Integration into the European Union[177]. The Strategy emphasized the importance of a number of key pre-accession policies and identified, in particular, five sectors in which Poland considered that it would need to benefit from transitional periods before full application of the *acquis*.

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[176]Cf."Report on the Execution of the Action Plan for the Adaptation of the Polish Economy and the Legal System to the Requirements of the Europe Agreement and of the Future Membership of Poland in the EU, in the period 1992 – 1996", Warsaw, 20 May 1997, p. 37.

[177]In this context, it is important to mention that various other Government programmes (e.g. the June 1994 "Strategy for Poland", updated with the "Package 2000", and April 1996 "Outline Concept of the Strategy for a Development of Poland up to 2010") contained plans aiming at facilitating the preparations for Poland's future membership in the EU. Cf. M. Soveroski, "Poland", in: M. Soveroski (ed.), *Agenda 2000. An Appraisal of the Commission's Blueprint for Enlargement*, European Institute of Public Administration, Maastricht 1997.

The National Strategy for Integration into the EU was a comprehensive document, including parts on the Polish Government's general policy objectives, on the adaptation of the economy (costs and benefits of the integration process, conditions of EU membership, business strategies, main areas of economic adaptation, including the four freedoms and competition policy), on the adaptation of legislation (scope, methodology and supplementary activities), on external affairs, on justice and home affairs (co-operation in the administration of justice, protection of the EU's external borders, co-operation of police forces, ensuring the safety of citizens), as well as on the training and human resources, and on information activities[178].

The document was meant to outline strategic directions of action for the Government bodies (Ministries and agencies), as well as to represent a sort of "road map" for all other participants in the process of integration (the President, the Parliament, political parties, social organisations, enterprise and employers' organisations, trade unions, etc.). The Strategy was designed to define the main aims of integration and to co-ordinate their implementation by the Government and a wide range of non-governmental organisations, in a way that would ensure Poland's best preparation for membership in the EU. It was drafted by the Office of the Committee for European Integration, following the resolution of the Sejm of 14 March 1996.

The National Strategy incorporated tasks to be performed in the period preceding accession negotiations, in the course of these negotiations, as well as in the initial post-accession period. The existing schedules for legal approximation had been taken into account and new timetables identified. The Government declared that it had based its policy choices on four main assumptions: that Poland's membership in the EU would include integration in all areas; that it would facilitate the maximalisation of the rate of economic growth accompanied by a gradual meeting of the criteria set for the Economic and Monetary Union; that Poland's integration with the EU was a mutually advantageous process; and that there were certain adjustment costs that had to be borne as a result of the integration. The points of reference were the criteria cited in the conclusions of the European Council in Copenhagen in July 1993 (i.e. "the Copenhagen criteria").

The Government recognised that membership in the EU would require substantial adjustments in the Polish economy and its legal system. Facing this immense task, it announced that it would attempt to obtain transitional periods in respect of certain sectors, although it declared that it would remain "prudent and moderate" in doing so, basing its actions on a "thorough consideration of the balance of advantages and possible costs of delays in the integration" of each particular sector.

The bodies charged with the implementation of the National Strategy for Integration were: the Council of Ministers; the Committee for European Integration; the Ministry of Foreign Affairs; other Ministries and central offices; regional and local authorities; and Polish diplomatic missions, particularly in the EU Member States and in the countries associated with the EU. Within this system, the main co-ordinating role was to be played by the Committee for European Integration.

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[178] Cf. *National Strategy for Integration*, Monitor for European Integration, Special Edition, January 1997, Committee for European Integration; and D. Hübner, "On 'National Strategy for Integration'", *in:* Yearbook of Polish European Studies 1 [1997] 177.

As for the co-ordinating of the overall efforts aimed at preparing Poland for accession to the EU, it was envisaged that it would take place on three levels:

- strategic – the Committee for European Integration;

- operational – on the level of Secretaries or Under-Secretaries of State responsible for European integration;

- working – at the level of the heads of European integration departments in individual Ministries and offices.

The Polish Government acknowledged that, in order for its new Strategy to be implemented correctly, many changes and improvements would have to take place, *inter alia* as regards the work of institutions in charge of drawing up and implementing new legislation. Better implementation of the provisions of the Europe Agreement and of the European Commission's White Paper was also required.

The starting point of the National Strategy for Integration was the evaluation of the degree of economic and legal adaptations contained in the Polish sectoral "White Papers"[179]. The Government emphasized the role of the Commission's White Paper, to which the Polish side responded by drawing up a timetable of adjustment measures. It also recalled its replies to the Commission's Questionnaire, submitted in order to formulate the opinion on Poland's EU membership application. The National Strategy for Integration was thus intended to represent one of the main elements of Poland's negotiation preparations and of drawing up the negotiation mandate. It was announced that, during the first quarter of 1997, the Committee for European Integration would prepare an action programme for the years 1997 – 2000, based on the Strategy. The sector adaptation programmes and negotiation recommendations would then supplement and develop it.

The Strategy envisaged that drafts of legal acts being drawn up were to be scrutinised from the point of view of their compatibility with the EC law. As mentioned before, Resolution No. 16/94 of the Council of Ministers envisaged such scrutiny in respect of bills submitted by the Government. However, the authorities recognised that a similar system was still missing as regards the drafts submitted by Members of Parliament or those Government drafts which had been modified by the Parliament in the course of their adoption. Further, in order to ensure that the quality of new legislation would be high and their EC conformity as full as possible, the Government envisaged close co-operation with representatives of the legal profession (academics, judges, prosecutors, barristers, legal advisers and notaries) in the course of the approximation process. This would also ensure easier implementation of the new legislation and its better acceptance by legal professionals. Among other actions envisaged to facilitate this, the Government intended to complete the official translations of EC legal acts and to compile the necessary dictionaries, this work being carried out and co-ordinated by the Committee for European Integration.

[179]The so-called "Polish White Papers" were drawn up between 1993 and 1996 on the instruction of the Government's Plenipotentiary for European Integration and Foreign Assistance. Altogether, over 70 volumes were issued. The structure of each White Paper was similar: the first section concerned the legal situation in the EU in respect of a given sector, the second – the state of Polish law in the same sector, and the third – conclusions as well as proposals for necessary amendments together with proposed methods of change.

The Strategy also included an intensification and acceleration of training in the EC law, for civil servants (starting from employees of the legal departments and other ministerial and office departments involved in the European integration issues, down to representatives of legal services of regional and local administration bodies), judges and public prosecutors, including – as much as possible – periods of professional training spent in the Institutions of the EU. European integration matters were to be included in the curricula of higher education courses in law, administration, political science, agriculture, etc. All these actions were to be co-ordinated by the Office of the Committee for European Integration, in co-operation with the appropriate Ministries, central offices and professional self-government organisations[180].

On competition policy, the Polish Government expressed the view that most of the relevant legislation had already been adopted. However, the Government acknowledged that the functioning of certain State-owned enterprises which enjoyed an almost monopolistic position could bring about conflicts with the rules of competition existing in the EU. Among the activities which had to be carried out prior to the accession in the competition sector, the National Strategy indicated that it was necessary for the competent bodies (and especially for the OCCP) to continue adapting legislation and practice in the field.

In a closely related area, the Polish Government intended to base its industrial policy on promoting the adaptation of Polish companies to a competitive environment in the future enlarged Union; this *inter alia* required de-monopolisation of many sectors of the economy. However, pending the achievement of these objectives, the authorities would support restructuring, consolidation and privatisation efforts in certain sensitive sectors (e.g. financial services, air transport, telecommunications) although the aim would be to gradually eliminate barriers to trade and protectionist measures, until their total disappearance upon entering the EU. In this context, the Polish Government had the intention to prepare sectoral restructuring and privatisation programmes, especially as regards companies that had until now enjoyed a privileged position on the market.

6. Criticism of the Strategy and the Government's response

Soon after the adoption of the National Strategy for Integration, critical voices, emanating mostly from the Government's Legislative Council, began to be heard as regards the efficiency of the Committee for European Integration's work in the approximation field. The main criticism consisted in the fact - already referred to above - that only draft laws submitted by the Government were systematically checked from the standpoint of their conformity with the *acquis*, while those originating in the Parliament (Sejm) were not. Further, there were cases where Polish legal acts, presumed to be conform with the *acquis*, were in fact not – a consequence of poor translation of relevant Community acts. Finally, there were problems in the communication and co-ordination of work between the Committee and the Ministries; apparently, expert opinions prepared by the Committee were not always taken into account by legal experts of particular Ministries while preparing draft new laws and regulations[181].

[180]For this purpose, in May 1997, a European Integration Council, including representatives of the civil society, was set up at the Prime Minister's Office.
[181]Cf. Z. Semprich, "Nowi "półkownicy"", "Rzeczpospolita", 25 June 1998.

Perhaps (in part) as a reaction to these critical remarks, the President of the Committee for European Integration ordered, on 6 March 1997, the setting up of an Inter-Ministerial Team for the Preparation of Poland's EU Membership Negotiations[182]. The Team, headed by the Secretary of the Committee, was composed of sub-teams led by deputy Ministers from the Ministries concerned. Its first report, issued in September 1997, consisted of three volumes: a synthetic document, an overview of the main negotiation problems and the third document (III A and III B), presenting full reports of particular sub-teams.

The report identified the main issues likely to cause difficulties in the course of accession negotiations and evaluated the size of the legislative gap between Poland and the EU. It was meant to represent a working document and a basis for further preparations for the establishment – by the end of 1997 – of the Polish Government's negotiation mandate.

On 20 May 1997, the Polish Council of Ministers adopted a "Report on the Execution of the Action Plan for the Adaptation of the Polish Economy and the Legal System to the Requirements of the Europe Agreement and of the Future Membership of Poland in the EU, in the period 1992 – 1996". This bulky (some 400 pages) document contained an evaluation of the progress achieved so far, including as regards competition policy. The Report also contained the Polish Government's evaluation of the role of PHARE, of the performance of the Polish economy in the light of the EU membership criteria, of the implementation of trade provisions of the Europe Agreement and of the impact of foreign direct investment on the economic relations between Poland and the EU.

In the introduction to the Report, the authors (experts employed by the Office of the Committee for European Integration) explained that, in the context of the recently adopted National Strategy for Integration (cf. above), it was no longer possible to limit oneself to annual reports presented by the former Government Plenipotentiary for European Integration and Foreign Assistance to the Parliament, based on the previous Government's Programme of Adaptation of Polish Economy and Legal System to the Requirements of the Europe Agreement. This was also due to the fact that the annual reports in respect of 1993, 1994 and 1995 were prepared taking into account the requirements of association of Poland with the European Communities, while since then the political agenda had changed and the present challenge was that of preparing Poland for future EU membership. Therefore, the Report in question was far broader in scope and referred to the tasks foreseen in the National Strategy for Integration as well as contained sections concerning the evaluation, from a horizontal standpoint, of economic processes in Poland in the light of the Copenhagen criteria.

Referring specifically to the issue of approximation of laws, the Report was quite critical of the progress achieved so far by the existing institutions and based on the existing procedures. In particular, it was considered that the instrument created by the Resolution No. 16/94 had turned out to be too weak, as a result of which the line Ministries had frequently failed to implement it in practice. For example, they had sometimes not submitted their drafts for preliminary evaluation of EC compatibility, and had on occasion undertaken adaptation efforts without due prior preparation and too late for them to be effective. Moreover, despite the clear wording of Resolution No. 16/94 on this subject, the Council of Ministers itself had often considered draft legal acts in respect of which an opinion on their EC compatibility had not been issued at all.

[182]Cf. "The Polish Government's Information Office Bulletin" No. 34/97.

The authors of the Report saw the reasons of this situation in a too low priority having been given to the approximation process in particular Ministries, together with a lack of long-term vision and insufficient human resources. The Report expressed hope that the new procedure, set up on the basis of the Resolution No. 133/95 and of the decision of the Committee for European Integration of 3 April 1997, would allow to improve the situation by obliging the Ministries concerned to draw up comprehensive, long-term approximation projects, covering not only the *acquis* referred to in the Europe Agreement but also other areas. Such projects, accompanied by detailed deadlines, would allow the Committee for European Integration to evaluate on a systematic basis the degree of advancement of approximation efforts in respect of each Ministry, as well as facilitate the co-ordination of such efforts.

Concerning competition policy, the Report referred *inter alia* to the amendment from 3 February 1995 to the Act on Counteracting Monopolistic Practices[183], introducing among others a new Article 11 on the control of mergers inspired by the corresponding provisions of the Council Regulation No. 4064/89. The mechanism set up was of a preventive nature (obligatory notification of intended mergers); further, the new provisions foresaw a *de minimis* rule; the Antimonopoly Office was given the right to prohibit a merger if its result would lead to the acquisition or reinforcement of a dominant position on the relevant market; finally, the Council of Ministers Regulation of 13 July 1995[184] determined the requirements for the merger notification procedure, including the introduction of an appropriate form (a so-called "notification questionnaire").

The Polish Government announced, for 1997, its intention to prepare a new draft competition law, fully compatible with the Community legislation. This was rendered necessary by the absence, in the existing Polish law, of a possibility to issue group exemptions, by the need to better formulate the provisions on abuse of dominant position, and to include provisions on monopolies.

The Report referred to the elaboration by the Antimonopoly Office, in the period 1991 - 1996, of 33 reports (financed by PHARE) on various aspects of approximation of competition law. These reports concerned *inter alia* the anti-trust jurisprudence of the Community Institutions as well as of German, British and US anti-trust authorities; national anti-trust laws of Western European, non-European and post-communist countries; competition regulations applicable to the mining industry, agriculture, transport, energy, telecommunications, postal services, banking, mass-media and communal activities; and rules relative to specialisation, franchising, intellectual property and know-how licensing agreements. A separate study concerned the applicability of competition principles to international commercial (private law) agreements.

7. Further response to the White Paper – the July 1997 Harmonogramme

On 15 July 1997, the Polish Government adopted another document: the "Harmonogramme of Actions Adjusting the Polish Legal System to the Recommendations of the European Commission's White Paper on Preparation for Integration with the Internal Market of the Union". The Harmonogramme indicated bodies of the State administration responsible for drafting new legal instruments and amendments to the laws already in force.

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[183] Cf. also Chapter II.B., below.

[184] Dz. U. Nr 87, poz. 438.

In the course of the approximation process, priority was to be given to areas covered by horizontal legislation, by framework directives and by such decisions of the Community Courts, the implementation of which required a massive investment in infrastructure. As for the administrative co-ordination of the approximation process, the main responsibility was incumbent on the Committee for European Integration, which was to organise regular meetings of directors of departments responsible for issues related to European integration in Ministries and Central Offices.

Further, problem-specific meetings of Deputy Ministers and directors of departments of Ministries represented in the Committee for European Integration were also organised, as well as issue-specific meetings convened *ad hoc* in order to resolve selected major issues (with the participation of only the interested Ministries and Central Government Offices). The co-ordination procedure was completed with monthly meetings of the Committee for European Integration. Finally, inter-ministerial co-ordination also involved institutions which did not belong to Government administration, such as the National Bank of Poland.

As regards competition policy, the task of the Polish administration was *inter alia* formulated as the continuation of adjustment of Polish legislation to the EU requirements in respect of anti-trust. The bodies responsible for the implementation of this task were the Office for Competition and Consumer Protection (OCCP), the Ministries of the Economy and of Finance, as well as other interested Central Offices of the administration. As to timetable, the bulk was to be realised by the end of 1997, while some aspects were defined as being of an ongoing nature, to be synchronised with the schedule of meetings of the EU-Poland Association Committee.

8. 1998: Timetable of Implementation of the National Strategy of Integration

In March 1998, the Secretary of the Committee for European Integration presented to the Council of Ministers another document: the Timetable of Implementation of the National Strategy of Integration (NSI) as amended after consultation with the Ministries and Central Offices concerned. The timetable contained a description of tasks, divided into chapters according to policy sectors (one of which was competition policy). There were also two appendices to the Timetable: proposals of implementation programmes of the particular tasks identified in the NSI (Appendix I) and the list of programmes and documents adopted by the Council of Ministers and its Committees, which would have to be revised in the context of the NSI (Appendix II).

Among the horizontal tasks, there were the following:

a/ analysis of the current Polish legal regulations concerning the functioning of the Polish market as well as of the degree of preparedness to implement in a short term the minimal necessary amount of regulations indispensable to join the EC internal market;

b/ drafting of a long-term analysis of structural changes in the Polish economy and of the degree of its preparedness to adopt the entire *acquis communautaire*;

c/ preparation/amendment of sector adaptation programmes in the context of EU accession negotiations;

d/ intensification of the adaptation of Polish law in order to gradually take over the entire *acquis communautaire* as well as monitoring, including *inter alia* the adoption by the Government of a Draft Timetable of actions adapting the Polish legal system to the recommendations of the European Commission's White Paper, and preparation of a system of translations of Community law;

e/ analysis of the process of adaptation of the organisation and functioning of public administration to the current changes and EU standards;

f/ analysis of negotiating positions of the European Commission and of the EU Member States in the context of the forthcoming membership negotiations;

g/ appointing negotiating teams and their chairmen;

h/ drafting of the proposal of detailed negotiating mandate based on the NSI; and

i/ appointing a team to coordinate the preparation of negotiations' documentation.

Interestingly, the deadlines set for implementation of all the above-mentioned tasks had been set to prior to the issue of the Timetable i.e. either in the course of or in the end of 1997.

One of the chapters of the Timetable concerned law adaptation. It included the following tasks:

a/ introduction of changes in the Polish law stemming from the obligations undertaken by Poland while ratifying the Europe Agreement (in particular, its Article 69) – the main institutions responsible being the relevant Ministries in co-operation with the Parliament and the deadlines of the two stages into which the realisation of this objective had been divided being 1 February 1999 and 1 February 2004;

b/ approximation of law as regards the rules of conducting economic activities by natural and legal persons, Polish and foreign (main institution – the Ministry of the Economy, co-operating institutions – all other State administration institutions interested, deadline – the end of 1997);

c/ preparing of a timetable for adaptation to the EC legal standards, as appendix to the Resolution of the Council of Ministers No 133/95 (main institution – Office of the Committee for European Integration [Co-ordination Department], other institutions – all other State administration institutions interested, deadline – the first quarter of 1997);

d/ adaptation of the Polish law to the requirements of the internal market, including the determination of the actual state of advancement of the EC law, analysis of corresponding regulations of Polish law, and preparing the principles of new regulations taking into account economic aspects, i.e. the costs and expected benefits of the changes (main institution – Office of the Committee for European Integration, other institutions – competent Ministries and central offices supported by expert teams, with the participation of the Parliament, deadline – "ongoing");

e/ control of draft laws introduced by the Government as concerns their conformity with the Europe Agreement and the EC law, according to the resolution of the Council of Ministers No. 16/94 (main institution – Office of the Committee for European Integration, other institution – the Parliament, deadline – "ongoing");

f/ putting in place a mechanism of review of draft laws introduced by Members of Parliament as well as amendments to the drafts presented by the Government (introduced by the MP's), as concerns their conformity with the Europe Agreement and with the EC law – setting up a relevant expert team (main institution – Office of the Committee for European Integration, other institution – the Parliament, deadline – the first half of 1997);

g/ preparation of appropriate staff, organisational and financial framework for the carrying out of law adaptation (main institution – Committee for European Integration, other institutions – all other central administration institutions interested, deadline – the first half of 1997); and, finally,

h/ creation of an official collection of translation of the EC legal acts (institution responsible – Office of the Committee for European Integration, deadline – the first half of 1997).

As already mentioned, at the time of adopting the Timetable (March 1998), several of the objectives specified in it should already have been met, their deadlines having expired in the course of 1997. This apparent anachronism could be explained by the fact that it was in reality a second version of the original Timetable adopted by the Office of the Committee for European Integration in the beginning of 1997, amended subsequently following remarks sent by various Ministries and other Central Offices of the Government in the course of the year.

The Timetable also included certain tasks related with the preparation of civil service training (in the central, regional and local administration, as well as with respect to Members of Parliament and staff of the Parliament) and with a general increase of the number of European law specialists. The first of these tasks was to be implemented by the Office of the Committee for European Integration (Department of European Training and Information) in co-operation with all other central administration institutions interested (deadline: the end of April 1997) and the second – by all Ministries and central offices engaged in the European integration process (the deadline in this context was set in a very imprecise manner – "the period of negotiations and the first stage of membership").

The training was additionally to include staff of those central administrative bodies which were in charge of carrying out the ministerial programs of adaptation to the EC standards, and of the training of specialists for the central, regional and local administration, in particular in the fields of the EC law and the Community programmes (the institution responsible was the Office of the Committee for European Integration – i.e. its Departments of European Training and Information and of Foreign Assistance, Community Funds and Programmes – in cooperation with, among others, the National School of Public Administration and the Ministry of Education; the process was to be "ongoing").

Further staff training was foreseen in order to prepare Poland for a successful process of law adaptation. One of the tasks formulated was the widening of the scope and speeding up of the execution of the programme of specialist training of staff of legal departments of Government Ministries and those working in the judiciary (institution responsible – Office of the Committee for European Integration and, more particularly, its Departments of Law Harmonisation and of European Training and Information; co-operating institution – Ministry of Justice; deadline – the end of 2000).

Another task was the complementing of the existing training programmes with traineeships in the EU Institutions, and in particular at the European Court of Justice and at the Court of First Instance as well as at the Secretariat of the Council of the EU and at the European Parliament (institution responsible – Office of the Committee for European Integration, Department of European Training and Information; co-operating institutions – all other central administration institutions interested; deadlines – the end of 1997).

The Appendix I to the Timetable contained proposals of Executory Programmes to the National Strategy of Integration. Among such proposed programmes, one may cite the Programme of harmonisation of Polish law with the EC law, which was to be prepared by the Office of the Committee for European Integration (Law Harmonisation Department), in collaboration with the interested Ministries and central offices. No fixed deadline was set for this task; the programme was supposed to be adapted continuously to the changing circumstances as accession process progressed.

Another programme was the approximation of the Polish judiciary and home affairs area to the EU system, to be elaborated and carried out by a special interministerial co-ordination committee (the aforementioned "K-4 Committee") on an ongoing basis. Finally, there was also to be a programme of law training, to be drafted by mid-1997 by the Office of the Committee for European Integration (namely by the Departments of Law Harmonisation as well as of European Training and Information) in collaboration with the Ministries of Justice and of Education.

9. Reorganisation of the law approximation and European integration structures (1998)

Following the adoption of the Timetable, the structures responsible for co-ordination and management of the pre-accession process (including the approximation of law) underwent further change. In November 1998[185], the staff complement of the Office of the Committee for European Integration had reached the number of 270 persons; by that time, the CEI had issued 1100 opinions on the compliance of draft legislation prepared by the Government. The overall supervision of both the negotiations and the work of the CEI was carried out directly by the Prime Minister, whose role reinforced the functioning of the Committee.

However, the co-ordination of the overall pre-accession process and of the preparations for negotiations continued to involve three different decision making bodies. Consequently, in 1998, the Government created a special body co-ordinating preparations for negotiations – the Inter-Ministerial Team for Preparations of Negotiations, composed of Task Forces dealing with particular areas, and set up the Negotiating Team to assist the Government Plenipotentiary.

[185]Cf."Regular Report from the Commission on Progress towards Accession. Poland", European Commission's D. G. for Enlargement's website.

On 24 March 1998, the post of Polish Government's Chief Negotiator with the EU was created; the new senior public official[186], with a grade of Secretary of State in the Office of the Prime Minister, responded both to the Secretary of the Committee for European Integration and to the Prime Minister[187].

At the end of 1998, the Negotiating Team, set up by the Prime Minister's Order No. 19 of 27 March 1998, consisted of 18 members, most of them at the level of Secretary or Under-Secretary of State: the Chief Negotiator as President; representatives of the Ministries of Foreign Affairs, of the Interior, of Finance, of Justice, of Economy, of Environment Protection, of Agriculture, of Labour, of Transport and of Telecommunications; the President of the Committee for European Integration; the President of the Government's Centre of Strategic Studies; Deputy President of the Office for Competition and Consumers Protection; the Government Plenipotentiary for Family Affairs; Poland's Representative at the European Union, and the Team's Secretary. It is noteworthy that the activity of the Negotiating Team was closely related with the Government's legislative programme, thus with the approximation of law activities[188].

10. Programme of Preparation for EU Membership (National Programme for the Adoption of the *Acquis*)

In June 1998, the Polish Government adopted yet another program, called the Programme of Preparation for EU Membership[189]. The scope of this document included all changes necessary in the law and in the economy in order to make Poland ready for EU membership. The tasks for the public administration have been divided into short- and medium-term ones (i.e. with the deadline for the full approximation fixed at the end of 2002).

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[186]The person appointed to the post was Mr Jan Kułakowski, former Polish ambassador to the EU and Secretary General of World Labour Confederation, a personality well known to and respected in the Brussels Institutions. Cf., *inter alia*, T. Oljasz, "EU Negotiator. Who Will Lead Us to Europe?", "Warsaw Voice", 3 February 1998; *and* SG, "Unia Europejska. Negocjować z Brukselą będzie Kułakowski", "Gazeta Wyborcza", 4 February 1998.

[187]His tasks were defined as follows (§ 2.1 of the Council of Ministers Regulation of 24 March 1998, Dz. U. Nr. 39, poz. 225) : preparing of the concept, co-ordinating of the negotiation process and negotiating of the accession treaty with the EU Member States. These tasks were to be implemented, in particular, through (§ 2.2) : preparing the timetable of negotiations; initiating and leading the work associated with the preparation of draft legal acts and organisational projects concerning the negotiations; participating in the process of preparation of draft negotiating instructions; co-ordinating the process of drafting the EU accession treaty. Among his powers, one should mention the obligation to submit all draft laws and other Government documents which might have an influence on the course of the negotiations, for his opinion (§ 4.2).

[188]As stressed in the Opinion of the Government's Legislative Council, it was necessary to harmonise Polish negotiating positions with the legislative programme. Cf. "Opinia Rady Legislacyjnej dotycząca terminu, od którego mają obowiązywać przepisy dostosowujące prawo polskie do wymagań Unii Europejskiej, *in:* Przegląd Legislacyjny, No 2/1999, p. 85 - 89.

[189]Cf. AL, KRZEM, "Polska – Unia Europejska. Tak się przygotujemy", "Gazeta Wyborcza", 24 June 1998. Adopting this document was the Government's response to the Declaration of the Committee for Foreign Affairs and European Integration of the Polish Senate of 18 March 1998, in which the latter *inter alia* stressed the necessity to speed up the Polish Government's preparations for membership negotiations with the EU, insisted on the need to ensure effective co-ordination in European integration matters between the different Ministries, and pointed at the necessity to complete the work on the National Programme of Preparation of Poland's Membership in the EU, which would update and precise the National Integration Strategy. The Declaration also made clear that it was indispensable to intensify adaptation efforts in order to render the Polish law compatible with the EC law; this had to include the creation of efficient implementation structures. On the other hand, it is important to note that the Senate Committee envisaged, for some parts of the *acquis communautaire*, "the adoption of which might entail too high socio-economic costs", a possibility of extending the full approximation in time. A declaration with similar undertones was adopted by the Sejm two days later (20 March 1998).

The Programme was assessed in the Commission's 1998 Regular Report[190]. The Commission stated that the Programme, referred to as the National Programme for the Adoption of the *Acquis* (NPAA), was a wide-ranging document which appeared to address numerous issues including many of the priorities set out in the Accession Partnership. The scope of the National Programme commitments was variable, with clear commitments to the achievement of certain objectives in some sections but with a lack of clarity as to the nature and degree of commitments in other areas. Precise statements on timing and calendars for the alignment with the EC law were quite heterogeneous sector by sector. Implementation structures were normally foreseen, albeit with the degree of information varying, again, from sector to sector.

A new issue, which the Commission thought necessary to consider in subsequent revisions of the Polish NPAA, was the impact of the restructuring of the decentralised Government administration on a number of *acquis* sectors. Further, the issue of enforcement in general required more attention. The information on budgetary requirements was also extremely variable; in some sectors it was completely absent, or very partly reflected without precisely indicating the periods covered. The preparation of a budgetary impact analysis was therefore a key issue to be addressed to ensure that both further revisions and Poland's pre-accession approximation strategy would be sustainable.

On competition policy, the Commission noted the adoption by the Polish Government, on 2 June 1998, of the strategy for "Counteracting Monopolies and Strengthening Competition Practices"[191]; however, it criticised the strategy for having provided a rather general outline of broad policy, without detail at the level of legislation and enforcement. The Commission estimated that the short-term Accession Partnership priorities in the field of anti-trust/merger legislation would most probably not be fulfilled. In the latter field, the Commission stressed that the enforcement of the existing anti-trust law should concentrate efforts on hard-core cartels and important mergers.

As regards administrative structures to apply the competition *acquis*, the Commission expressed an opinion that the OCCP's high turnover in staff due to low remuneration remained a significant constraint on its effective functioning. The Commission stressed that the role, functioning and powers of the OCCP needed to be reinforced and the number and qualification of staff increased. Expertise had to be reinforced at all levels (judiciary, sub-national administration).

11. Polish negotiating position on competition policy

On 29 January 1999, the Polish Government presented to the Commission its negotiating position, containing *inter alia* the information on the Government's legal approximation and administrative adaptation programme in the area of competition[192]. The Polish Government declared that it accepted and would implement in full the *acquis* in this field, and that it would not request derogations or transition periods[193].

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[190]Cf. the 1998 Regular Report on Poland's progress towards accession, European Commission's D. G. for Enlargement's website.

[191]Cf. Chapter III.A.3.

[192]Cf. the Polish Chief EU Accession Negotiator's website: www.negocjacje.gov.pl/neg/stne/pdf/stne6en.pdf.

[193]With the important exception of some forms of State aid granted to companies that had invested in Special Economic Zones (where Poland requested a transition period until the end of 2017) as well as State aid to steel industry (that was the subject of separate negotiations with the Commission).

Further, it declared that the all necessary steps would be taken to transpose and enforce the *acquis* in the area of competition policy, including where necessary amending the existing legislation. The Government's point of view was quite optimistic as concerns the approximation of competition rules set out in ex-Articles 85 – 89 (after amendment, Articles 81 - 85) EC and the relevant secondary Community acts. The Government estimated that the Polish law was already in conformity with the EC standards to a significant degree.

The negotiating position contained a brief description of the main characteristics of the Act of 24 February 1990 on Counteracting Monopolistic Practices[194]. It was pointed out that the aforementioned Act provided for a ban both on competition restricting agreements between entrepreneurs and on abuse of a dominant market position. The Act also set up an obligation to notify intended mergers in order to obtain a permission of the President of the OCCP. The Government further stressed the universal character of these provisions, applicable to all economic sectors regardless of their ownership structure (State or private companies).

On the less positive side, the Polish authorities acknowledged one major incompatibility of the existing anti-trust legislation with the *acquis*, namely the absence of the possibility to issue block exemptions to categories of restrictive agreements. Another problem recognised by the Government was that the "rule of reason" was formulated differently in the Polish law, and that its scope of application was defined in such a way that it could also be applicable to cases of abuse of a dominant position. Further, merger control provisions did not include concentrations resulting from transactions concluded by natural persons not engaged in economic activities.

The Government declared that work had been initiated on a new competition act[195], intended to remedy the above-mentioned incompatibilities as well as to reinforce the powers of the competition authority (i.e. the OCCP).

12. Commission's 1999 Regular Report – assessment of the Polish NPAA

The Commission's 1999 Regular Report[196] contained *inter alia* an evaluation of the amended version of the Polish NPAA. The Commission appreciated that it was a wide-ranging document addressing many of the priorities set out in the Accession Partnership, but regretted that the inclusion of many of the medium-term priorities of the Partnership often obscured the real priorities. Further, the Commission considered that Poland's NPAA should provide clearer timing, budgetary impact assessment and organisational requirements of the country's accession trajectory. It was also stressed that the NPAA would have to ensure more coherence between Poland's commitments in the framework of the Europe Agreement and its own legal and institutional aspects of preparation for accession.

In the view of the above, and to assist budgetary, legal, institutional and financial preparations, the Commission called for greater clarity as to how the NPAA might help meet the specific priorities set out in the Accession Partnership; this would provide an invaluable guide for the programming of national aid and the EU's inputs into this process.

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[194] Cf. more details in Chapter II.B.1.

[195] Cf. Chapter II.B.5.

[196] Cf. the 1999 Regular Report on Poland's progress towards accession, European Commission's D. G. for Enlargement's website.

The Commission added that the preparation of a budgetary impact analysis for the approximation of legislation was an essential issue to be addressed to ensure that further alignment process would be sustainable. It noted that there was currently a lack of clarity with regards to the financing in a number of areas, such as the Structured Dialogue.

One of the more precise criticisms of the Polish NPAA was that, while having provided a good overview of the actions taken in the past, it frequently missed an equally detailed description of steps still to be taken in short- and medium-term, in particular with respect to financing. Consequently, the Commission considered that the NPAA was not sufficiently clear and precise to become a guide for the programming of the Community technical assistance in the immediate future. The Commission was of the opinion that the NPAA should also contain a more detailed analysis of the consequences of the recent public administration reform[197] and the impact which it would have on the implementation of the Programme in both administrative and budgetary context. It added that the Polish Government's National Development Plan, scheduled to be adopted as an annex to the NPAA by the end of October 1999, should provide the basis for the planning of the PHARE funding in a limited number of regions in the country for the period 2000 – 2002.

As regards competition, the Commission was of the opinion that Poland had achieved a reasonable level of alignment in the field of anti-trust and mergers. Amendments to the Law on Counteracting Monopolistic Practices had entered into force in January 1999, and had improved the situation[198]. However, the Commission considered that further alignment, in particular regarding block exemptions, remained to be completed. In this context, the Commission estimated that more qualified staff was needed in the anti-trust area for the OCCP.

In general, the Commission stressed that the number of cases, the activities undertaken by the OCCP and foreseen for the Office indicated that without reinforcing the administrative capacity and increasing the OCCP budget, the implementation of very important legislation (anti-trust) would continue to face serious problems. Further, to ensure that competition policy and competition rules are being fully enforced, it was advisable to raise awareness and expertise at different levels in Poland. The Commission stated that, without these increased resources, the capability of the OCCP to fulfil its increased functions would be compromised.

13. 1999: another revision of approximation structures and procedures

In the course of 1999, the awareness of persisting weaknesses in the *de facto* operation of approximation structures and procedures became manifest also in the Polish Parliament and in the media. In March 1999[199], a group of Polish MP's tabled a draft amendment to the Sejm's Rules of Procedure. The background of this initiative was the report of the Office of Studies and Expertise of the Sejm's Chancellery, in which it had been found that – since the beginning of the term of the current legislature – approximately 3% of the draft bills submitted by the Government had been evaluated as incompatible with the relevant EC legislation. However, drafts submitted by the Government represented only about 30% of all draft laws examined by the Parliament.

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[197] Among other changes, the 49 provinces (voivodships) were replaced with 16 larger ones. One of the aims of this reform was to create stronger regions, capable, once Poland joins the EU, of taking full profit of the Union's regional policy instruments.

[198] Cf. Chapter II.B.4.

[199] Cf. J. Pilczynski, "Syzyfowe prace ustawodawcze", "Rzeczpospolita", 18 March 1999.

According to the report, 30 to 50% of all legislative drafts submitted to the legislative power did not contain the necessary opinion as to their EC compatibility. This number included also certain Government drafts, despite the clear obligation of appending such opinions contained in the existing legislation (e.g. Article 31 (2) (a) of the Sejm's Rules of Procedure). Worse, draft laws submitted by MP's – which represented as much as 56% of all drafts examined by the Sejm – were, as already mentioned earlier, not subject to this requirement.

Similarly, drafts submitted by the President, the Senate and the Sejm's committees usually did not contain any evaluation of their conformity with the *acquis communautaire*. Serious *lacunae* in the approximation process could also be observed at later stages of the legislative process. Drafts compatible with the EC law could easily be rendered incompatible through the introduction of subsequent amendments in the Sejm committees, during the plenary debate and while being examined by the Senate.

In order to prevent such situations, the proposed amendment to the Sejm's Rules of Procedure foresaw that all drafts considered by the Sejm, irrespective of their origin, would have to be accompanied with a statement by their authors, confirming their compatibility with the EC law. Such statements would then be evaluated by legal experts appointed by the Chairman of the Sejm and, in case of further doubts, would be submitted for examination to the Sejm's European Integration Committee. Further, any subsequent amendments to the drafts, including those introduced by the Senate, would require the opinion of the Committee for European Integration, whose representatives would be obliged to participate and help in the drafting work. All these proposals aimed at ensuring that new Polish laws are fully compatible with the relevant EC standards.

The aforementioned proposals were adopted as amendment to the Sejm's Rules of Procedure on 19 March 1999[200]. Pursuant to Article 31 of the Rules of Procedure, draft acts and resolutions had to be first submitted to the Chairman of the Sejm, together with an explanatory note containing *inter alia* information on the draft's EU/EC conformity (if the draft was not fully compatible with the *acquis*, the note had to contain reasons for this).

According to Article 31 (3) (b) of the Rules of Procedure, a draft Act described by the author as an "approximation Act" had to be accompanied by a translation of the relevant Community act. These explanations had only a preliminary character, since the Chairman of the Sejm had to request another opinion on the draft's compatibility with the *acquis* before its first reading in the Parliament. This opinion was prepared and submitted by parliamentary experts. In case of incompatibility, the Chairman of the Sejm was obliged to refer the draft to the Parliamentary European Integration Committee for yet another opinion. The opinion was then submitted to the author of the draft.

According to the Sejm's Rules of Procedure, the legislative procedure required three readings of any draft act. During all stages of the procedure, if there were any doubts as to the conformity of the amended draft with the EC law, a request for an opinion could be submitted to the Committee for European Integration. This could be the case during the readings of the draft act in the Sejm as well as during the Sejm debates on amendments introduced by the Senate. It is noteworthy that the Committee's opinion was not binding on the Parliament.

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[200] Monitor Polski No 11/1999, item 150. Cf. also A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, Sussex European Institute Working Paper No 45, May 2001, p. 17-18; and J. Jaskiernia, "Badanie zgodności projektòw ustaw z prawem Unii Europejskiej w sejmowym postępowaniu ustawodawczym", *in:* Państwo i Prawo, No 7/1999, p. 19-33.

During the committee part of the legislative procedure, when a draft's conformity with the EC law was considered, representatives of the Committee for European Integration took part in the proceedings together with a representative from the parliamentary legal service. This facilitated the scrutiny of the legislation during the parliamentary process and helped avoid amendments incompatible with the *acquis*.

14. Report on the implementation of the NPAA in 1999

On 4 April 2000, the Polish Council of Ministers adopted the Report on the Execution during 1999 of the National Programme of Preparation for EU Membership[201]. The Report analysed the implementation of various measures set out in the National Programme, following the same structure as the Programme. The Polish authorities stressed that ongoing monitoring was necessary in the light of the "enhanced" Pre-accession Strategy included in the Agenda 2000, part of which was the Accession Partnership[202]. Implementation of the Accession Partnership was controlled by the Europe Agreement bodies and by the European Commission. The declared purpose of the Polish authorities' Report was to form part of this monitoring system.

The basic objective of the Report was to present the priorities and tasks of the National Programme actually implemented in the course of 1999, with the description of legislative amendments, institutional changes, information actions aimed at the "end users" (economic entities, consumers, taxpayers, NGOs, etc.), as well as the financial expenditure made. Taking into account (according to the Polish Government itself) the occurring delays in approximation of laws, an attempt was made to analyse the process more in depth.

The relevant legislative changes were divided into legal acts which had entered into force and those which were still in a more or less advanced drafting and adoption stage (adopted by the Council of Ministers, adopted by the Committees of the Council of Ministers, drafting work completed/not completed at ministerial level). This was compared with the deadlines set in the National Programme and – if there were delays – the reasons for them were presented.

Further, with respect to the legal acts which had entered into force and those still in drafting stage, the evaluation of the degree of their compatibility with the corresponding EC acts was added. This section of the Report was thus to be considered as a report on the approximation of law in 1999 (until then, such reports were presented as separate documents). Similarly, while commenting on the institutional and structural changes, the implementation delays as compared with the original schedule were presented together with their cause. Such a method of presentation of the adaptation process was meant to discipline it further and to identify responsibilities for the timely implementation of particular tasks in the Ministries and Central Offices concerned. It was also supposed to help establish a diagnosis of the degree of implementation of the priorities identified in the National Programme, therefore making it easier for the Committee for European Integration to take decisions required in order to make up for the delays, especially in the legislative sphere. The content of the Report was also to serve as a basis for the information to be forwarded to the European Commission in the context of preparations for the drafting of the 2000 Regular Report on Poland's progress on the way to EU membership.

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[201]Cf. the website of the Office of the Polish Committee for European Integration. The Report referred to the National Programme as amended in 1998 and 1999, cf. E. Synowiec, "Modyfikacja Narodowego Programu Przygotowania do Członkostwa w Unii Europejskiej, *in:* Wspòlnoty Europejskie, No 7-8/1999, IKCHZ, p. 31 - 44.

[202]Cf. Chapter I.D.4.

The Report described developments concerning the degree of utilisation by Poland of PHARE funds (preparation of the relevant structures and mechanisms, including the "Institution building" chapter) and the degree of advancement of preparation of organisational structures necessary to be able to use the EU pre-accession funds (ISPA and SAPARD).

As regards the administrative capacity to apply the *acquis*, the main priority was identified as the preparation of regional administration for the participation in certain areas of Community policies as well as in Community programmes and funds. The institution in charge of this priority was the Office of the Committee for European Integration (more precisely: its Department of European Information and Training). With respect to the stage of implementation, it was admitted that there had been a delay of three months – as compared with the original deadline of November 1999 – in the adoption of the relevant draft programme. The reason given for this delay was that the relevant Ministries were late with sending back their remarks to the first draft transmitted by the Committee for European Integration in October 1999, so that the final version of the draft could only be examined by the Committee on 14 February 2000.

As regards institutional changes, it was mentioned that, by Order of the Prime Minister of 15 June 1999, the European Training Department of the Office of the Committee for European Integration had been transformed into the European Information and Training Department, which had taken up as one of its tasks the implementation of the priority in question. The Report concluded that it was imperative to take urgent action in order to carry out the foreseen training programme for employees of regional administration of all levels, as well as to set up the team of accredited lecturers for voivodship training centres.

As concerns another task – translation of the *acquis communautaire* into Polish language – the situation was considered far from satisfactory. Until the date of adoption of the Report, only some 35% of the *acquis* had been translated, which represented merely 27% of the number of pages foreseen in the National Programme of Preparation for Membership. This delay was explained partly by the failure to provide the relevant bodies (in particular, the Committee for European Integration) with funds necessary for the task and, partly, by the lack of sufficient co-ordination of translation activities between the Committee for European Integration and the Ministries and other Central Offices concerned. It was thus concluded that the setting up of such a co-ordination and verification system was indispensable without further delay, and that it was necessary to include it as one of additional tasks into the 2000 version of the National Programme.

With respect to competition policy, the Report acknowledged a delay in the preparation of the draft new Act on the Protection of Competition and Consumers[203]. The draft had been finalised by the OCCP in the end of 1998 and sent for inter-ministerial consultations in February 1999; the latter consultations had only been completed in the end of 1999. As a reason for this delay (compared with the timetable foreseen in the National Programme), the Report pointed at the high degree of complexity of the matter to be regulated, a large number of remarks and amendments introduced to the draft during inter-ministerial consultations, and the emergence of a number of points of controversy during these consultations. The consequence of this delay was that necessary executory regulations, the drafting of which was foreseen in the National Programme, had not been prepared, with the exception of a draft regulation on the calculation of turnover of undertakings participating in a merger. Further, the planned training of OCCP staff on the new Act had not been organised, as the final text was still not ready.

[203] Cf. Chapter II.B.5.

On the positive side, the Report pointed at the so-called "small amendment" to the Act of 24 February 1990 on Counteracting Monopolistic Practices (entry into force on 2 January 1999)[204], based on a draft prepared at the OCCP in 1998; the aim of this amendment was chiefly to liberalise administrative supervision over undertakings, in accordance with the spirit of Community law. Further, in the course of 1999, the OCCP prepared draft executory regulations to the 1990 Act on requirements for notifications of intended mergers and on undertakings obliged to notify intended mergers (adopted by the Council of Ministers on 7 December 1999, entered into force on 29 December 1999), and on detailed procedure of inspections in undertakings.

In conclusion on competition policy, the Report stated that delays with respect to anti-trust were generally minor and the degree of compatibility with the EC law sufficiently high to envisage removing this priority from the 2001 version of the National Programme.

15. April 2000 – the revised NPAA

On 26 April 2000, the Polish Council of Ministers approved a new, updated version of the National Programme of Preparations for EU Membership[205]. The Programme included a detailed enumeration of actions – in the main, the approximation of laws and administrative adaptations – in several areas, including competition policy (covering also the approximation of anti-trust legislation). The Programme was accompanied by several Appendices, concerning the financial support to the adaptation process by the EU (PHARE, SAPARD and ISPA). It thus roughly followed the structure of the Commission's Regular Reports.

The National Programme was an updated and modified version of the earlier Programme of June 1998[206]. The necessity to update the Programme in question was a consequence of the decision of the Council of Ministers of 4 May 1999, obliging the Secretary of the Committee for European Integration to monitor and verify the implementation of the Programme, as well as of the Resolution of the Sejm of 18 February 2000 concerning the preparations of Poland for EU membership, especially as regards the need for the Government to attach the highest priority to the approximation of Polish law to the EC law. Further, the updated Accession Partnership and the Commission's 1999 Regular Report, as well as Poland's recent undertakings in the context of accession negotiations, were also taken into account.

The new draft Programme was elaborated by the Office of the Committee for European Integration in collaboration with the Ministries and Central Offices engaged in the process of European integration. It was approved as a draft by the Committee for European Integration on 10 April 2000. The declared objectives of the revised Programme were to consolidate that policy document, to render more precise (based on the engagements of Poland set out in the negotiating positions) the deadlines for legal and institutional adaptation actions, and to identify in a fuller and more precise manner the basic adaptation priorities (to be implemented in the pre-accession period – i.e., according to the Polish Government's ambitious goal, until the end of 2002), as well as to define new priorities stemming from the socio-economic policy of the Government and from the modified version of the Accession Partnership.

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[204] Cf. Chapter II.B.4.

[205] Cf. the website of the Office of the Polish Committee for European Integration, www.ukie.gov.pl.

[206] Cf. Chapter II.A.10.

The division between short-term and medium-term (i.e. till the end of 2002) priorities was retained. It was envisaged to continue the implementation of certain adaptation objectives that had not been achieved in the period 1998 – 1999. The new version of the Programme contained, in accordance with the Sejm's Resolution of 18 February 2000, a timetable of draft laws to be introduced by the Government. In this context, it was stressed that the existing system of control of EC conformity of draft laws provided by the executive branch had been supplemented by the new procedure of checking the EC conformity of draft laws produced in the Parliament[207]. It was expected that these changes would ensure that new or amended legislation in Poland would be more coherent and more conform with the EC law, irrespective of the origin of legal drafts. Finally, it was stressed that planned adaptation actions would support the implementation of engagements made by Poland in its negotiating positions.

After having approved, in 1999, the previous version of the Programme, the Council of Ministers obliged the Secretary of the Committee for European Integration to supplement the Programme with tasks stemming from the screening carried out in the course of accession negotiations, as well as to add (as necessary) new tasks and modify the priorities. The need to monitor and amend as necessary the Programme was the consequence of the assumption that the Programme would have an open nature, subject to periodic clarification and adaptation to changing circumstances, especially in the context of ongoing accession negotiations.

In order to increase the efficiency of the Programme and to create a closer link between adaptation tasks and undertakings made by Poland in the course of the negotiations, the modified Programme was drafted along the structure of 29 negotiation chapters (positions), i.e. undertakings were formulated as Programme tasks and subjected to monitoring. The critical remarks of the European Commission formulated in the 1999 Regular Report were also taken into account. Thus, more attention was paid to the detailed presentation of sources of financing of particular tasks, compatibility with the results of the screening exercise was ensured, deadlines for realisation of particular priorities were set more precisely, and adaptation tasks were more closely linked with institutional developments. Further, participants engaged in integration tasks were subjected to a stricter discipline.

The description of each priority/task was modified as compared with the previous version of the Programme and contained:

- a short description of a task with indication of its basis, justifying the necessity of its realisation as well as (as appropriate) indication of the progress in its implementation (if the task was a continuation of a previous task identified in the first version of the Programme);

- a description of a priority with indication of the final aim envisaged and possible intermediate objectives;

- institutions responsible for programming of tasks and their implementation (both leading and co-operating institutions);

- a short diagnosis of the extent of incompatibility of the Polish law with the EC law;

[207]Introduced by the Resolution of the Sejm of 19 March 1999, amending the Rules of Procedure of the Sejm (cf. Chapter II.A.13).

- a timetable of indispensable legislative changes (the tables contained, on the one hand, relevant Community acts and, on the other, corresponding drafts of Polish legal acts implementing the Community legislation, together with deadlines – as precise as possible – for their implementation);

- necessary institutional changes (setting up of new institutions and modification of the mandate of the existing ones);

- additional actions indispensable for the entry into force of new regulations or for the setting up of new institutions (any administrative or judicial procedures to be modified, modification of procedures for the control of respect of technical norms, etc.);

- financing – assessment of necessary expenditure and sources of their financing (PHARE, or local government budget, private capital, credits from international financial institutions) for the period 2000 – 2002, with a division according to the basic categories of expenditure (investments, computer equipment with software, recruitment of new staff, training, expert opinions, analytic works, legal opinions, translation and any other categories concerned).

In addition to the above-mentioned elements, attention was paid in respect of some of the priorities to the information for end-users (companies, consumers, lobbies, associations of producers, etc.) about practical consequences of modifications introduced in the legal system and in the mechanisms of functioning of the economy.

The realisation of these priorities was to be subjected to ongoing monitoring by the Polish authorities. This was to be the task of the Office of the Committee for European Integration, in co-operation with the Ministries and other institutions involved in the European integration process. The assessment of the degree of attainment of these priorities was to be performed annually in the form of a report drafted on the basis of contributions provided by the Ministries and Central Offices concerned. This report was to be presented by the Office of the Committee to the Committee itself, together with suggestions and drafts of relevant decisions.

As regards specifically competition policy, the Programme contained two priorities, covering anti-trust and State aid. With respect to the former, the Polish authorities again expressed the view that the existing Polish law was already generally compatible with the EC law. It was also recalled that, in its negotiating position concerning this chapter, the Polish Government had undertaken to adopt and implement the entire Community legislation on anti-trust, and had declared that Poland would not seek any transition periods in this regard. Further, it was recalled that the EU had (in particular, in the Commission's 1999 Regular Report) stressed that it was necessary to reinforce the institutions and procedures in the field concerned, as well as to intensify the relevant training of civil servants at all levels of public administration. Therefore, the main task to be fulfilled in the framework of this priority was to achieve full harmonisation of Polish law with the EC legislation and to ensure its appropriate implementation and enforcement.

The priority was further described in the following manner:

1. final objective: full harmonisation and implementation of competition law, covering merger control, restrictive agreements and abuse of dominant position;

2. intermediary objectives: adoption of the new Law on the Protection of Competition and Consumers (harmonisation with Articles 81 and 82 EC); issue by the Council of Ministers of appropriate executory regulations; ensuring efficient enforcement via institutional reinforcement of relevant administrative bodies;

3. institutions responsible: Office for Competition and Consumer Protection.

As to the manner of achieving these objectives, it was again stated that the existing Polish competition law was nearly totally compatible with the EC law, the only incompatibilities consisting of the lack of possibility to issue group exemptions, a different formulation of the "rule of reason", the relative character of the prohibition of abuse of dominant position, and the absence of obligation to the obtain approval by the competition authority for mergers with active participation of persons not engaged in an economic activity[208].

What followed was a detailed timetable of legislative and regulatory amendments to be introduced in order to conform fully with a very exhaustive list of primary and secondary legislation in the field (Treaty provisions; Council Regulations Nos. 17/62, 1215/99 and 2821/71; Commission's group exemptions concerning research and development, insurance, vertical restraints, specialisation, liner conferences, technology transfers, franchising, motor distribution, exclusive purchase and exclusive distribution; Council Regulations on specific rules on competition in transport sector; the Merger Regulation, and the procedural Commission Regulation No. 2842/98). It was thus foreseen that relevant amendments to the Polish Law on the Protection of Competition and Consumers would be the subject of inter-ministerial consultations in February 1999, followed by the adoption of a draft law by the Economic Committee of the Council of Ministers by 30 March 2000, and by the Council of Ministers in the second quarter of 2000. Further, it was planned that the amendments would be adopted by the Parliament in the last quarter of 2000, and enter into force in the first quarter of 2001.

As to the executory regulatory acts, the plan was to have them subjected to inter-ministerial consultations in the last quarter of 2000, have them discussed by the Economic Committee of the Council of Ministers in the second quarter of 2001, followed immediately by their entry into force[209]. Concerning the necessary institutional changes, it was envisaged – in the course of 2001 – to set up, within the structure of the Office for Competition and Consumer Protection, a new Department of Analysis and Control, as well as an Office of Anti-trust and Unfair Competition Jurisprudence. Further, detailed plans of recruiting extra staff, of training sessions and of reinforcing consultative functions of the Office with respect to demonopolisation and liberalisation of the economy, were set out together with deadlines extending over the years 2001 and 2002.

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[208] As a matter of fact, these differences were quite important, especially as regards abuse of dominant position; it is difficult to avoid an impression that the Polish Government intentionally played down their impact.

[209] Unlike in the case of the Act itself, this part of the programme – both as regards the list of regulations and the timing of their adoption – was not fully implemented. Cf. Chapter II.B.5. and following.

Finally, there was a table setting out the Polish Government's estimates of needs in terms of financing and specifying the expected sources of this financing over the period 2000 – 2002. In general, it was expected that 450.000 EUR would be spent in 2000 (exclusively from PHARE sources), 708.000 EUR (PHARE) and 1.716.000 PLN (from the State Budget) in 2001, and 169.000 EUR (PHARE) and 740.000 PLN (State Budget) in 2001, on items such as infrastructure, computer hardware and software, recruitment of new staff, training, consultancy, translations, etc.

16. July 2000 – another modification of the approximation framework

The framework for approximation of law was further modified in July 2000, when the Parliamentary legislative procedure was amended to an important extent[210]. This included the setting up of a specialised European Law Committee and the introduction of new, tight time limits for particular stages of the procedure. According to Article 56 (w) of the Sejm's Rules of Procedure, a draft Act transmitted by the Government and labelled as "approximation Act" had to be submitted to the European Law Committee. Only in exceptional circumstances, and at the request of the President of the Sejm, would such a draft be analysed by a sectoral parliamentary committee; however, in any event, such a draft would be transmitted to the Sejm's European Integration Committee.

In September 2000, the Polish authorities produced another bulky document: an Addendum to the Information for the European Commission's Regular Report on Poland's Progress Towards Accession to the EU (1999 – 2000), in which they announced an acceleration of the pace of law approximation process. An agreement to this effect had been reached on 10 July 2000 between the Presidents of both Chambers of the Polish Parliament and the Prime Minister, aiming principally at improving co-ordination and co-operation in the adoption and implementation of the *acquis communautaire*.

The great innovation was that the Sejm's European Law Committee was given the power to elaborate draft so-called "adjustment laws" (or "European Law Acts")[211], which would be composed of provisions amending several laws at a time, in order to bring all of them in line with the EC law simultaneously. This was intended to significantly speed up the process, allowing to avoid adopting full amended versions of each law concerned. There were two types of adjustment laws: collective laws (adjusting Polish provisions in many fields to the EC law) and systemic laws (adjusting Polish provisions in a single field to the EC law).

The preparation of adjustment laws was carried out pursuant to the Resolution of the Committee for European Integration of 24 July 2000 on the rules of proceeding with the Governmental draft laws adjusting Polish legislation to the EC legislation, as well as on co-ordination and revision of translations of Community acts. According to that procedure, draft adjusting laws were prepared by the competent Ministries or Central Offices. After inter-ministerial consultations, the Office of the Committee for European Integration issued opinions on the drafts as regards their compliance with EC the legislation and with the Government's integration policy.

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[210] Cf. A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, Sussex European Institute Working Paper No 45, May 2001, p. 18.

[211] Cf. A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, Sussex European Institute Working Paper No 45, May 2001, p. 12.

The European Law Committee undertook an impressive programme of analysing and preparing draft laws: for example, 14 of them were analysed and brought to full conformity with the EC law in August 2000 alone (including the amended Law on Competition and Consumer Protection), thirteen drafts were examined by the end of September 2000, and there were 22 draft laws scheduled by the Government for examination until the end of 2000.

In order to – as the Polish Government formulated it – "give an appropriate dimension to the approximation work"[212], on 16 June 2000 a post of Under-Secretary of State responsible for European legislation matters was created in the Office of the Committee for European Integration. Further, as of 1 August 2000, the co-ordination and implementation of law approximation actions had been conferred to the newly created European Legislation Department at the Office of the Committee for European Integration.

On competition policy, the Addendum to the Information for the Commission's 2000 Regular Report presented the progress made between September 1999 and June 2000. New pieces of legislation included an executory regulation to the 1990 Act on Counteracting Monopolistic Practices, concerning the requirements for notification of intended mergers[213], and a Regulation on the procedure of carrying out inspections of undertakings[214]. The draft new Act on the Protection of Competition and Consumers, adopted by the Council of Ministers on 26 April 2000, had been submitted to the Sejm on 15 May 2000. According to the Polish Government, the new Act was to harmonise the Polish law with the Community law by way of introducing the institution of block exemptions, the *de minimis* rule and the adjustment to the *acquis communautaire* of the rule of reason[215].

Moreover, the Act contained new provisions adjusting the existing rules on merger control to the Council Regulation No. 4064/89, *inter alia* through the increase of notification thresholds up to 50 million EUR (joint turnover of entities participating in the concentration); this was aimed at the elimination of notifications of intended mergers which had no impact or an insignificant impact on competition on the relevant market. In addition, it was planned to extend the obligation to notify the intention to merge to natural persons. Further, modifications of provisions governing the proceedings before the President of OCCP were to be introduced in order to increase the efficiency of this authority.

The Addendum also contained information about other steps taken by the Polish Government in the competition sphere, e.g. the ongoing implementation of the 1998 Strategy for "Counteracting Monopolies and Strengthening Competition"[216]. These measures included *inter alia*:

a/ an ongoing de-monopolisation and liberalisation of certain sectors (e.g. telecommunications, postal services, energy sector, rail transport);

b/ efforts to eliminate market entry barriers;

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[212]Cf. Addendum to the Information for the European Commission's Regular Report on Poland's Progress Towards Accession to the EU, Warsaw, September 14, 2000, p. 8.

[213]Council of Ministers Regulation of 7 December 1999, Dz.U. Nr 99, poz. 1161. It entered into force on 28 December 1999 and replaced the previous Regulation of 13 July 1995.

[214]Council of Ministers Regulation of 15 February 2000, Dz.U. Nr 13, poz. 159. It entered into force on 14 March 2000.

[215]Cf. Chapter II.B.5.

[216]Cf. also Chapter III.A.3.

c/ implementing a new State aid policy; and

d/ a reinforced action against excessive market concentration

In the course of 1999, the OCCP had carried out monitoring of the competition level in selected sectors of economy. Based on information from the Ministries responsible for the implementation of different tasks included in the Strategy, the OCCP had drafted and presented to the Economic Committee of the Council of Ministers a general report on the Strategy's implementation. The findings of the report with respect to particular sectors of the economy were as follows:

a/ in the telecommunications sector, prerequisites for de-monopolisation of the market of interzonal services had been created by a tender evaluation and the granting of licences to three independent operators;

b/ in the energy sector, work aimed at the preparation of an integrated schedule for establishing the energy market and privatisation of companies operating in this sector had been accelerated;

c/ in the coal mining industry, restructuring activities were continued in accordance with the amendments to the Government Programme for the "Reform of Coal Mining Industry in Poland in the years 1998-2000", adopted by the Council of Ministers;

d/ in other areas (*inter alia* fuel and gas sectors) work was ongoing in order to update the restructuring and privatisation programmes.

Summing up the overall situation in the competition field, the Polish Government reiterated its negotiating engagement to fully harmonise and implement anti-trust provisions by 31 December 2002. It considered that the existing anti-trust legislation was already almost totally compatible with the relevant EC legislation; full compatibility was to be achieved after entry into force of the new competition act.

17. The Commission's opinion in the 2000 Regular Report

In the 2000 Regular Report on Poland's Progress towards Accession[217], the Commission noted the fresh impetus in the adoption of *acquis* since the Sejm debate on European integration in February 2000 and the creation of the Parliamentary European Law Committee. However, although admitting that much had been done towards regaining momentum, the Commission stressed that these efforts would have to be further intensified and the flow of legislation likewise increased. The call for further efforts applied even more to the strengthening of the administrative capacity to apply the *acquis*. In this respect, the Commission noted some developments, in particular in the civil service legislation, but considered them not to be commensurate with the progress in adopting legislation.

[217]Issued on 8 November 2000, cf. the European Commission's D. G. for Enlargement's website.

The Commission also assessed the modifications introduced since the previous Regular Report in Poland's NPAA. It noted that the Polish administration had made a considerable effort to improve the NPAA (i.e. the National Programme for the Preparation of EU Membership). The main innovation had been the development of a uniform tabular style for the report, which was intended to bring all the relevant information together in a more user-friendly manner. However, the Commission stressed that, in certain areas, the adoption of the tabular approach, while adding clarity in some respects, did reduce the amount of information on the current state of play making it difficult to judge the base line from which progress could be measured.

In the Commission's view, the revised NPAA, adopted by the Polish Council of Ministers in April 2000, was an improvement as compared with the previous version also because it attempted to take into account the comments made in the 1999 Regular Report concerning the coherence between commitments, clear statement of priorities and necessary financial resources.

The Commission was pleased to note that there had been progress in all the above aspects, although to varying degrees. The coherence between the NPAA and commitments made in the negotiations had been improved although there were still instances where there was discord on points of detail. Actions were better prioritised, but there remained a tendency to include such a vast range of issues that, as observed by the Commission in the previous Regular Report, the real priorities were obscured. Administrative reform was also dealt with in some areas in more detail, although in others the description remained vague.

The Commission considered that the areas where the greatest improvements had still to be made concerned the forward looking elements of the report and the financial perspectives. There was still a tendency for the NPAA to reflect what had already happened or at least had already been decided, for example in the context of PHARE programming, rather than looking towards future areas of work. This, in the Commission's view, tended to limit the effectiveness of the document as a policy tool for programming future assistance through PHARE, ISPA and SAPARD. The Commission stressed that the above-mentioned situation was further exacerbated by continued weakness in the treatment of the financial perspectives themselves.

There had been some progress since the 1999 Regular Report in linking financial needs to the priorities. However, the Commission pointed out that, in many instances, these were either short-term perspectives or the broader costs of implementing the *acquis* had not been duly taken into account. In this context, the Commission stressed that the preparation of a budgetary impact analysis for the approximation process was an essential issue to be addressed to ensure that both further revisions and Poland's pre-accession strategy would be sustainable. The Commission added that there was currently a lack of clarity with regard to the financing in a number of areas, for example the environment.

As regards competition policy, the Commission acknowledged that significant progress had been made since the previous regular report in the area. In the field of anti-trust *acquis*, the Polish Government had adopted two executory regulations which had simplified and clarified anti-trust proceedings: firstly, in December 1999, the regulation concerning the detailed requirements for notifications of intended mergers, and secondly, in February 2000, the regulation on detailed terms and procedures of conducting controls of entrepreneurs' compliance with the provisions on counteracting monopolistic practices[218].

[218] Cf. Chapter II.A.16.

Overall, as regards anti-trust, the Commission considered that the Polish legislation was to a great extent compliant with the EC law. Regarding the implementation, the main challenge was now to ensure that the OCCP gives priority to cases that concern the most serious distortions of competition (e.g. cartels). Further alignment was still necessary, especially in view of developments in the *acquis* on vertical restraints.

Speaking of administrative capacity, the Commission noted that the OCCP had faced an expanding role over the last few years as its key activities had been enlarged to cover merger control, counteracting monopolistic practices and consumer protection[219]. Furthermore, the OCCP was in charge of the legislative work that had contributed to the harmonisation of the Polish antimonopoly and consumer protection laws with the European Community legislation. Given the existing and new responsibilities of the OCCP, the Commission stressed that it was of crucial importance that the overall resources of the Office are sufficient. The fact that the Office was not classified as a Ministry resulted in lower levels of remuneration which in turn made it more difficult to retain staff.

18. April 2001 – the Government's report on implementation of the NPAA in 2000

On 20 April 2001, the Polish Government adopted the Report on the Realisation during 2000 of the National Programme of Preparation for EU Membership[220]. The Report, prepared by the Committee for European Integration and presented first to the Council of Ministers and subsequently to the Parliament, discussed legislative and institutional changes that had taken place in the course of 2000, as well as other measures taken in order to enable the implementation and enforcement of the new legislation.

The presentation followed the order of chapters and priorities set out in the National Programme, and each chapter was concluded with an assessment of the degree of implementation of the priorities concerned. As regards approximation of laws, the analysis identified the acts that had entered into force and those that were still at various stages of adoption procedure, also as compared with the deadlines set in the National Programme. Wherever delays were discovered, an attempt was made at identifying their cause. This was facilitated by the adopted style of analysis, specifying also the progress made on intermediate stages of legislative work, i.e. within the particular Ministries and central offices. Further, all legal acts were analysed in the light of their compatibility with the *acquis*.

The Polish authorities stressed that the process of law harmonisation had accelerated in the course of 2000, mainly due to the changes in the National Programme and Poland's engagements in the context of accession negotiations. This was reflected in the updated timetable of work on harmonising legislation, assuming shorter deadlines for its adoption. Further, a new mechanism was introduced, under which the Committee for European Integration assessed the progress in approximation efforts in certain key sectors and regularly reported to the Council of Ministers about this progress. The Report also referred to the establishment of the Sejm's European Law Committee[221] as well as the Senate's European Legislation Committee. Both committees represented all political options present in the Parliament, confirming the importance which the legislative power attached to the legal approximation issue.

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219 Cf. also Chapter III.A. 1.

220 Cf. the website of the Polish Committee for European Integration, www.ukie.gov.pl.

221 Cf. Chapter II.A.16.

According to the Report, 64 draft harmonisation laws had been adopted by the Council of Ministers between April and the end of 2000, in accordance with the Government's legislative work plan. In addition, each draft law was accompanied, upon its transmission to the Parliament, with a table illustrating the degree of its conformity with particular provisions of the EC law; a statement of reasons justifying the harmonising character of the draft; an opinion on conformity with the principles of the Polish EU integration policy; and revised translations of corresponding Community acts. The Report paid particular attention to the setting up of administrative structures necessary to implement and enforce the approximated legislation. Progress in this field was analysed in respect of each chapter and each priority of the National Programme.

As regards, specifically, the chapter on competition policy, the Government pointed out the adoption, on 15 December 2000, of the new Act on the Protection of Competition and Consumers[222], which was to enter into force on 1 April 2001. The Act, which was considered by the Polish authorities as fully compatible with the EC provisions on mergers, restrictive agreements and dominant positions, was adopted in accordance with the envisaged timetable. Concerning draft acts, the Report made reference to a series of executory regulations to the above-mentioned Act, which were to be subjected to inter-ministerial consultations and submitted to the Council of Ministers in near future (in addition, their preliminary versions had already been presented to the Sejm on 8 August 2000). These draft acts were Regulations of the Council of Ministers on: the method of calculation of the turnover of undertakings; the method and procedure of carrying out competitions for the post of President of the Office for Competition and Consumer Protection; the fees imposed on requests to initiate anti-trust proceedings; and the precise requirements for notifications of planned mergers.

The Report also contained quite detailed information on the expenses incurred in the area concerned, which totalled 663.900 PLN in the course of 2000[223]. Summing up this chapter, the Polish Government considered that the objectives from the National Programme in respect of 2000 had generally been met (with the exception of a minor delay in the drafting and sending for inter-ministerial consultations of the draft executory regulations to the new Act on the Protection of Competition and Consumers, the first of which had been sent for consultations in mid-February 2001).

The new Act had a comprehensive character and was considered by the Government to have a "high degree" of conformity with the EC law. The same was said of the executory regulations, which were foreseen to enter into force in the second quarter of 2001. As to the administrative capacity, the authorities were aware of the need to increase the resources and the level of staff expertise of the Office for Competition and Consumer Protection.

[222] Dz.U. Nr 122/2000, poz. 1319. Cf. Chapter II.B.5.

[223] For training courses: 21.200 PLN from the State budget and 149.900 PLN from PHARE; for expert opinions and consultations: 228.600 PLN from PHARE; for translations: 24.100 PLN from the State budget and 14.600 PLN from PHARE; other purposes: 225.500 PLN from PHARE; total: 45.300 from the State budget and 618.600 PLN from PHARE. The Report also made reference to a twinning programme in the area of competition policy, run together with the French (as leading partner) and Finnish competition authorities.

19. The 2001 version of the Polish NPAA

On 12 June 2001, the Polish Government adopted an updated and amended version of the National Programme of Preparation for EU Membership[224]. The purpose of the amendment was to take account of new legal acts adopted by the Community since the previous version of the National Programme, as well as of new elements of Community policies, the progress of transposition of the *acquis* in Poland and new engagements of Poland in the context of EU accession negotiations. This was already the fourth version of the National Programme, which also reflected the Accession Partnership priorities, conclusions of the Report on the implementation of the National Programme in the course of 2000[225] and – last but not least – the Commission's 2000 Regular Report[226]. In view of the acceleration of the legislative drafting and adoption activity of the Polish Government and Parliament over recent months (with the adoption of 103 draft harmonising acts by the Council of Ministers, and the passing of 53 of such acts by the Sejm), the Government focussed its attention on the drafting and adoption of executory acts, setting up necessary institutions and improving administrative capacity.

Concerning competition, the Government considered that its main remaining tasks were the completion of a full transposition of the *acquis* into the Polish legal system and ensuring the appropriate implementation and enforcement of relevant provisions; in this context, reference was made in particular to the Commission's remark from its 2000 Regular Report that the Office for Competition and Consumer Protection should focus its activity on the most serious violations of anti-trust rules and on further harmonisation of the rules concerning vertical restraints. The Polish authorities stressed that the new Act on the Protection of Competition and Consumers had brought about welcome changes in this respect e.g. by harmonising the "rule of reason" and the *de minimis* notions with those in force in the Community, laying down the legal basis for group exemptions, raising the thresholds for merger notifications, etc. The Act also foresaw the issue by the Office for Competition and Consumer Protection of a Journal, in which selected decisions of the Office President and official guidelines on interpretation of competition provisions would be published.

As concerns group exemptions (including those relating to agreements in air transport, shipping, insurance and car sector), the updated National Programme envisaged their adoption in the second half of 2002[227]. The adoption of the draft Council of Ministers regulation on the requirements for merger notifications was planned much sooner - in the second quarter of 2001. In the course of the same year, the Government intended to set up, within the OCCP, a Competition Jurisprudence Department. For 2002, the authorities' intention was to create a new Department of Analysis and Control within the Office. The National Programme also contained a detailed plan of actions necessary to enable the entry into force of the new acts as well as the setting up of new administrative divisions, such as the recruitment of eight persons in the Competition Jurisprudence Department (in 2001) and 16 persons in the Department of Analysis and Control (in 2002), recruitment of 9 extra staff (one for each regional office) at the OCCP, holding training sessions for the Office staff and members of the judiciary as well as of the business community (in the course of 2001 and 2002), and strengthening the advisory powers of the Office in the context of further liberalisation of certain sectors of the economy.

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[224] Cf. the website of the Polish Committee for European Integration, www.ukie.gov.pl.

[225] Cf. Chapter II.A.18.

[226] Cf. Chapter II.A.17.

[227] These objectives were only partially achieved (as regards the block exemption concerning the insurance sector). The group exemption covering agreements in the car sector was adopted in 2003, and those concerning air transport and shipping have not yet been issued (July 2007). Cf. also Chapter II.B. 10 and 11.

Further, the National Programme set out in a detailed manner the expected sources of financing of the priorities and actions in the anti-trust area for the period 2001 - 2002. The Government envisaged the total expenditure of 8.406.370 PLN, including 2.542.400 PLN from the State budget, the remainder coming from PHARE sources (PHARE 1999 and PHARE 2000). The planned expenses were presented by category (infrastructure and equipment; hardware and software; recruitment of new staff; training; legal expertise and consultations; translations; other) and divided between the expenses to be incurred in 2001 and 2002. Generally, the budget was expected to raise between 2001 and 2002 (in the first of these years, the Polish Government planned to spend 671.500 PLN from own resources and receive 572.200 EUR from PHARE; in the second: 1.870.900 PLN from own resources and 746.600 EUR from PHARE).

20. The Commission's assessment in the 2001 Regular Report

In the 2001 Regular Report[228], the Commission acknowledged that, since the previous Regular Report, there had been intensive work on the transposition of the *acquis* into the Polish legislation. In some areas there had been "notable breakthroughs" with regard to the adoption of primary legislation, while in others there had been a steady consolidation of the achievements of 2000 through the adoption of the necessary secondary legislation on the basis of the framework laws adopted in the preceding year.

The Commission welcomed this process of consolidation and, as it formulated it, "putting flesh on the legislative bones" and stressed that it was vital in terms of the future ability to implement the *acquis*, as well as that it was necessary to intensify efforts in this area. The need for further efforts applied even more to the strengthening of the administrative capacity - despite further positive developments, the Commission stressed that the divergence between progress in adopting legislation and adapting administrative structures remained great. This was reflected in the extent to which the short-term priorities of the Accession Partnership had been addressed.

Assessing Poland's record in meeting the Accession Partnership priorities and objectives set out in the NPAA, the Commission was relatively positive as regards competition, although the administrative structures still required reinforcement. As for the NPAA itself, the Commission praised the Polish Government for having adopted a revised version[229], which was said to represent "further incremental progress" over the 2000 version. The strengths of the 2000 document had been built on, notably the uniform tabular style for the report which brought all the relevant information together in a more user-friendly manner, as well as coherence between the NPAA and commitments made in the negotiations and the prioritisation of actions. Efforts had also been made to address the weaknesses of the previous versions, such as the lack of information on institutional arrangements and the limited information on financial aspects, although the Commission stressed that more could have been done in this respect. Further, the Commission again noted the persistent tendency to reflect what had already happened or at least had already been decided, e.g. in the context of PHARE programming, rather than looking towards future areas of work. In the Commission's view, this would, in particular for certain chapters, limit the effectiveness of the NPAA as a policy tool for programming future assistance through PHARE, ISPA and SAPARD.

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[228] SEC (2001) 1752, issued on 13 November 2001, cf. the European Commission's D. G. for Enlargement's website.

[229] Cf. Chapter II.A.19.

On competition policy, the Commission acknowledged that, since the previous Regular Report, Poland had made significant progress in the adoption of new legislation aligning the legal framework with the *acquis*. However, it stressed that this progress had not been reflected in the development of a strong enforcement record.

In the field of anti-trust, on the legislative side, the new Act on the Protection of Competition and Consumers had entered into force in April 2001. This new legislation would enable the Council of Ministers to issue block exemptions and to introduce exemptions related to agreements of minor importance (*de minimis*)[230]. The Act also foresaw the raising of notification thresholds in merger cases (to 50 mln EUR), thereby improving the old control system that had resulted in a large number of mostly unnecessary merger notifications. Further, the new legislation developed procedural rules, and gave an independent status to the competition authority. Two executory regulations to the Act had been adopted in the same period, concerning the calculation of turnover of undertakings and administrative fees.

As regards the OCCP[231], the Commission noted that it was now composed of the Head Office in Warsaw and nine regional branch offices, with an overall staff of 222 persons. Poland's enforcement record for 2000 consisted of 297 decisions in the anti-trust area (16 on restrictive agreements, 279 on abuse cases and 2 others). In 57 antimonopoly proceedings, the OCCP had imposed fines. The highest fine, amounting to 55 million PLN (14.8 million EUR), had been imposed on the Polish Telecom (Telekomunikacja Polska S.A.). The OCCP had also taken 701 decisions in the area of merger control[232].

Overall, the Commission stated that Poland had adapted its basic legislation so as to contain the main principles of anti-trust. The performance with regard to establishing a credible record of enforcement was, however, rather more variable.

In the area of anti-trust, Poland’s legislation contained the basic principles of Community anti-trust rules, concerning restrictive agreements, abuse of dominant position and merger control. The adoption by Poland of Community block exemptions was now opportune, in line with the Community's new policies on vertical restraints. The OCCP appeared to the Commission to have a reasonably extensive enforcement record, but the Commission estimated that it would be useful to establish a more deterrent and effective fining policy. Priority, in the Commission's opinion, had to be given to cases that concerned the most serious distortions of competition.

As concerns administrative capacity, the Commission was of the view that the OCCP was an independent authority with reasonably sufficient resources and expertise. However, the Commission stressed that the real test of its capacity would come as it strove to develop a good record on enforcement. In this context, it was essential that investments in institution building continue, notably in training (including the judiciary) and IT facilities.

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[230] Cf. Chapter II.B.5.

[231] Cf. Chapter III.A.

[232] Cf. more information on the OCCP’s enforcement activity in Chapter III.A.2.

21. Polish report on the NPAA's implementation in 2001

The Commission's remarks were taken into account by the Polish authorities in the context of the evaluation of the implementation of the NPAA (or, as the programme was called in Poland, the National Programme of Preparation for EU Membership). In the Report on the Programme's Implementation in 2001[233], the Polish Government assessed *inter alia* Poland's progress in the transposition of the *acquis* in the competition policy area. As regards anti-trust, the authorities were satisfied with the timely adoption of the Council of Ministers Regulations on the calculation of turnover of undertakings participating in a merger[234] and on the detailed procedure and methods of carrying out inspections of undertakings and associations of undertakings in the course of proceedings before the President of the OCCP[235]; as well as the Prime Minister's Regulations on the method and procedure of holding competitions for the post of President of the OCCP[236], and on the amount of fees required for applications in the anti-trust proceedings as well as on the methods of their payment[237].

However, it was expected that the draft updated Council of Ministers Regulation on the detailed requirements for notification of planned mergers (replacing the older regulation of 7 December 1999) would be adopted before the end of March 2002 i.e. some 9 months behind schedule. Furthermore, one important outstanding issue - to be settled in 2002 - was the adoption of regulations on group exemptions. Likewise, the Government was obliged to acknowledge that the setting up of the Competition Jurisprudence Department at the OCCP had not taken place according to the planned timetable. The reason given for this delay was that, basically, the authorities were not convinced about the necessity to create such a department, as its envisaged tasks were satisfactorily performed by the Office's Legal Department.

On the positive side, the Department of Analysis and Control - the main task of which was to carry out market analyses - had been set up as foreseen, in December 2001. The Government also considered that it had accurately implemented the National Programme as regards the training activities for the staff of the OCCP, as well as for the judiciary and companies. Among the training sessions for the Office's staff, one could mention courses on group exemptions, on cartels particularly distorting competition (in the light of the Swedish experience), on opening up for competition of natural monopolies (based on the French experience), etc. The cost of all these activities amounted to 597.400 PLN, out of which 510.100 PLN came from PHARE'99 and PHARE'2000.

Among other things, the Report focussed on Poland's progress in the translation of the *acquis*. The main institution responsible for the implementation of this task was the Office of the Committee for European Integration (and, more precisely, its Translation Department), supported by all the Ministries and Central Offices concerned. Also in this respect, the Government was obliged to acknowledge delays (instead of the planned 40.000 pages, some 28.000 pages had been translated, out of which some 4.000 verified), mainly due to backlogs in certain Ministries and Central Offices. Despite a significant reinforcement of the staff of the Translation Department, its existing resources did not allow it to do more than sample checks of the quality of translations produced by outside companies.

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[233] Adopted by the Committee for European Integration on 22 February 2002, cf. the Committee's website, www.ukie.gov.pl.

[234] Entered into force on 28 June 2001, Dz.U. Nr 60/2001, poz. 611.

[235] Entered into force on 27 October 2001, Dz.U. Nr 116/2001, poz. 1240.

[236] Entered into force on 21 July 2001, Dz.U. Nr 69/2001, poz. 720.

[237] Entered into force on 5 May 2001, Dz.U. Nr 34/2001, poz. 404.

On the positive side, a new translation database, accessible to all users, had been initiated in June 2001. Further, the cooperation with the European Commission (especially TAIEX[238]) had intensified and, for the first time, there had been contacts regarding translations with the relevant services of the European Court of Justice and the Court of First Instance. Nevertheless, the authorities did acknowledge that further efforts were necessary, especially as regards the verification of translations. In order to meet the deadline of May 2003 for the completion of the translation process, it was envisaged to strengthen the coordination of work between various structures involved. As regards the jurisprudence of the Community Courts (estimated by the Polish Government to cover 18.000 pages), the authorities intended to entrust with the task of translation work the Office of the Committee for European Integration; however, the translations' verification would be carried out at the Ministry of Justice.

22. The Commission's 2002 Regular Report

In the 2002 Regular Report[239], the Commission focussed *inter alia* on the development of relations between the EU and Poland in the context of future accession. In this regard, attention was drawn to the adoption, in April 2002, of a joint Action Plan to strengthen Poland's administrative and judicial capacity. The revised Accession Partnership adopted in January 2002 had served as the point of departure in this exercise. The purpose of the Action Plan was to identify jointly the forthcoming steps required for Poland to achieve an adequate level of administrative and judicial capacity by the time of accession, and ensure that all necessary measures in this regard were taken, providing Poland with targeted assistance in areas that were essential for the functioning of the enlarged EU.

In this context, the Commission pointed at the PHARE programme (under which 342.2 million EUR had been allocated for 2002 for the measures foreseen under the National Programme, as well as an additional 51.8 million EUR for institution building), which also included an exceptional additional assistance (250 million EUR) to accompany negotiating countries' efforts to strengthen administrative and judicial capacity. The Commission assessed positively the impact of various twinning projects under way in Poland (17 of them were still ongoing and/or nearing completion under PHARE 1999, 44 in the framework of PHARE 2000, 39 under PHARE 2001, and 34 were foreseen under PHARE 2002). The Commission noted with satisfaction that almost all "old" EU Member States were involved in Poland and that a wide range of policy sectors were covered.

Regarding competition policy, the Commission noted Poland's further progress since the previous Regular Report. The Act on the Protection of Competition and Consumers[240], in force since 2000, contained the basis principles of Community anti-trust rules as regards restrictive agreements, abuse of dominant position and merger control. Further alignment with the *acquis* had taken place, e.g. in October 2001, the Regulation of the Council of Ministers on conducting inspections of firms in the course of anti-trust proceedings had entered into force, and the Regulation on the detailed conditions to be fulfilled when giving notice of an intention of concentration had in its turn entered into force in April 2002. The Commission also took note of the entry into force, in August and September 2002, of the first block exemption regulations, taking into account the Community's new policies on vertical and horizontal restraints[241].

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[238] Cf. also Chapter I.D.7.b.

[239] SEC (2002) 1408, issued on 9 October 2002, cf. the European Commission's D. G. for Enlargement's website.

[240] Cf. Chapter II.B.5.

[241] Cf. Chapter II.B.7. and following.

The Commission was satisfied with the enforcement record of the Polish competition authority (the OCCP)[242], which was considered to be truly independent and possessing satisfactory resources (250 officials). In 2001, a total of 654 decisions had been issued, of which 20 concerned restrictive agreements, 218 abuse of dominant position and 416 had been adopted under the modified merger control regime. Since the ceiling for obligatory notifications of merger cases had been increased, the OCCP had received fewer notifications and had, therefore, had the opportunity to concentrate on merger cases that seriously undermined competition. The Commission noted that the focus of anti-trust activity had been usefully shifting towards anti-competitive practices that most seriously distorted competition, e.g. cartels.

As the main challenge for the Office in the anti-trust field, the Commission again highlighted ensuring effective application and enforcement of the rules, which implied the development of a more deterrent sanctions policy. Further, the Commission considered it essential that the Office continued to actively develop its resources, in particular in view of the planned modernisation and decentralisation of the application of the EC anti-trust rules[243] which, after accession, would bring about new important tasks and responsibilities for national competition authorities.

The Commission welcomed the appointment, for a term of 5 years, of the new OCCP President, for the first time following a competition. Subsequent extensive reorganisation of the Office had the objective of shifting the focus of activities towards *ex officio* investigations and cartel fighting. In particular, new departments, such as the Department of Market Analysis and EU Jurisdiction, had been set up. In April 2002, the Council of Ministers adopted the Report on the Status of Competition and Competition Policy for 2002-2003. The analysis and the diagnosis it contained provided, according to the Commission, a basis for the formulation of objectives of activities aiming at further development and strengthening of competition. The report also defined the aims of competition policy for 2002 – 2003.

Concluding its analysis of Poland's preparations for EU membership in the competition field, the Commission stated that Poland was "reasonably advanced" as regards legislative alignment, administrative capacity and enforcement record. In order to complete its accession preparations, Poland needed to continue to update its alignment as the *acquis* in this area evolved. The Commission also stressed that Poland needed to continue to develop a track record of proper implementation and enforcement of anti-trust legislation.

The Commission assessed globally the extent to which Poland had met the priorities of the Accession Partnership and implemented the measures foreseen under the Action Plan for Strengthening Administrative and Judicial Capacity. This assessment relied on the January 2002 version of the Accession Partnership (AP), on the basis of which the Action Plan was drafted jointly by the Commission and the Polish Government. As to competition, the picture was mixed, with the best progress achieved (as mentioned above) in anti-trust and much remaining to be done in respect of State aid. The Commission also pointed at the need to continue efforts to raise awareness of the respective rules among all market participants, and to train judges in competition law.

[242] Cf. also Chapter III.A.2.

[243] Cf. more details in Chapter IV.B.

23. November 2002 – the Polish Government's revised Programme of Preparation for EU Membership

On 20 November 2002, the Polish Council of Ministers adopted a new version of the Programme of Preparation of Poland's Membership in the EU, covering the last quarter of 2002 and the year 2003[244]. Regarding competition policy, the Government identified the remaining tasks, such as setting up of a unit specialised in competition jurisprudence at the OCCP (deadline: March 2003; formally implemented on the basis of the Order of the Prime Minister No 124 of 21 October 2002, modifying the Statute of the Office by creating a Legal and European Jurisprudence Department; it was planned to recruit three additional staff); and setting up of a new Department for Analysis and Control at the OCCP (deadline: March 2003; formally implemented on the basis of the Order of the Prime Minister No 142 of 31 December 2001, modifying the Statute of the Office; the Department concerned employed 7 persons, and it was planned to recruit 4 additional staff).

The implementation of the National Programme of Preparation for EU Membership was again reviewed by the Polish Council of Ministers on 18 March 2003[245]. As regards competition policy, the Government first of all pointed at the adoption of a series of Council of Ministers Regulations concerning group exemptions (on vertical restraints - dated 13 August 2002, in force since 27 August 2002[246]; on specialisation and R&D agreements - with the same date of adoption and entry into force[247]; on technology transfer agreements - dated 30 July 2002, in force since 12 September 2002[248]). In addition, new Council of Ministers Regulations had been adopted as regards exemptions for agreements in the insurance[249] and motor vehicle[250] sectors, and on merger notifications[251].

Further, the Polish authorities considered that the administrative capacity of the OCCP (both at the central office in Warsaw and in regional offices) had been strengthened, *inter alia* due to a series of training sessions for staff and to improving the IT network. Several seminars and training sessions for companies as well as seminars and courses for judges had taken place; all these training activities had been carried out in the framework of twinning agreements with the French and Swedish competition authorities. Concerning the institutional developments, the Polish Government mentioned the merging of two departments of the OCCP (i.e. the Departments of Infrastructure and of Industry); this was explained by important changes which had recently taken place on certain markets and by the related increase of the number of notifications of mergers. Further, two new departments had been created: the Department of Market Analysis - dealing with the setting up of databases concerning various markets and drafting analytic reports for departments involved in decision-making on particular cases; and the Department of International Co-operation and Public Relations, implementing the Office's information policy and co-operating with national and international organisations and institutions dealing with competition matters.

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[244] Cf. the website of the Polish Committee for European Integration, www.ukie.gov.pl.

[245] The Report covered the year 2002, cf. the website of the Polish Committee for European Integration, www.ukie.gov.pl.

[246] Dz.U. Nr 142/2002, poz. 1189. Cf. Chapter II.B.7.

[247] Dz.U. Nr 142/2002, poz. 1188. Cf. Chapter II.B.9.

[248] Dz.U. Nr 137/2002, poz. 1152. Cf. Chapter II.B.8.

[249] Adopted on 30 July 2002, in force since 12 September 2002, Dz.U. Nr 137/2002, poz. 1151. Cf. Chapter II.B.10.

[250] Adopted on 28 January 2003. Cf. Chapter II.B.11.

[251] Adopted on 3 April 2002, in force since 12 April 2002, Dz.U. Nr 27/2002, poz. 334.

In addition, the Government confirmed the creation of the Legal and Community Jurisprudence Department, the task of which was *inter alia* to publish the Journal of the OCCP (until the date of publication of the Report, three such Journals had been issued, containing information about decisions taken by the Office and about judgments of the Court for the Protection of Competition and Consumers (CPCC) as from April 2001), keep a database of all decisions of the Office's President and judgments of the CPCC, as well as a record of the jurisprudence of the European Commission and the Community Courts. The Department also maintained a database of Polish and Community competition provisions. The cost of all these measures amounted to 7.673.500 PLN during the year 2002, including 4.284.600 PLN from PHARE.

24. Amendments to the Programme after the EU accession referendum (July 2003)

In July 2003, following the EU accession referendum[252], the Polish Government issued another update of the National Programme of Preparation for EU Membership[253], which covered tasks to be implemented until the envisaged entry of Poland to the Union, on 1 May 2004. The Government stressed that the Council of Ministers had transmitted 91 draft harmonising laws to the Parliament since the beginning of 2002, out of which 67 had already been adopted by the Sejm. Further, 650 executory acts had been adopted until the end of June 2003, although - as the Polish authorities acknowledged - the process was far from being completed and further efforts were required. There were over 60 draft laws to be adopted by the Council of Ministers in the course of 2003 (out of which 33 had already been prepared), as well as more than 200 executory regulations. In this context, the Government declared its intention to closely co-operate with the Parliament and to monitor (through the Office of the Committee for European Integration) the legislative work on draft laws submitted by the Council of Ministers; it also stated that it would not hesitate to submit draft legislation deleting provisions contrary to the EC law (including secondary legislation).

In respect of administrative capacity, the main focus was on the preparation of institutions in charge of the future management of structural funds. Further, the Government intended to continue intensely the training programmes for public administration staff of all levels, concerning altogether some 26,000 civil servants. In this respect, the main, ongoing training needs were related with the current and future tasks of the administration in the context of the forthcoming EU membership, i.e. the participation of Polish representatives in the EU's decision-making process (including the participation in various committees and working groups); the formulation of co-ordinated Polish positions on EU matters; the ongoing transposition of the *acquis* into the Polish legal system; and the participation in EC/EU policies and programmes, as well as creating appropriate conditions for the absorption of structural and cohesion funds. The programme included basic training in EU matters (especially for newly-recruited staff) and specialised ongoing training sessions (seminars, workshops, etc.), provided by the Office of the Committee for European Integration and by the National School of Public Administration (in co-operation with the Ministries and central offices concerned as well as EU Institutions and Member States and various foundations or organisations); in this context, the role of PHARE (and, especially, of the twinning programmes) was stressed.

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[252] In the accession referendum that took place in Poland on 7 and 8 June 2003, 77.45% of voters said "yes" to EU accession, 22.55% said "no" and the turnout was 58.85%. Cf. the website of the Polish Committee for European Integration, www.ukie.gov.pl.

[253] Cf. the website of the Committee for European Integration, www.ukie.gov.pl.

Regarding the translations of the *acquis* into the Polish language, the Government presented a detailed timetable of translations (chapter by chapter, with the number of pages and deadlines for transmission to the relevant services of the European Commission for approval) to be produced by the end of 2003. For example, the translated competition *acquis* (in a package together with taxation, some 2000 pages) was to be transmitted to the Commission in November 2003. Some 2000 pages of text were being transmitted to Brussels by the Office of the Committee for European Integration every week (until 30 June 2003, some 20,000 pages out of the estimated total of 76,000 pages had been transmitted). Verified translations were available on the websites of the European Commission[254] and of the Committee for European Integration[255], and copies were sent to the Polish Ministries and Central Offices.

The Polish authorities acknowledged that there were delays in the production of translations, especially as regards those which were to be prepared in the Ministries. In order to tackle this problem, the Government decided that those translations not sent by the Ministries in due course would be done by outside firms chosen by competition held by the Office of the Committee for European Integration. Three such competitions were to be organised before the end of 2003, so as to ensure that the whole *acquis* was translated before Poland's entry to the EU. In addition, translations of some 860 judgments of the Community Courts were to be ready by the same date (1 May 2004).

The Polish authorities declared that additional efforts would be made to ensure better absorption of the various forms of Community assistance, especially in the framework of PHARE, SAPARD and ISPA. In this context, the entry into operation of the fully decentralised PHARE and ISPA programmes implementation system - the so-called EDIS ("Extended Decentralisation of Implementation System"[256]) - was considered as a top priority. In addition, a new task was added in the pre-accession period, namely the preparation of structures and programme documents necessary for the implementation of the so-called Transition Facility i.e. a programme (foreseen to operate between 2004 and 2006) of further reinforcement of administrative structures of new Member States, in particular with the view to improve the capacity to implement and enforce the *acquis*. This included the setting of priorities and defining projects eligible for funding from this programme. Further, the Government planned to adopt, at the end of 2003 or at the beginning of 2004, procedures allowing to use the budgetary reserve funds in order to cover specific tasks related to the entry to the EU and, in particular, to co-finance projects supported by Community funds.

The duty of monitoring the implementation of the tasks set out in the National Programme was bestowed on the Office of the Committee for European Integration. Information on progress in this respect was to be presented and discussed every two weeks during sessions of the Preparatory Team of the Committee. Particularly important issues - as well as those in respect of which difficulties or delays had occurred - were to be brought to the attention of the Council of Ministers on the occasion of its weekly information meetings on European matters.

Regarding competition policy, the Polish Government acknowledged the necessity to amend the Act on Special Economic Zones in order to implement the negotiating commitment to align tax reductions granted to undertakings which had received their operating permits before 1 January 2001.

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[254] In the CCVista database, cf. "http://ccvista.taiex.be".

[255] Cf. "http://www.ukie.gov.pl/dtc.nsf".

[256] Cf. also Chapter I.D.7.a.

As regards reinforcement of administrative capacity, the Polish Government intended to complete, by the end of December 2003, its preparations for the functioning of the OCCP in the framework created by the Council Regulation No. 1/2003 on application of Articles 81 and 82 EC[257]. The Government also planned, on an ongoing basis, a series of training sessions for judges of district, appeal and Supreme courts, as well as for the CPCC, on anti-trust. The OCCP wanted to actively participate in the setting up of the European Competition Network[258].

25. November 2003 – the Commission's Comprehensive Monitoring Report on Poland's preparations for accession

In November 2003 i.e. after the conclusion of EU accession negotiations (on 13 December 2002) and the signing of the Accession Treaty (16 April 2003), the Commission issued, in respect of Poland, a document called "Comprehensive Monitoring Report on Poland's Preparations for Membership"[259]. This followed the statement in the Commission's Strategy Paper (accompanying the 2002 Regular Report), according to which *"acceding countries need to implement the acquis by the date of accession, except in cases where transitional arrangements have been agreed. Commitments undertaken in the negotiations must be fully met before accession. The Regular Reports point to a number of areas where further improvements need to be made in the context of the political and economic criteria and in the relationship to the adoption, implementation and enforcement of the acquis. These should be vigorously pursued. In order to analyse progress and to facilitate successful membership of the European Union, the Commission will regularly monitor this and report to Council. The Commission will produce six months before the envisaged date of accession a comprehensive monitoring report for the Council and the European Parliament."* The importance of pre-accession monitoring was subsequently confirmed by the Copenhagen (December 2002) and Thessaloniki (June 2003) European Councils.

The Monitoring Report reflected the situation in Poland as at the end of September 2003. Concerning the translation of the *acquis* into Polish language, the Commission noted that, after a relatively slow start in the beginning of 2003, due mainly to the re-revision by the Translation Coordination Unit of existing translations, the statistics for the number of pages revised and ready for the finalisation procedure which had been transmitted to the EU Institutions was now on track. The legal and linguistic quality of the Polish versions of the *acquis* also seemed - according to the Commission - to have improved and appeared now to be satisfactory. However, the Commission stressed that the present flow had to be at least maintained, if not increased, to ensure that all the necessary *acquis* is translated by the time of accession.

Regarding competition policy, the Commission acknowledged once again that Poland had adopted legislation containing the main principles of the Community anti-trust rules as regards restrictive agreements, abuse of dominant position and merger control. However, the Commission pointed at the need to continue preparations for the application of the EC's new procedural regulation[260].

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[257] Cf. Chapter IV.B.
[258] Cf. Chapter IV.B.
[259] Cf. the European Commission's D. G. for Enlargement's website.
[260] Cf. Chapters III.A.3 and IV.B.

On a positive note, the Commission assessed as satisfactory the functioning of the OCCP, although it stressed that - in view of the decentralised application of anti-trust rules under the new EC's procedural regulation - additional strengthening of the administrative capacity would be opportune. Further efforts were also still needed to raise awareness of anti-trust rules among all market participants and to build up a credible and transparent competition culture. In this context, the Commission stressed the need to further develop special training for judges.

In the Commission's view, the anti-trust enforcement record was overall satisfactory, though – as the Commission stressed once again – it would be advisable to focus more on serious distortions of competition, such as cartels, as well as to focus investigations on practices that were important for the market structure. Furthermore, the Commission expressed the view that the policy on sanctions (fines) should be further reinforced. In short, the Commission found that Poland was expected to be in a position to implement the whole of anti-trust *acquis* by the time of accession, although efforts to development a proper enforcement track record had to continue.

26. The eve of accession – another reform of administrative structures for dealing with European affairs

In the spring of 2004, i.e. practically on the eve of the EU enlargement, the Polish Government decided to reform its administrative structures dealing with European affairs. According to the decision taken by the Council of Ministers on 10 March 2004[261], a new Council of Ministers Committee, chaired by the Deputy Prime Minister and composed of all line Ministers and Deputy Ministers, was to define the Polish European policy as from accession. The Committee was to be assisted by the new European Secretariat, which was to replace the Committee for European Integration as from the date of EU accession.

The European Secretariat was to be subordinated directly to the Chancellery of the Prime Minister. The initial idea was launched by the Prime Minister Leszek Miller at the beginning of 2004, but the final decision was only taken after long discussions at the Council of Ministers, mainly due to the resistance of the Minister of Foreign Affairs (Włodzimierz Cimoszewicz), who preferred the option of subordinating all the structures dealing with EU affairs to his Ministry. The European Secretariat was to take over a part of the tasks of the Committee for European Integration - such as co-ordinating the work of Ministries and Central Offices in Community matters, preparing Polish positions (to be presented in the European Institutions), analyses and opinions, drafting new legislation and controlling its implementation, maintaining contacts with the Parliament and keeping documentation of all contacts with the EU; however, certain other tasks (e.g. related with pre-accession aid, translation of the *acquis* and the strengthening of administrative capacity) would be transferred to line Ministries (until their full implementation).

Another novelty, related with the appointment of the European Affairs Minister Danuta Hübner (who had until then exercised the task of Secretary of the Committee for European Integration and had been responsible for the co-ordination of the EU affairs within the Government) to the post of Poland's first commissioner in the European Commission after enlargement, was that the post of the European Affairs Minister was to be abolished. Instead, the post of Secretary of the European Secretariat was to be given to one of the current deputy Secretaries of the Committee for European Integration, with the rank of Secretary of State.

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[261] Cf. A. Stankiewicz, "Unia w ręce premiera", "Rzeczpospolita", 9 March 2004; and AST, "Oleksy od Europy", "Rzeczpospolita", 10 March 2004.

Changes were also envisaged in the European structures of the Polish Parliament. Before accession, a new European Union Committee in the Sejm was to be set up in order *inter alia* to issue opinions on draft Community acts. All Parliamentary parties and clubs were to be represented in that commission proportionally.

Following these decisions, the Sejm's European Committee ceased its activity in its existing form in July 2004[262]. Since its creation on 24 October 2001, it had carried out 276 meetings and examined 135 draft acts from the standpoint of their compatibility with the Community law. In the course of its activity, it had set up 105 sub-committees dealing with particular drafts, most of which related to agriculture, health care and public finances. The outcome of its work took the form of 57 entirely new acts adopted by the Parliament, as well as over 200 amendments to the existing acts. As mentioned above, the Sejm's European Committee was replaced by the new European Union Committee, with a wide mandate covering a range of issues related with the Polish membership in the EU.

The afore-mentioned changes in the structures dealing with European affairs within the Polish Government would on the whole seem to be well adapted to Poland's new status as a EU Member State. That said, the implementation of these reforms proved to be less than perfect. In particular, the decision to dissolve the Committee for European Integration was still not carried out 15 months after Poland had joined the EU[263] and, moreover, the CEI spent important sums on recruiting new staff and purchasing new IT equipment (nearly 30 million PLN between 1 May 2004 and mid-2005). In fact, the Polish Prime Minister, Mr Marek Belka, signed an Order prolonging the existence of the Committee provisionally - but for an unlimited period – in November 2004. This has attracted numerous critical reactions in the Polish political class and the media.

The 2005 parliamentary elections and the change of government that had followed did not help advance the reform of the administrative structures responsible for dealing with the European affairs. In fact, the Committee for European Integration was definitively not dissolved but its Office lost its independence, becoming an integral part of the Ministry of Foreign Affairs[264]. As a result, many of the competencies of the Office have been taken over by the line ministries, the coordination of European affairs became far from evident and the work of the CEI has become a relatively secondary aspect of the agenda of the Ministry of Foreign Affairs. It remains to be seen whether these changes will serve well the purpose of co-operation between Poland and the EU structures.

[262]Cf. "Sejmowa Komisja Europejska ostatecznie zakończyła prace", PAP (Polish Press Agency), 29 July 2004.
[263]Cf. "Urzędnik UKIE bierze średnio 6240 zł ", "Super Express", 5 August 2005.
[264]Cf. "Rządowy mózg w sprawach europejskich chce odejść z MSZ", "Gazeta Wyborcza", 2 March 2006.

B. Development of the Polish anti-trust law in the context of approximation to the EC rules[265]

1. 1990 - the first Polish competition act

The first Polish competition legislation dates back to the early 1990s. The Act on Counteracting Monopolistic Practices of 24 February 1990[266] was directed against three main anti-competitive strategies of enterprises: "monopolistic agreements" (Article 4), "abuse of market position" (Articles 5 and 7) and "excessive concentration" (Articles 11 and 12). It was based on the principle of prohibition (Article 6) or the principle of supervision (Article 11), which followed to a large extent the approach of Articles 85 and 86 (now 81 and 82) of the EC Treaty as well as of Council Regulation No. 4064/89 on the control of concentrations between undertakings[267].

The Act created a competition authority called the Antimonopoly Office, which was given quite important powers. In particular, it could apply the same types of sanctions (including pecuniary fines) as the European Commission and competition authorities of the EC Member States. Further, the Antimonopoly Office enjoyed a large degree of adjudicative independence, while its decisions were subject to control of an independent court of law (the Antimonopoly Court). Pursuant to an important amendment of the Act in 1995[268], the Antimonopoly Office was given wider merger control powers. A further amendment in 1996 increased the scope of the Office responsibilities and competence in the field of consumer protection and consequently since October 1996 this central administration body has been known as the Office for Competition and Consumer Protection (OCCP)[269]. The President of the OCCP, appointed by Prime Minister, acted as the competition and consumer protection authority, supported by the OCCP. The Trade Inspectorate (IH – formerly State Trade Inspectorate – PIH), performing functions of market surveillance, was subordinated to the President of the OCCP.

The first version of the Act on Counteracting Monopolistic Practices (hereafter referred to as "the Act") generally transposed the concepts, definitions, approaches and procedures of the EC law. However, there were also some important discrepancies.

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[265] On this issue, cf. also J. Olszewski, *Prawo konkurencji*, WSAiZ, Przemyśl 1998; S. Gronowski, *Polskie prawo ochrony konkurencji*, ZPP, Warszawa 1998; C. Kosikowski, T. Ławicki, *Ochrona prawna konkurencji i zwalczanie praktyk monopolistycznych*, Wydawnictwo Naukowe PWN, Warszawa 1994.

[266] Dz.U. Nr 89/91, poz. 403, with several subsequent amendments.

[267] Cf. P. Skoczny, "Harmonization of the competition law of the EC associated countries seeking for EU membership with the EC competition rules. Example: Poland", paper presented at the 3rd ECSA-World Conference "The European Union in a Changing World", Bruxelles 1996, Publication Office of the European Communities – Luxembourg; as well as P. Saganek, T. Skoczny (ed), *Wybrane problemy i obszary dostosowania prawa polskiego do prawa UE*, Centrum Europejskie UW, Warszawa 1999; "Harmonizacja polskiego prawa antymonopolowego z regułami konkurencji Wspólnot Europejskich", in: *Transformacja gospodarki polskiej w latach dziewięćdziesiątych. Ekonomia – prawo – zarządzanie. Księga jubileuszowa na 25-lecie Wydziału Zarządzania UW*, ELIPSA, Warszawa 1998, pp. 175 – 188; T. Skoczny (ed), *Harmonizacja prawa polskiego z prawem Wspólnot Europejskich. Prawo konkurencji*, vol. 1 – 4, ELIPSA, Warszawa 1998.

[268] Cf. Chapter II.B.2.

[269] On the OCCP's origins, structure, powers and activity, cf. Chapter III.A.

The following analysis proceeds along the issues identified by the European Commission in the early 1990s in the course of contacts with the responsible Polish officials concerning the approximation of Polish competition law[270]:

1. the scope of the Act corresponded overall to the requirements of the EC legislation: it covered all practices which had their effect on the territory of Poland (Article 1) - thus not only those actually taking part in Poland; it included actions by not only undertakings (both legal and natural persons) but also by their associations, as well as both formal agreements, decisions of associations and concerted practices (Article 2.1 to 2.3); and it covered both the goods and the services (Article 2.5). However, it is noteworthy that the Polish Act did not adopt the same approach as the Community law with respect to the geographical and product market definitions (in addition to not transposing the very notion of "relevant market"); instead, the rather vague notions of "national or local market" were applied;

2. as regards restrictive agreements, the provisions of the Act were not entirely conform with the *acquis*. First of all, the prohibition of such agreements, decisions and practices was not of a general nature (as in Article 81 (1) of the EC Treaty) - instead, there was an enumerative list of such agreements (Article 4). On the positive side, the Act foresaw the sanction of nullity for agreements and practices prohibited by it (Article 8.2), and the enumerative lists set out in Article 4 covered certain types of both horizontal and vertical agreements.

   Concerning the procedure, the Act did not put in place an obligatory notification procedure analogous to that foreseen in Article 4 of the Council Regulation No. 17/62. Also the provisions concerning individual exemptions were not fully compatible with the EC legislation: the list of preconditions for such exemptions was much shorter than in Article 81 (3) of the EC Treaty (Article 6 of the Act merely referred to restrictions which "do not limit the competition in a significative manner", and Article 9.2, which only concerned specialisation and common purchase and sale agreements, spoke additionally of "significative lowering of production or sale costs" and "improvement of the quality of goods"), and nothing was said in the Act about the possibility of revocation of an individual exemption; further, the Act did not enable the issue of group exemptions, and there was no equivalent of a *de minimis* rule as found in the EC legislation;

3. with respect to the abuse of dominant position, the Act introduced its own definition of a dominant position (i.e., according to Article 2.7 of the Act, a "position of an undertaking, in which it does not encounter significative competition on the national or local market), with an express presumption (absent in the EC legislation) that an undertaking enjoys such a dominant position when its market share exceeds 40%. As in the EC law, pursuant to Article 5 of the Act, abuse of dominant position was prohibited (interestingly, unlike in the case of restrictive agreements, the list of forbidden practices - albeit not identical with the one from Article 82 EC - was not exhaustive but merely illustrative); however, unlike in the Community law, this prohibition was not absolute, as Article 6 of the Act made possible an exemption based on the same criteria as those applicable to cartel agreements.

[270]The checklist of issues, or evaluation criteria, was entitled "Main Criteria for Legislation". The author received a copy of this checklist from one of the officials of the Polish Mission to the EU in Brussels, in the autumn of 1994.

In addition, the Act contained an element unknown, at least in this form, to the EC law i.e. the concept of "monopolistic position" defined (Article 2.6) as a position, in which an undertaking "does not encounter competition on the national or local market". Undertakings found to be in such a position (as well as those enjoying a dominant position, provided that their market share and practices which they applied resulted in a situation analogous to the one of undertakings having a monopolistic position) faced more strict requirements; in particular, under Article 7.1 of the Act, they were never (i.e. without a possibility of exemption) allowed to: a/ limit, despite having the necessary capacity, the production, sale or purchase of goods, especially if such practices led to the rising of sale prices or lowering of purchase prices; b/ suspend sale in order to raise the price; c/ impose excessive prices;

4. as to mergers, the provisions contained in Chapter III (Articles 11 to 13) of the Act were broadly compatible with the rules set out in the Council Regulation No. 4064/89. The Act created a system of obligatory notification of intended mergers (Article 11.1), although the rules were less clear than the corresponding Community ones (there were no turnover thresholds - only the requirement to notify if the new entity or one of the parties would/already did enjoy a dominant position on the market; in addition, the formulation used could be interpreted as meaning that all mergers or "transformation" of undertakings would have to be notified, the dominance criteria only applying to the creation of an entirely new undertaking); the notification had a suspensive effect on the planned merger (Article 11.3), and the Antimonopoly Office had 2 months to take its decision (Article 11.2).

   The criteria for prohibition (establishing or reinforcing a dominant position - Article 11.2) were similar to those from the EC merger regulation, although the Polish Act was even more restrictive in that it did not foresee exceptions for reasons of public interest (however, the Antimonopoly Office enjoyed quite a wide discretion in assessing a merger) and did not contain an equivalent of a *de minimis* rule; furthermore, the Antimonopoly Office had important powers of sanction, including the divestiture of illegal mergers (Article 12);

5. concerning procedural aspects, the Act followed the philosophy of the Council Regulations No. 17/62 and No. 4064/89. The Antimonopoly Office enjoyed sufficient investigative powers (including the right to enter all premises, have access to all documentation, require explanations and any additional information necessary for the accomplishment of its task, participate in meetings of management structures, take copies and temporarily confiscate documents, and use the services of experts - cf. Article 20.3 of the Act). However, professional secrecy and business secrets had to be respected (cf. Article 20.4).

   Further, the Office could impose fines (up to 15% of annual turnover, cf. Article 14.2) and periodic penalty payments (up to 10% of monthly turnover, cf. Article 15), as well as fines to be paid by the undertakings' managers (up to the equivalent of 6 monthly salaries, cf. Article 16) - all this with prescription periods of one to three years (Article 14.4 and 15.1). The Office also had the right to carry out sectoral inquiries (Article 19.1.5).

Regarding the procedural safeguards for undertakings (right to be heard, access to file, rights of third parties, judicial review and publicity of decisions), these were provided by the general rules of the Administrative (as concerns the procedure before the Antimonopoly Office) and Civil (as regards the appeal procedure before the Antimonopoly Court i.e., in practice, the Warsaw Provincial Court) Procedure Codes, which were applicable *mutatis mutandis.*

It can be seen from the above that the Act was not fully compatible with the EC law. However, the main problem in its actual implementation was the lack of clarity and precision of many of its concepts, expressing general rules and specific features of individual "monopolistic practices". This is the area where the case law established by the Antimonopoly Office[271] and the Antimonopoly Court[272] has played a significant role, helping in many cases to clarify these concepts, as well as influencing the legislator in the direction of subsequent amendments of the Act.

2. 1995 – the first important amendments to the 1990 Act

As already mentioned, the first important set of such amendments was introduced in 1995. Among the main changes brought into the Act one should *inter alia* note the abolishing of the exhaustive character of the list of restrictive agreements in Article 4, and the deletion of points 1 and 2 of Article 4.1 (which prohibited not only the abuse of "monopolistic" and dominant position but also "monopolistic practices" of economic entities not enjoying qualified market position; after amendment, practices covered by the deleted provisions e.g. imposing onerous contracts and tie-in obligations were prohibited only if they constituted an abuse of dominant position).

Further, the 1995 amendment brought about extensive modifications as regards the control of mergers[273]. The idea of dualism of competition protection - a statutory prohibition of mergers already effected (Article 4.1, points 3 and 4) and preventive control over the intention to merge (Article 11) was abandoned. Instead, following the example of most the states of the world and the EC, the solution was chosen according to which concentrations of economic entities are permitted by the act, but made subject to preventive control, with the reservation that mergers may be prohibited by means of an administrative decision if they could result in gaining or consolidating a dominant position on the market (Article 11.1 and Article 11(a).4.1). The amendment also introduced a clear statutory definition of concentrations which are subject to control, in particular mergers and acquisitions, and limited the scope of the obligation to notify the intention to merge to mergers with a high significance.

It is noteworthy that, following the changes introduced in 1995, the powers of the Antimonopoly Office in the administrative proceedings were additionally strengthened (Article 19a), while at the same time enhancing the confidentiality of the information gathered in the course of these proceedings (Articles 20a and 21a). In addition, the sanctions for violation of the Act were made more severe (Articles 14 to16)[274].

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[271]Cf. Chapter III.A.2.

[272]Cf. Chapter III.B.2.

[273]Cf. P. Skoczny, "Harmonization of the competition law of the EC associated countries seeking for EU membership with the EC competition rules. Example: Poland", paper presented at the 3rd ECSA-World Conference "The European Union in a Changing World", Bruxelles 1996, Publication Office of the European Communities - Luxembourg.

[274]Cf. M. Król-Bogomilska, "Kary pieniężne nakładane na przedsiębiorców w świetle polskiego i

3. 1998 – another set of amendments to the 1990 Act

Another important amendment to the Act was adopted in 1998 and entered into force on 2 January 1999[275]. The main changes introduced concerned the liberalisation of the administrative control of mergers, in order to further align the Polish legislation with the EC law[276]. The quantitative thresholds qualifying a merger for a pre-transactional notification were raised from the equivalent of 2 million ECU to the equivalent of 5 million ECU (in the case of mergers consisting in the acquisition of an organized part of assets of an economic entity), and from the equivalent of 5 million ECU to the equivalent of 25 million ECU (in the case of all remaining types of mergers listed in the Act i.e. acquisitions of and subscriptions for shares, assumption by the same person of a post in the managing bodies of competing economic entities, mergers as such, and any other direct or indirect forms of take-over of control).

However, these thresholds were still to be calculated on the basis of the worldwide turnover of the entire groups of companies involved in the merger. This meant that, in the case of a simple acquisition, the turnover of the target company, all of its subsidiaries, and its parent and grandparent entities had to be taken into account.

The amendment also addressed another previously unclear point, related with the requirement to notify the OCCP of the intended establishment of a new company. Pursuant to the amended version of the Act, the intention to subscribe for shares in a company to be newly established was subject to a mandatory notification if the threshold of 10% of shares in the company was to be met or surpassed as a result of such a subscription, and if the aggregate value of the annual sale of goods and/or services of the entities subscribing for these shares exceeded, in the calendar year directly preceding the year of establishment, the equivalent of 25 million ECU. It is noteworthy that these thresholds were relatively low; some authors[277] explained this by the intention of the OCCP to use this provision as one of the methods of gathering information about the market.

4. 1999 amendments

The 1999 amendments abolished the requirement to notify the OCCP of intended transformations of economic entities, i.e., for example of the intended transformation of a limited liability company into a joint stock company, or of a State enterprise into a commercial company. The Polish Government justified this proposal by the fact that transformations of entities as such did not influence a company's market share.

Procedural matters were also addressed in the 1999 amendments. Among other changes, the OCCP was granted an additional possibility to extend in practice the deadline within which it had to issue its opinion on the notified merger (the periods during which the OCCP awaited the filing of a required notification by the other merging parties was no longer taken into account when calculating the 2 month deadline within which the OCCP had to take its decision).

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wspólnotowego prawa konkurencji", www.ce.uw.edu.pl/wydawnictwo/Kwart_1998_3/Bogomilska.pdf

[275] Cf. S. Gronowski , E. Wojtaszek-Mik, *Ustawa antymonopolowa. Orzecznictwo. Piśmiennictwo. Przepisy*, C.H. Beck, Warszawa 1998.

[276] Cf. A. Stefanowicz-Barańska, "Amendment of merger control provisions in Polish antimonopoly law", The Poland Library, www.masterpage.com.pl/outlook, index # 1207.

[277] Cf. A. Stefanowicz-Barańska, above.

Further, the amendments clarified the issue of the statute of limitations for imposing sanctions on undertakings (and members of their managing bodies) which had failed to file a mandatory merger notification - a provision was added stating that, in such cases, the statute of limitations was five years from the date on which the obligation to file the notification arose.

The 1999 amendments authorized the Council of Ministers to issue regulations concerning the principles and procedures of control of the observation by undertakings of the provisions of the Act[278]. This was meant to provide greater clarity *inter alia* in light of the existing controversy concerning the OCCP's right to request information of any undertaking prior to initiating formal administrative proceedings (thus, without the procedural safeguards afforded to parties under the Administrative Procedure Code).

5. 2000 – the new competition act (2000 Act)

As already mentioned earlier, the above-mentioned amendments to the 1990 Act on Counteracting Monopolistic Practices were considered by the Polish authorities as necessary but not sufficient to bring the Polish legislation into full conformity with the EC competition law. This is why, in parallel to these amendments, the Government submitted to the Parliament an entirely new draft Act. The Act on the Protection of Competition and Consumers was adopted by the Parliament on 15 December 2000[279], and entered into force on 1 April 2001.

a. objectives and scope

The declared objectives of the new Act (hereafter: the 2000 Act) were:

a/ the creation of conditions for the development and protection of competition on the territory of Poland (Article 1.1);

b/ preventing and counteracting practices and concentrations of undertakings, which cause or may cause restriction of competition or unjustified limitation of freedom of business activity on the territory of Poland, irrespective of whether these practices and concentrations originate in Poland or abroad (Article 1.2);

c/ the protection of the interests of undertakings and consumers against anticompetitive practices and concentrations, provided that this is in the public interest.

The 2000 Act referred only and exclusively to anticompetitive practices and concentrations of undertakings acting on their own behalf, thus leaving out of its scope anticompetitive effects resulting from direct or indirect actions of the State. According to some authors[280], this limitation was intentional and motivated by the wish to leave beyond the strict control mechanism established by the 2000 Act actions involving the State and public resources, in the context of the ongoing transformation (restructuring, privatisation, etc) of the Polish economy.

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[278] Cf. S. Gronowski, *Ustawa antymonopolowa. Komentarz*, C.H. Beck, Warszawa 1999.

[279] Dz. U. Nr 122, poz. 1319. Cf. *inter alia* E. Piontek, "New Polish Competition Law", News Letter No 2/2001, Piontek, Rymar, Ślązak, Wiśniewski&Associates Law Office, Warsaw; and A. Stobiecka, "Polish Competition Update", ECLR [2002] 2, pp. 92 – 98.

[280] E.g. E. Piontek, cf. above.

The authorities counted on the possibility to proceed in this manner at least until Poland joins the EU and becomes bound by the EC law provisions in this context. However, this was a somewhat unrealistic expectation - the EU side had continuously pressed Poland to transpose as soon as possible the State aid *acquis* and thus Poland was well obliged to adopt such rules subsequently, in a separate law[281].

b. substantive rules

The 2000 Act prohibited three categories of practices:

i/ agreements, concerted practices and decisions of undertakings and/or associations of undertakings, which have as their object or effect the elimination, restriction or any other distortions of competition on the relevant market[282], in particular those consisting of:

i. fixing directly or indirectly, prices and other conditions of purchase or sale of goods;

ii. limiting or controlling the production or supply, as well as technical development or investments;

iii. sharing markets of supply or purchase;

iv. application in similar transactions with third parties onerous or not homogenous contract terms, thus creating for these parties diversified conditions of competition;

v. making the conclusion of an agreement subject to acceptance or fulfilment, by the other party, of another performance, having neither substantial nor customary relation with the subject of the agreement;

vi. limiting access to the market or eliminating from the market undertakings which are not party to the agreement;

vii. fixing conditions of a bid made by undertakings participating in a tender, in particular, in relation to the scope of the work or the price

(Article 5);

[281]Act of 27 July 2002 on Conditions of Acceptability and Control of Public Aid for Undertakings, Dz.U. Nr 141, poz. 1177. Furthermore, in their enforcement activities, both the OCCP and the CPCC have in fact adopted a particularly tough stance towards violations of anti-trust rules by public or State bodies. Cf. Chapter III.A.2. and III.B.2.

[282]The 2000 Act filled the *lacuna* from the previous Act, by introducing (in Article 4.8) a definition of the relevant (product and geographical) market analogous to that used in the EC law. According to this provision, a "relevant market" was a market of products which, due to their intended use, price and characteristics (including their quality) were considered by their buyers as substitutes; and which were offered on a territory on which, because of their kind and characteristics, the existence of barriers to entry, consumer preferences, significant price differences and transport costs, competitive conditions (environment) were similar.

b/ abuse of a dominant position on the relevant market by one or more undertakings, in particular consisting of:

i. direct or indirect imposition of unfair prices, including predatory prices or undercutting prices, significantly delayed payment terms or other conditions of purchase or sale of goods;

ii. limiting the production, the supply or technical development to the detriment of contractors or consumers;

iii. application in similar transactions with third parties onerous or not homogenous contract terms, thus creating for these parties diversified condition of competition;

iv. making the conclusion of an agreement subject to acceptance or fulfilment, by the other party, of another performance having neither substantial nor customary relation with the subject of agreement;

v. preventing the creation of conditions necessary for the emergence or the development of competition;

vi. imposition by an undertaking of onerous contract conditions, yielding to this undertaking unjustified profits;

vii. creating for consumers onerous conditions of redress (Article 8);

c/ concentrations between undertakings, the implementation of which would result in the creation or strengthening of a dominant position, that brings about a significant restriction of competition on the market (Article 17).

It can be seen from the above list that the 2000 Act came much closer (to a, basically, full compatibility) to the provisions of Articles 81 and 81 EC as well as to the merits of the EC merger regulation, in comparison with the previous Act[283]. The 2000 Act also followed closely the relevant provisions of the EC Treaty in declaring null and void agreements, concerted practices and decisions or other acts of undertakings and of their associations covered by the statutory prohibition (Articles 5.2 and 8.3) unless this prohibition is waived with regard to them either on the ground of individual or group exemptions (Articles 7 and 11.1) or because of their minor importance (Article 6).

Thus, in comparison with the Act of 1990, the two major incompatibilities with the *acquis*, namely the lack of a possibility to issue group exemptions and the absence of a *de minimis* rule, were eliminated. The exemption criteria were formulated in a manner analogous to that of Article 81 (3) EC: in order to qualify for an exemption, the practice had to contribute to improvement of the production or distribution of goods or to technical or economic progress and ensure a fair share of benefits to the buyer or user, as well as not to:

a/ impose, upon the undertakings concerned, restrictions which are not indispensable for the achievement of these objectives;

[283] Cf. E. Usowicz, "Nowa ustawa antymonopolowa", Gazeta Prawna, 6 November 2001.

b/ afford participating undertakings the possibility to eliminate competition on the relevant market in respect of a substantial part of the goods in question

(cf. Article 7.1).

The 2000 Act provided for the possibility (not an obligation) for the Council of Ministers to issue group exemption regulations, which had to define:

a/ specific conditions which were to be satisfied for the agreement to be considered as exempted from the prohibition;

b/ clauses, the existence of which was not considered to infringe the statutory prohibitions ("white clauses");

c/ clauses, the existence of which constituted an infringement of the statutory prohibitions ("black clauses"), and

d/ period during which the exemption was to apply (cf. Article 7.2).

As can be seen, the approach adopted by the Polish legislator was basically identical (albeit somewhat less "refined", *inter alia* due to the omission of the "grey clauses" possibility) to that encountered on the Community side[284]. In this context, it should be stressed that the fact that the respective Polish provisions were not identical with the EC ones was not in itself in contradiction with Poland's obligation to transpose the *acquis* – for as long as the Polish provisions respected the spirit of the Community law and were not contrary to it. As the Commission stated already in its White Paper[285], it was not necessary for Poland to transpose literally the *acquis* in this field; it could limit itself to taking over of the principles within the appropriate structural framework. Furthermore, the whole exercise was (at least from the perspective of the Polish authorities) seen as transitional, in the sense that the EC competition provisions would prevail over the national law as soon as Poland joins the EU (i.e., with respect to situations with a Community element, covered by the scope of application of the Community law); thus, possible minor differences between the Polish and the EC competition provisions would become even less important over time.

In the context of the exemption procedure, the 2000 Act did away with one more important difference between the previous Act and the EC law - it abolished the possibility of exempting abuses of dominant position, which were consequently unconditionally prohibited (as well as null and void). On the positive side (at least according to the author of this thesis), the legal presumption of dominance if the undertaking's market share exceeds 40% - not found in the same form in the corresponding Community legislation but contributing to legal certainty - was preserved (cf. Article 4.9 of the 2000 Act). However, this presumption could be abolished by the suspected undertaking(s) in the course of the proceedings.

[284] In addition, this approach reflected the older model of Community group exemption regulations, cf. more detail in Chapter II.B.7. to 11.

[285] Cf. Chapter I.B.

As regards the *de minimis* rule, it was also very closely modelled on the EC one. The following agreements were qualified as of minor importance (cf. Article 6):

a/ those concluded between competitors whose combined market share, in the year preceding calendar year in which such agreement is concluded, does not exceed 5%;

b/ those concluded between undertakings, acting at different stages of the economic process (vertical agreements), whose combined market share, in the year preceding the calendar year in which such agreement is concluded, does not exceed 10 %.

In relation to distribution agreements concluded by an undertaking with at least two other undertakings, the combined market share of these undertakings was calculated following the joint criteria mentioned at a/ and b/, above.

c. procedural rules

Concerning procedural matters, the 2000 Act foresaw a two-instance procedure, with the first instance (before the President of the OCCP) being of an administrative character and the second - appeal before the Antimonopoly Court within 14 days from the delivery of the decision - following the rules of civil procedure (cf. Article 78). Separate sets of procedural rules applied to proceedings in cases of restrictive agreements and abuses of dominant position on the one hand, and mergers on the other. However, there were also some common basic provisions.

As regards the procedure applying to restrictive agreements and abuses of dominant position, the first-instance proceedings (before the OCCP President) were two-tier i.e. composed of the "explanatory" (or preliminary) investigation which could (but did not have to) lead to the actual "antimonopoly investigation" (cf. Article 42). The procedure applicable to mergers differed from the above in that it did not foresee the explanatory investigation stage.

An explanatory investigation could be initiated *ex officio* by means of a resolution of the President of the OCCP, if the circumstances led him to suspect a possible infringement of the provisions of the 2000 Act (Article 43). The aims of an explanatory investigation were defined as follows:

a/ to preliminarily assess whether an infringement of the provisions of the 2000 Act, giving grounds to institute an antimonopoly investigation, has occurred;

b/ to carry out market research, including as regards its structure and concentration level;

c/ to assess whether legitimate interests of consumers have been infringed, which would justify taking actions foreseen by separate legal acts.

The time-limit for the explanatory investigation was set at 30 days maximum. Following the closure (by means of an administrative decision) of an explanatory investigation, an antimonopoly investigation could be initiated, either *ex officio* of upon a motion (Article 44), which could be introduced by: an undertaking or an association of undertakings (provided they proved their legal interest); a territorial self-government body; an organ of State inspection; the Ombudsman for Consumers; and a consumer organisation (Article 84)[286]. The parties to the antimonopoly investigation procedure were the President of the OCCP as well as the person who applied for a decision and/or the person against whom the investigation was carried out (Article 86). In addition, the President of the OCCP could authorise another person, with a proven legal interest, to participate in the proceedings in the character of an "interested party" (Article 87).

The OCCP President instituted and closed the antimonopoly investigation by way of an administrative decision, of which the parties to the proceedings had to be informed. He could refuse to institute the proceeding when (cf. Article 85):

a/ based on the information in his possession, he concluded that there was no proof of infringement of the 2000 Act;

b/ the party who introduced the motion failed to provide, within the fixed time-limit, information necessary to decide upon instituting or refusing to institute the proceedings, and

c/ the motion did not meet the statutory requirements.

The refusal to institute proceedings took the form of a resolution, which was appealable. The proceedings could not be instituted if more than a year had passed since the end of the year during which the practices concerned had ceased. In the course of the proceedings, the parties could agree to settle their dispute through conciliation, provided that it was without prejudice to the public interest (cf. Article 88). If there were sufficient grounds for suspicion that objects, files, books, documents and other data carriers which could have an impact on the investigation were stored in a person's domicile, the Antimonopoly Court could, upon a motion of the President of the OCCP, authorise a police search. This authorisation was not subject to an appeal (cf. Article 91).

The 2000 Act foresaw an important catalogue of procedural rules and rights for the parties to the proceedings, e.g. the right for the President of the OCCP to seek all necessary information from the undertakings involved (Article 44); the right for undertakings to present documentary and witness evidence (Articles 46 to 48); the right of the President of the OCCP to call (after having heard the parties' opinion) experts (cf. Articles 49 to 54) and to hold a hearing (cf. Article 55); extensive rights for the President of the OCCP and his staff to carry out inspections (including access to all premises, documents and persons - Articles 57 to 59, and the right to seize items of evidence - Articles 60 - 61), in the respect of business secrecy (Articles 62 and 63), as well as to give his decision an immediately executable character (Article 90), etc.

[286] On 21 April 2007, a package of amendments to the 2000 Act *inter alia* abolished the procedure initiated upon a motion, leaving in place only the *ex officio* procedure. This was explained by the will to limit the number of abusive motions in matters of minor importance and without an interest for the protection of competition. Of course, companies could still send communications to the OCCP, which could initiate an *ex officio* procedure based on this information. Cf. las, PAP, "UOKiK: kary dla firm naruszających interesy konsumentów", "Gazeta Wyborcza", 20 April 2007.

In cases concerning restrictive practices and abuses of dominant position, the proceedings had to be terminated not later than within four months from the day of their institution (Article 92). When issuing a decision to this effect, the OCCP President could take into account only the charges on which the parties had the opportunity to state their views (Article 66).

d. sanctions

The 2000 Act foresaw, similar to the previous Act, an impressive catalogue of sanctions for the violation of its provisions (cf. Articles 101 to 106). Most importantly, the President of the OCCP had the right to issue a decision ordering the termination of a practice. Further, he could also impose fines on the undertaking(s) concerned. There were two types of fines: those imposed for breach of procedural provisions and those imposed as sanction for substantive violations. As concerns the former, the President of the OCCP could, by way of decision, impose a penalty of 10 to 1000 EUR for each day of failure to execute his decision on the merits - or a judgment of the Antimonopoly Court (subsequently, CPCC). He could also impose a fine of 200 to 5000 EUR on a party to the proceedings, which (even unintentionally) declared false data or misleading information concerning the notification of an intended merger, as well as, when a party did not fulfil the obligation to inform the President of the OCCP about anti-trust proceedings instituted against this party abroad and about the outcome of the proceedings.

The same fines could be imposed for a failure to co-operate with an inspection carried out by the OCCP in the context of an ongoing investigation. Further, fines of 1000 to 50000 EUR could be imposed for violations of the statutory requirements concerning notifications. Concerning the fines for substantive violations (of provisions on restrictive agreements and abuse of dominant position), the President of the OCCP was given the right to impose them in the amount ranging from 1000 to 5000000 (!) EUR; however, the fine could not exceed 10 % of the annual turnover in the accounting year preceding the year of imposing the fine.

e. mergers

As regards mergers, these were considered as being of minor importance where either:

a/ the combined turnover of participating undertakings did not exceed the equivalent of 10 million EUR on the territory of Poland during any of two of the completed last business years; or

b/ the combined market share of undertakings intending to concentrate did not exceed 20 % (cf. Article 13.1 and 13.2)[287].

With regard to the mergers concerned by the a/ category, the combined turnover was understood as including both the turnover of undertakings directly participating in the merger and of those participating in the capital groups in which the undertakings directly involved in the mergers participated.

[287] As of April 2007, the turnover threshold was raised to 50 million EUR (or one billion worldwide). Further, in case of a takeover, it was not required to notify it if the turnover of the taken over company had not exceeded 10 million EUR in the preceding year. Cf. M. Kosiarski, "Przejęcia małej fabryki nie trzeba zgłaszać", "Rzeczpospolita", 6 February 2007.

"De minimis" mergers were exempted from the duty of notification. Further, mergers of undertakings participating in the same capital group (and, under a number of specific conditions, mergers resulting from bankruptcy or composition proceeding, temporary purchases of transferable securities made by investment institutions, as well as other temporary purchases, by undertakings, of stocks and shares as collaterals) were also not subject to obligatory notification (cf. Article 13.3 to 13.6).

Regarding all the other mergers, the 2000 Act specified that they should be declared prohibited (via a decision by the President of the OCCP) if their implementation would result in the creation or the strengthening of a dominant position, as a result of which competition on the relevant market would be significantly restricted unless, in individual cases, a merger is recognized either as contributing to the economic development or technical progress, or as one that may have a favourable impact on the national economy (Article 19)[288]. This formulation was to a significant degree compatible with the approach adopted in the EU context.

In merger cases, the proceedings had to be terminated not later than within two months since their institution, except in cases of intended purchase of publicly traded stocks, where the time-limit was 14 days. The investigation could not be initiated if more than 5 years had elapsed from the end of the year when the violation of the 2000 Act took place, or when the decision about the imposition of a fine became legally binding (Article 68). Further (cf. Article 93), the proceedings could not begin if more than one year had elapsed from the moment when the prohibited practices had ceased.

The following intended mergers (provided that the combined turnover of the undertakings participating in the merger exceeded 50 million EUR in the year preceding the year of the notification) were subject to obligatory notification[289] (cf. Articles 12 and 94):

a/ merging undertakings acting jointly (or creating a joint undertaking);

b/ one undertaking taking over the direct or indirect control of another undertaking;

c/ a person who performs the function of a member of a managing or controlling body of one undertaking being appointed to a similar function in another undertaking;

d/ a financial institution or an undertaking acquiring stocks or shares in order to secure liabilities.

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[288] This meant that if a merger created a dominant position, it would nonetheless be cleared in these circumstances.

[289] The 2000 Act contained a provision stipulating that the intention to carry out a merger had to be notified. This provision was not amended also after the entry into force of the new EC Merger Regulation (i.e. Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, in force as from 1 May 2004), in which the notification procedure was significantly modified. Under the new rules, notification was possible on the basis of a good-faith intent to merge, where previously a binding agreement was required. This gave a greater flexibility to companies as regards when to seek regulatory clearance (however, the prohibition of executing the agreement prior to an authorisation remained in place). Further, the previous seven-day deadline for the filing of a notification was abolished. Cf. http://ec.europa.eu/comm/competition/publications/special/3_merger.pdf.

In cases where a merger was carried out by a dominant undertaking through at least two dependent undertakings, the notification duty rested with the dominant undertaking. The notification of a merger had to be made within 7 days from the conclusion of an agreement to this effect or from the moment of carrying out of another action, on the basis of which the merger was taking place. All the notifying undertakings became automatically parties to the proceedings (Article 94.1). Naturally, the President of the OCCP had the right to initiate the investigation *ex officio* if he came across information about a merger which could have taken place in violation of the provisions of the 2000 Act.

The President of the OCCP could, by means of a resolution which was not subject to complaint, admit to the proceedings (as an "interested party"), a person who proved his legal interest and, in particular, an undertaking over whom control was being taken or an entity disposing of the property (cf. Article 95). The interested entities were authorized to provide explanations and documents relevant to the assessment of the case.

The notification of mergers had a suspensive effect i.e. the undertakings involved were obliged to refrain from proceeding with the merger until the decision of the OCCP President was issued (however, they could proceed if the OCCP President failed to issue the decision within the time-limit, cf. Article 98). The final decision could authorise the merger unconditionally, authorise it under certain conditions or prohibit it (cf. Article 18).

The 2000 Act contained separate rules on the sanctions for substantive violations of the provisions concerning mergers (cf. Article 20). If the merger in question had already been carried out - and it was considered that it was impossible to restore competition on the relevant market in any other way - the President of the OCCP had the right to issue a decision (and set a time-limit for its implementation) in order to:

a/ split the merged undertaking (dismantle the merger) pursuant to conditions set in the decision;

b/ oblige an undertaking to divest the entirety or a part of its property;

c/ oblige an undertaking to divest stocks or shares ensuring the control over the undertaking which had been subject to a merger; or dissolve the undertaking over which the partners to a merger had joint control;

d/ dismiss a person from the post of member of a managing or controlling body of the undertaking(s) participating in the merger.

It is noteworthy that the 2000 Act conferred extensive powers on the President of the OCCP in the context of the merger procedure, equivalent in fact to the powers of managing bodies of participating undertakings. In addition, the President of the OCCP could apply to the competent court for the annulment of the agreement or for taking other legal steps aimed at restoring the previous status (Article 100).

6. 2003 amendments

In December 2003, the OCCP prepared a series of amendments to the 2000 Act[290], the intention of which was to reflect the changes introduced into the EC competition law by the Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[291]. The core of the changes brought about by the Regulation No. 1/2003[292] consisted - in the light of the fact that the enlargement of the EU would imply a very significant increase in the workload of the relevant services of the European Commission - of delegating a significant part of the up-till-then exclusive powers of the Commission to competition authorities in the Member States, which would be given the task and the right to apply the EC competition law directly. Essentially, the Polish amendment would increase the OCCP's inspection powers, enable the Commission services to assist such inspections and to carry them out independently, raise the maximum fine for certain violations of the 2000 Act to 50 million EUR, while creating the possibility for the President of the OCCP to alleviate sanctions against undertakings involved in illegal agreements which decided to cooperate with the OCCP ("leniency programme"[293]).

The President of the OCCP was to be given the right to initiate anti-trust proceedings directly pursuant to the EC legislation, and to impose fines on EU undertakings violating this legislation, as long as the prohibited practices had an impact on trade between the EU Member States. In close co-operation with other competition authorities of the Member States (in the context of the European Competition Network), the President of the OCCP would also be able to issue decisions in a certain category of cases of not only Polish, but also European character.

The amendment reflected the provisions of Regulation No. 1/2003, according to which national competition authorities in the EU Member States had to notify the European Commission about every case before they issued a decision based on the EC legislation. Such a notification had to include a brief description of the case and a draft of the decision, or another document determining further action. This information would be made available to competition authorities of other Member States, which would be able to consult the Commission on any event related to the application of the EC law.

As mentioned above, one major innovation in respect of inspections was that the Commission services were to be able to carry out independent inspections of Polish undertakings, in which case the OCCP would be obliged to provide the Commission officials with any support required by national legislation, e.g. by obtaining a court warrant or ensuring police assistance if necessary.

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[290] Cf. Press Release of 11 December 2003, the OCCP's website, www.uokik.gov.pl.

[291] I.e. the new procedural regulation, which was to replace the Regulation No. 17/62 as from the date of EU enlargement (1 May 2004). O.J. L 1/1 - 25, 4 January 2003.

[292] Cf. also further developments in Chapter IV.B.

[293] However, the "leniency programme" did not seem to work well in practice. As the OCCP itself acknowledged, only four companies had decided to make use of this possibility between 1 May 2004 and 1 March 2005. This was attributed by the Office, in part, to the relatively low degree of awareness of this procedure among the companies concerned and their uncertainty as to what information should be provided to the OCCP and what criteria are applied by the Office when deciding whether to reduce the sanction. In addition, some experts (e.g. Alina Szarlak, partner in the White&Case law firm, and Robert Gwiazdowski from the Adam Smith Centre) expressed the view that companies did not sufficiently fear that their cartels might be discovered and punished, as they considered that the OCCP had no sufficient means to do it effectively. Cf. K. Niklewicz, "Świadek koronny? Nie w gospodarce", "Gazeta Wyborcza", 15 March 2005.

Furthermore, the OCCP staff was to be able - as from the date of Poland's accession to the EU - to carry out inspections pursuant to an order by the Commission or on request of competition authorities of other Member States. Apart from EU accession-related changes, the amendment provided for some new procedural possibilities for the OCCP, such as preliminary measures. Under specific circumstances, the President of the OCCP would exceptionally be able to order an undertaking to halt a given practice (that could exert irreversible effects on the market) before the proceedings are concluded.

As far as mergers were concerned, the amendment introduced an assumption that it is a given undertaking's turnover, not its market share, that should be considered as the principal criterion of applicability. Thus, Article 13 (2) of the 2000 Act, which exempted from the mandatory notification intended mergers when the joint market share of participating undertakings did not exceed 20%, was annulled. The OCCP considered[294] that the new rules were applicable to all mergers that had not yet been implemented as of 1 May 2004, i.e. also those notified prior to this date, in respect of which the Office President had decided not to initiate proceedings (because of the merger being below the 20% threshold, and thus not requiring notification under the pre-May'2004 rules) or to stay the already initiated proceedings. This meant that proceedings in such cases were to be (re)opened, and the only procedural concession accorded to the parties was that they would not be bound by the 7-day time-limit for the notification (Article 94 (4) of the 2000 Act being no longer valid as of 1 May 2004, either)[295]. They were allowed to notify the mergers concerned at any time, provided that the notification would take place prior to the merger's implementation.

The amendment of December 2003 abolished the requirement for the notification of intended mergers to be made within the statutory period of time, and so were the fines for failing to report the intention to merge. The idea behind it was that undertakings should be punished for having proceeded with a merger without the approval of the President of the OCCP, and not for the failure to notify.

7. Executory regulation (block exemption) on vertical restraints

Following the entry into force of the 2000 Act, the Polish Government initiated the drafting of several executory regulations, including group exemptions authorised in Articles 7 and 11 of the Act. One of them was the Council of Ministers Regulation of 13 August 2002 on the Exemption of Certain Vertical Agreements from the Prohibition of Agreements Restricting Competition[296]. The Regulation followed quite closely (albeit not entirely) the Commission Regulation No. 2790/1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices[297]. It set out the conditions which vertical agreements had to fulfil in order to qualify for a group exemption, as well as contained lists of authorised ("white") and prohibited ("black") clauses in such agreements (cf. § 1. 1) - 3) of the Regulation). The definitions used in the Regulation (cf. § 2) were generally compatible with those applied in the EC legislation.

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[294] Cf. the OCCP's website, www.uokik.gov.pl.

[295] Theoretically (although it has not been applied in practice), the OCCP President could even resort to the sanction of ordering divestiture of the mergers concerned.

[296] Dz. U. Nr 142/2002, poz. 1189. Entered into force on 20 September 2002.

[297] Issued on 22 December 1999, O.J. L 336/21 - 25.

As regards the scope of the Polish Regulation, it did not include technology transfer agreements, motor distribution and servicing agreements as well as other types of agreements which were to be covered by different group exemptions pursuant to Article 7 of the 2000 Act[298]. This approach was basically the same as that adopted in the Commission Regulation No. 2790/1999. However, unlike the latter, the Polish Regulation did not specify whether - and under which conditions - it covered the agreements entered into between an association of undertakings and its members, as well as between such an association and its suppliers[299]. Further, it did not contain a provision similar to Article 2 (4) of the Commission Regulation, concerning the important issue of applicability (and conditions thereof) of the group exemption to vertical agreements entered into between competing undertakings.

In a manner analogous to Regulation No. 2790/1999[300], the Polish Regulation defined the conditions of its applicability (or the "thresholds"). Thus (cf. §§ 5 - 7), vertical agreements could qualify for a group exemption if the share of the supplier (and of the capital group to which the supplier belonged) in the relevant product market did not exceed 30%. When the agreement contained exclusive supply clauses, the exemption applied if the analogous share of the buyer (and of the capital group to which the buyer belonged) was not exceeded. However, if the market share did not exceed 30% but rose after the conclusion of the agreement (although without crossing the limit of 35% market share), the group exemption still applied, albeit only for a period of 2 years from the end of the year during which the 30% threshold had been crossed for the first time. The group exemption also applied if the market share (initially not exceeding 30%) rose above the 35% threshold after the conclusion of the agreement, although its application in such cases was limited to one year following the end of the year in the course of which the 30% threshold had been crossed for the first time. In general, the group exemption could not apply for longer than two consecutive years following the end of the year during which the market share exceeded 30%.

Unlike the Commission Regulation No. 2790/1999 (which enumerated the "grey" and "black" clauses), the Polish Regulation contained a (non exhaustive) list of authorised ("white") clauses restricting competition in vertical agreements. These listed clauses (cf. § 8 of the Regulation), which were all compatible with the EC law, included the following restrictions:

a/ limiting the right of the buyer to set the price for the sale of goods to the end user, through the setting (by the supplier) of maximum or recommended prices (unless this *de facto* amounted to setting minimal or fixed prices);

b/ limiting the right for the wholesale distributor to resell the goods directly to consumers;

c/ limiting the right for selective distributors to sell the goods covered by the selective distribution system to distributors not belonging to the system;

d/ limiting the right for the buyer to resell components to other undertakings, which would use these components to produce goods considered as substitutes for the goods sold by the supplier;

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[298] Cf. Chapter II.B.8 and 11.

[299] Cf. Article 2 (2) of Regulation No 2790/1999.

[300] Cf. Articles 9 - 11.

e/ obliging the buyer to purchase a certain range or a minimum amount of goods;

f/ obliging the buyer to sell the goods concerned only with the supplier's trademark;

g/ obliging the buyer to undertake promotion activities;

h/ obliging the franchisor to communicate to the franchisee the know-how and to provide him with trade and technical assistance during the time of the franchising agreement;

i/ obliging the franchisor to refrain from using and from allowing other undertakings to use the entire or the part of the franchising "package" on the franchisee's territory;

j/ obliging the franchisor not to deliver to other undertakings the goods covered by the franchising agreement (or other goods considered as their substitutes) on the franchisee's territory;

k/ obliging the franchisee to refrain from direct or indirect trade activity similar to the activity of other franchisees and of the franchisor on the territory on which they could compete with each other; this obligation could continue applying for up to a year after the expiry of the agreement;

l/ obliging the franchisee to refrain from buying shares in undertakings competing with the franchisee or with the franchisor, in the amount allowing to influence the activity of these undertakings;

m/ obliging the franchisee not to disclose the know-how provided by the franchisor to third persons, as long as the know-how has not been communicated to the public;

n/ obliging the franchisee to communicate to the franchisor all experience acquired in the course of the execution of the franchising agreement;

o/ obliging the franchisee to:

i. inform the franchisor about all violations of intellectual and industrial property rights concerned by the franchising agreement;

ii. undertake legal action against all persons violating the above-mentioned rights;

iii. provide assistance to the franchisor in all actions against the persons referred to in point *ii.* above;

p/ obliging the franchisee to refrain from using the know-how communicated by the franchisor for other purposes than those foreseen in the franchising agreement:

r/ obliging the franchisee not to transfer the rights and obligations stemming from the franchising agreement to other undertakings, without the franchisor's authorisation.

Chapter 4 of the Regulation contained two lists of prohibited ("black") clauses in vertical agreements. In § 9, the following clauses were enumerated as those which may never be exempted under the block exemption (and, consequently, as those preventing the whole agreement from qualifying unless it was possible to separate them from the rest of the agreement):

a/ prohibiting, directly or indirectly, parties to the agreement to compete with each other for an unlimited period or for a period exceeding 5 years, unless the buyer sells the goods covered by the agreement in premises or on a land owned, possessed or leased by the supplier (as well as leased by the supplier from third persons unconnected with the buyer), and the period during which such a prohibition is imposed does not exceed the period of occupancy of such premises or land by the buyer;

b/ prohibiting, directly or indirectly, distributors acting in a selective distribution system to sell goods of particular competitors of the supplier;

c/ prohibiting, directly or indirectly, the buyers to manufacture, purchase, sell or resell goods after the expiry of the period for which the agreement was concluded, unless such clauses:

i. concern goods considered as substitutes for the goods covered by the agreement, and

ii. are limited to the premises or the land on which the buyer carries out his activity during the period of validity of the agreement, and

iii. are indispensable for the protection of the know-how communicated to the buyer by the supplier

- and the period of validity of the clauses fulfilling the requirements set out in points *i.* to *iii.* is limited to a maximum of one year following the expiry of the agreement.

Further, pursuant to § 10 of the Regulation, the block exemption did not cover vertical agreements which - directly of indirectly, alone or combined with other circumstances depending on the will of the parties - had as their object or effect:

a/ restricting the buyer's right to set the prices of the goods covered by the agreement, through the imposition by the supplier of minimum or fixed prices;

b/ restricting the territory or the choice of clients, to whom the buyer can sell the goods covered by the agreement, except for:

i. restrictions on active sales on a given territory or to a given group of clients, the sale to whom has been reserved for the supplier or for other buyers, provided that these restrictions do not render it more difficult for clients to acquire goods covered by the agreement;

ii. restrictions on sale to end users by wholesale distributors;

iii. restrictions imposed on selective distributors on sale of goods covered by the agreement to other distributors, not belonging to the selective distribution system;

iv. restrictions on resale of goods, having the characteristics of components, to other undertakings, which would use these components to manufacture goods considered as substitutes for the goods sold by the supplier;

c/ restricting the possibility for retail distributors operating in a selective distribution system to sell to end users, except for the limitation on sale in premises which do not meet the criteria identified in the agreement forming the basis of the system;

d/ restricting cross-supplies between distributors active in a selective distribution system, including between distributors operating at different levels of trade;

e/ restricting the supplier's right to sell components as spare parts to end users, repair shops or other service providers, to which the buyer did not confer the task of repairing or servicing the goods manufactured with the use of these components.

It is noteworthy that the clauses enumerated in §§ 9 and 10 of the Polish Regulation were basically identical with those set out in, respectively, Article 5 and Article 4 of Regulation No. 2790/1999. The Regulation was to expire on 31 December 2007[301] i.e. two and a half years earlier than the Commission Regulation[302].

8. A block exemption concerning technology transfer agreements

The regulation exempting certain categories of technology transfer agreements was issued on 30 July 2002[303]. It was clearly inspired by the analogous EC regulation which was in force at that time, i.e. the Regulation No. 240/96[304], which explains why its philosophy and structure differed quite considerably from the new Community block exemption on technology transfer agreements, adopted in 2004[305]. In particular, the Polish regulation contained less precise definitions of its scope (it was among others not fully clear whether it applied to services), and there was no real difference in approach according to whether the companies involved were – or were not – competitors; the latter aspect was *inter alia* apparent in the manner in which thresholds had been defined (only one market share threshold – 30% - as compared with the lower threshold for competing companies in the EC regulation, i.e. 20 %). Thus, it could be argued that the Polish regulation was more lax in its attitude to technology transfer agreements.

[301] Cf. § 12.
[302] Pursuant to Article 13, it was to expire on 31 May 2010.
[303] Dz.U. Nr 137, poz. 1152.
[304] O.J. L 31/2, issued on 9 February 1996.
[305] Commission Regulation (EC) No. 772/2004, issued on 27 April 2004, O.J. L 123/11 – 17.

Another major difference between the Polish and the Community regulations (present also in other Polish block exemptions, cf. above and below) was the presence of a (non-exhaustive) list of "white clauses"[306]. These clauses included, first of all, different variants of a non-compete clause between the parties (concerning both the licensor and the licensee), as well as a ban on active sales for the licensee.

Further, there were the obligations for the licensee to: use the licensor's trade mark and to inform the clients about the licensor's identity; to limit the use of licensed technology to own production needs; to keep the know-how secret; to refrain from sub-licensing the technology concerned; to stop production once the agreement expired; to grant the licensor licenses for any improvements (provided this obligation was reciprocal and non-exclusive); to respect quality standards; to inform the licensor about any license violations and to ensure appropriate protection of the licensed technology; to pay a fee for its use; to respect minimum production quotas and refrain from using the technology in certain geographical and product markets; and to refrain from using the licensed technology to set up production infrastructure for third persons (unless this was done to fulfil the licensee's own needs). Among the "white clauses", there were also those granting the licensor certain rights such as the right to cancel the agreement and to seek legal remedies in case of violation of the agreement by the licensee; and to withdraw the exclusive license if the licensee started competing with the licensor or using the technology in a manner contrary to the agreement.

The Polish regulation contained a provision[307] on temporal limits of application (i.e. 10 years from the moment of introduction of the products concerned on the market) of the non compete and active sales ban clauses in agreements on licensing know-how – a provision somewhat more rigid than the approach adopted by the Commission (which relied more on the period when the know-how concerned remained actually of economic relevance, that is secret and substantial). As regards the "black clauses"[308], the main difference between the Polish and the Community regulations seemed to be the absolute character of the prohibition of a passive sale ban in the Polish block exemption, which was a stricter approach than that in the Regulation No. 772/2004[309]; further, the Polish regulation expressly excluded from the scope of the block exemption agreements for joint exploitation of the technology concerned and for common organisation of sales. There was also a provision not found in the corresponding EC regulation, namely that the exemption would not apply to agreements between a partner to an agreement and a joint venture set up by both partners if the share of the goods covered by the license on the relevant market exceeded 20 %[310].

It is noteworthy that the Polish regulation had a relatively short period of validity (i.e. 5 years); therefore, it was likely that it would be replaced by a text more conform with the Community Regulation after it expires[311].

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[306] Cf. § 4.

[307] Cf. § 6.1.

[308] Cf. § 8 and 9.

[309] Cf., in particular, Article 4. 1 (c) (iv); Article 4.2 (b) (i) and (ii); and Article 4.2 (c) of the Community Regulation.

[310] 10% in the case of agreements covering both the production and the distribution, cf. § 9.2 of the Polish regulation.

[311] 31 July 2007. The EC Regulation will expire on 30 April 2014, cf. Article 11.

9. A block exemption concerning specialisation and R&D agreements

On 13 August 2002, the Polish Council of Ministers issued a block exemption regulation, covering specialisation and research and development agreements[312]; it entered into force on 21 September 2002. The Regulation was based on two Community block exemptions, contained in the Commission Regulations Nos. 2658 (specialisation agreements) and 2659 (research and development agreements), both issued on 29 November 2000[313].

The definitions used in the Polish Regulation generally closely followed those from the corresponding Commission Regulations, with the exception of the definition of know-how, which was slightly differently formulated (the Polish definition, contained in § 2, point 6, of the Regulation, omitted the criterion of the know-how being "identified" - cf. Article 2 (10) of Regulation No. 2659/2000 - but added a further qualification of know-how as "practical information" by specifying what this practical information meant i.e. technical or technological information or principles of organisation and management).

The provisions concerning exemption (§ 3) were almost identical with the relevant provisions of the respective Commission Regulations (Articles 1 (1) and 1 (2) of Regulations Nos. 2658 and 2659/2000). There were, however, some minor differences in the formulations used e.g. the Polish definition of unilateral specialisation agreements (§ 3.1.1.a. of the Polish Regulation) omitted the reference to a "competing undertaking" used in Article 1 (1) (a) of Regulation No. 2658/2000, and replaced it with the notion of "the other party or parties to the agreement".

However, this was compounded by the provision in § 3.3 of the Polish Regulation, which stated clearly that the group exemption in the case of unilateral specialisation agreements did not apply to agreements between non-competing undertakings. As to the R&D agreements and ancillary restraints in both categories of agreements concerned by the Polish Regulation, the formulations used in § 3.1.2 and 3.2 were basically identical with those found in Article 1 (1) of Regulation No. 2659/2000 as well as in Articles 1 (2) of both Commission Regulations concerned, although the Polish Regulation missed a provision analogous to the second sub-paragraph of Article 1 (2) of the R&D Commission Regulation, specifying that the exemption could never apply to clauses having the same object as those enumerated on the "black list" in Article 5 (1) of the said Regulation.

Chapter 2 of the Polish Regulation specified the market share thresholds for its application, in a manner following very closely the Commission Regulations. Thus, the block exemption applied to specialisation agreements if the combined market share of all the parties to the agreement (as well as their capital groups) on the relevant market did not exceed 20% in respect of each product covered by the agreement (cf. § 4.1). If this market share rose above 20% but did not exceed 25% after the conclusion of the agreement, the block exemption applied for 2 years following the end of the year during which the 20% threshold was exceeded, and for one year if the 25% threshold was crossed (cf. § 5.1).

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[312] Council of Ministers Regulation on the Exemption of Certain Specialisation and Research and Development Agreements from the Prohibition of Agreements Restricting Competition, Dz.U.Nr 142, poz. 1188. Cf. also Ż. S., "Obowiązuje od 21 września. Porozumienia ograniczające konkurencję", Rzeczpospolita, 21 September 2002.

[313] Respectively, O.J. L 304/3-6 and 7-12.

As to R&D agreements, the thresholds were defined nearly identically as in Articles 4 and 6 of Regulation No. 2659/2000 (25% in respect of each product covered - or meant to be replaced - by the agreement; application limited to 2 years if the market share rose above 25% but below 30% following the conclusion of the agreement, and to one year if the 30% limit was exceeded); as in the Commission Regulation (cf. Article 4 (1)), there was no threshold for R&D agreements concluded between non-competing undertakings.

However, the Polish Regulation contained a different time-limit for the validity of the exemption (i.e. only 5 years instead of 7, cf. § 4.3 of the Polish Regulation) in the case of agreements between non-competitors which foresaw joint exploitation of the results of the research and development. Another (potentially quite important) difference concerned the method of calculation of the market share: while both Commission Regulations stipulated (cf. Article 6 (1) (c)) that the market shares of connected undertakings were to be apportioned equally to each undertaking having the rights or powers in these (jointly controlled) undertakings, the Polish Regulation stated (§ 6.3) that the sales between undertakings belonging to the same capital group were not to be included into the market share calculation.

In paragraph 7 of the Polish Regulation, the conditions for exemption of research and development agreements were formulated in a wording extremely close to that of Article 3 of Regulation No. 2659/2000[314]. On the other hand, the approach adopted by the Polish Government differed from that of the Commission as regards the authorised ("white") clauses in specialisation and research and development agreements. While the Commission considered it appropriate to move away from the idea of listing such clauses and decided to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements[315], the Polish Council of Ministers opted for the solution drawing upon the previous versions of the EC block exemption regulations concerning specialisation and R&D agreements[316], i.e. enumerating (albeit in a non-exhaustive way) the authorised clauses[317].

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[314]Article 3 of Regulation No 2659/2000 stipulates the following:
"Conditions for exemption
1. The exemption provided for in Article 1 shall apply subject to the conditions set out in paragraphs 2 to 5.
2. All the parties must have access to the results of the joint research and development for the purposes of further research or exploitation. However, research institutes, academic bodies, or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results may agree to confine their use of the results for the purposes of further research.
3. Without prejudice to paragraph 2, where the research and development agreement provides only for joint research and development, each party must be free independently to exploit the results of the joint research and development and any pre-existing know-how necessary for the purposes of such exploitation. Such right to exploitation may be limited to one or more technical fields of application, where the parties are not competing undertakings at the time the research and development agreement is entered into.
4. Any joint exploitation must relate to results which are protected by intellectual property rights or constitute know-how, which substantially contribute to technical or economic progress and the results must be decisive for the manufacture of the contract products or the application of the contract processes.
5. Undertakings charged with manufacture by way of specialisation in production must be required to fulfil orders for supplies from all the parties, except where the research and development agreement also provides for joint distribution."

[315]In the Commission's opinion, this was consistent with an economics-based approach which assesses the impact of agreements on the relevant market. Cf. recital (5) of Regulation No 2658/2000 and recital (7) of Regulation No 2659/2000.

[316]Cf. Commission Regulation No 417/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of specialization agreements (with subsequent amendments); and Commission Regulation No 418/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of research and development agreements (with subsequent amendments), O.J. L 053 , 22 February 1985.

This, in the author's view, seems to have been a more reasonable approach in the Polish context, taking into account the fact that Polish companies, lawyers and courts had – as compared with their counterparts in the EU – less experience with anti-trust law and with applying complex economic analyses in the context of its application.

As concerns specialisation agreements, some of these clauses (cf. § 8, points 2 to 5) were also mentioned in the Regulation No. 2658/2000[318]; however, there were also clauses not found in the corresponding Commission Regulation, such as obliging the parties to the agreement not to conclude specialisation agreements concerning the same or substitutable goods with third persons (cf. § 8.1 of the Polish Regulation). The same could be said of the obligations on parties concerning the minimum stock of products and spare parts (§ 8.6), minimum quality standards (§ 8.7) and servicing for clients (§ 8.8).

With respect to research and development agreements, the Polish Regulation contained, in its § 9, a long (though not exhaustive) list of authorised clauses. These were as follows:

a/ setting the production targets, if the use of results of R&D activity included joint production of goods covered by the agreement;

b/ setting sales targets and fixing the prices for direct clients, if the use of results of R&D activity included joint distribution of goods covered by the agreement;

c/ obligation to purchase the goods covered by the agreement exclusively from the parties as well as from their joint ventures or undertakings and other third persons to whom the parties jointly conferred the production (specialisation clause);

d/ obligation to communicate the know-how indispensable to carry out the R&D programme or to use its results;

e/ obligation not to use the know-how obtained from the other party to the agreement for other purposes that the carrying out of the R&D programme and using its results;

f/ obligation to obtain and maintain the validity of intellectual and industrial property rights concerning the goods or processes covered by the agreement;

g/ obligation to inform other parties about violations of their intellectual and industrial property rights, to undertake legal action against the violators of these rights, and to provide assistance in each case when such an action is undertaken as well as to participate in the costs of such actions;

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[317] The same approach could, as already mentioned, be found in all the other Polish group exemption regulations, cf. Chapter II.B. 7, 8, 10 and 11.

[318] These clauses were: purchasing and marketing arrangements, reference to which was made in Article 3 of the Commission Regulation (although the Polish Regulation only mentioned appointing an exclusive third party distributor, omitting thus the non-exclusive third party distribution in the context of a joint production agreement); setting of sales targets and the fixing of prices that a production joint venture charges to its immediate customers (cf. Article 5 (2) (b) of the Commission Regulation); and agreeing on the amount of products in the context of unilateral or reciprocal specialisation agreements or setting the capacity and production volume of a production joint venture in the context of a joint production agreement (cf. Article 5 (2) (a) of the Commission Regulation).

h/ obligation to pay the fees and to perform services for other parties in order to compensate for the uneven financial participation in the costs of common R&D or for the uneven participation in the use of its results;

i/ obligation to share with other parties the proceeds from fees obtained from third persons;

j/ obligation to provide other parties with certain minimum amounts of goods covered by the agreement and to respect minimum quality standards; and

k/ obligation to respect the confidentiality of the know-how obtained from other parties or jointly acquired in the framework of the R&D programme, also after the expiry of the agreement.

Chapter 4 of the Polish Regulation contained the list of prohibited ("black") clauses. In this respect, it is noteworthy that, while § 10 (concerning specialisation agreements) was an almost literal translation of the corresponding provision (Article 5 (1)) of Regulation No. 2658/2000[319], the provision applying to R&D agreements (§ 11) departed quite significantly from Article 5 (1) of Regulation No. 2659/2000[320].

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[319] Article 5 (1) excludes from the group exemption agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object (a) the fixing of prices when selling the products to third parties (b) the limitation of output or sales; or (c) the allocation of markets or customers. The Polish Regulation did not mention the allocation of customers.

[320] Article 5 (1) stipulated as follows:

"Agreements not covered by the exemption

1. The exemption provided for in Article 1 shall not apply to research and development agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the freedom of the participating undertakings to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the research and development relates or, after its completion, in the field to which it relates or in a connected field;

(b) the prohibition to challenge after completion of the research and development the validity of intellectual property rights which the parties hold in the common market and which are relevant to the research and development or, after the expiry of the research and development agreement, the validity of intellectual property rights which the parties hold in the common market and which protect the results of the research and development, without prejudice to the possibility to provide for termination of the research and development agreement in the event of one of the parties challenging the validity of such intellectual property rights;

(c) the limitation of output or sales;

(d) the fixing of prices when selling the contract product to third parties;

(e) the restriction of the customers that the participating undertakings may serve, after the end of seven years from the time the contract products are first put on the market within the common market;

(f) the prohibition to make passive sales of the contract products in territories reserved for other parties;

(g) the prohibition to put the contract products on the market or to pursue an active sales policy for them in territories within the common market that are reserved for other parties after the end of seven years from the time the contract products are first put on the market within the common market;

(h) the requirement not to grant licences to third parties to manufacture the contract products or to apply the contract processes where the exploitation by at least one of the parties of the results of the joint research and development is not provided for or does not take place;

(i) the requirement to refuse to meet demand from users or resellers in their respective territories who would market the contract products in other territories within the common market; or

(j) the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or resellers from obtaining, or from putting on the market within the common market, products which have been lawfully put on the market within the Community by another party or with its consent."

In fact, the list of "black clauses" in the Polish Regulation was much shorter than in the Commission Regulation - it did not include the clauses mentioned in Articles 5 (1) (f), 5 (1) (g), 5 (1) (i) and 5 (1) (j). Moreover, the period after which the clause - restricting the circle of customers that the participating undertakings may serve - became excluded from the benefit of the group exemption was shorter in the Polish Regulation (5 years, cf. § 10.3) than in the Commission Regulation (cf. Article 5 (1) (e)). Thus, the Polish act was more lenient to some extent, but more severe in another aspect.

It is noteworthy that there was one more, very important, difference between the Polish Regulation and its Community analogues – namely the absence of a possibility to withdraw the benefit of the group exemption comparable to the right conferred upon the Commission by virtue of Articles 7 of both Commission Regulations concerned. Further, the term of expiry of the Polish Regulation (31 December 2007, cf. § 13) did not correspond to the terms of expiry of the Community Regulations (31 December 2010, cf. Articles 9 of both Regulations).

10. A block exemption concerning the insurance sector

In July 2002, the Polish Government issued a block exemption Regulation concerning agreements between undertakings carrying out activities in the insurance sector[321]. It was basically closely modelled on the corresponding (then) Community act, i.e. the Commission Regulation No. 3932/92[322], which was somewhat unfortunate as the latter Regulation was soon replaced by a new Community block exemption, contained in the Commission Regulation No. 358/2003[323]. This probably explains some differences between the Polish and the EU texts, although the basic lines of both were the same.

Among the main differences, one should mention the approach also demonstrated by the Polish authorities in other block exemption regulations, namely the continued attachment to "white clauses", which were expressly enumerated in paragraphs 14, 16 and 17 of the Polish Regulation[324].

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[321] Issued on 30 July 2002, Dz.U. Nr 137, poz. 1151, in force as from 14 August 2002 and until 31 July 2007.

[322] Issued on 21 December 1992, O.J. L 398. Cf. C. Estera, "The application of EU competition rules to the insurance sector. Past developments and current priorities", published in the British Insurance Law Journal No. 94, 1 March 1997, and on the European Commission's D.G. for Competition's website, http://europa.eu.int/comm/competition/speeches/text/sp1997_019_en.html.

[323] Issued on 27 February 2003, O.J. L 53 of 28 February 2003. It entered into force on 1 April 2003, and was valid until 31 March 2010.

[324] These paragraphs stated as follows:

"§ 14. 1. The agreements subject to the exemption may determine:
1) the categories of risk covered by the group,
2) the conditions governing admission to the group,
3) the individual own-account shares of the participants in the risks co-insured or coreinsured,
4) the conditions for individual withdrawal from the group,
5) the rules governing the operation and management of the group.
2. The agreements concerning reinsurance groups may additionally determine:
1) the shares in the risks covered which the participants do not pass on for co-reinsurance,
2) the cost of co-reinsurance, which includes both the operating costs of the group and the remuneration of the participants in their capacity as reinsurers."

"§ 16. Subject to the provisions referred to in § 14, the exemption shall apply to the agreements containing:
1) the obligation, in order to qualify for the co-insurance cover within the group, to
a) take preventive measures,
b) apply the general or specific insurance conditions accepted by the group,
c) apply the premium tariffs and commissions set by the group,
2) the obligation to submit to the group for approval any settlement of any claim relating to a co-insured risk,

There were also some provisions in the Polish Regulation which could not be found in the same form in Regulation No. 358/2003, for example § 9, excluding the benefit of the block exemption where the standard insurance policy conditions contained clauses which excluded losses from the cover that normally related to the class of insurance concerned. Further, the Polish Regulation could to some extent be considered as more restrictive than its Community equivalent, as the thresholds above which the Polish block exemption did not apply to agreements on joint coverage of specific categories of risks (§ 13) were set lower, both in terms of market share (10 to 15% instead of 20 to 25% in the EC Regulation) and the maximum permissible duration of restrictions imposed on members of an insurance or reinsurance group (6 months as compared with one year). In addition, § 15 of the Polish Regulation enumerated *inter alia* two types of "black clauses" which were not mentioned expressly in the EC Regulation (although, arguably, were quite obvious in the light of the spirit of the EC competition rules and practice), namely those by which members of a group would not, having regard to the characteristics of the risks concerned, encounter any significant difficulties in operating individually on the relevant market without organizing themselves in a group; and by which one or more participants would exercise a determining influence on the commercial policy of more than one group on the same market.

On the other hand, the EC Regulation contained some provisions that could not be found in the same literal manner in the Polish one, e.g. Article 3 (1) (b), mentioning as one of conditions for exemption that an agreement on the calculations or tables should include as detailed a breakdown of the available statistics as is actuarially adequate. Further, the Polish Regulation did not contain an equivalent of two types of "black clauses" enumerated in the EC Regulation, namely those due to which standard policy conditions would contain any indication of the level of commercial premiums, and would exclude or limit the cover of a risk if the policyholder installed, used or maintained security devices which were not approved in accordance with the relevant specifications agreed by an association or associations of insurers in one or several other Member States or at the European level (Article 6 (1) (a) and (k) of Regulation No. 358/2003).

Furthermore, the Polish Regulation did not foresee a temporal limitation of the application of its block exemption as concerns co-insurance or co-reinsurance groups which were created after the Regulation's date of entry into force in order exclusively to cover new risks, unlike in the case of the Community Regulation which contained such a time limit (i.e. 3 years, cf. Article 7). It is also noteworthy that the Polish Regulation did not have an equivalent of certain points of Article 9 of the EC Regulation, concerning conditions for exemption of agreements on security devices[325].

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3) the obligation to entrust the group with the negotiation of reinsurance agreements on behalf of all concerned,
4) a ban on reinsuring the individual share of the co-insured risk.
§ 17. Subject to the provisions referred to in § 14, the foregoing exemption shall apply to the agreements concerning reinsurance groups containing:
1) the obligation, in order to qualify for the co-reinsurance cover within the group, to
a) take preventive measures,
b) apply the general or specific insurance conditions accepted by the group,
c) apply a common commission and premium tariff defined by the group,
2) the obligation to submit to the group for approval the settlement of claims relating to the co-reinsured risks and exceeding a specific amount, or to pass such claims on to it for settlement,
3) the obligation to entrust the group with the negotiation of retrocession agreements, for and on behalf of all concerned,
4) a ban on reinsuring the individual retention or retrocession of the individual share."

[325] And, more precisely, the provisions stipulating that the exemption shall apply on condition that:
« (e) any lists of security devices and installation and maintenance undertakings compliant with specifications

Finally, some of the clauses that were "blacklisted" in the Polish Regulation (e.g. those in § 6 (2) – agreements relating to studies founded on unjustifiable hypotheses; § 10 (3) – clauses introducing a significant imbalance to the disadvantage of the policyholder between the rights and obligations of the parties under the policy; and § 15 (3) – clauses resulting in the division of the market) were treated somewhat milder under the EC Regulations, as they were put among causes for a possible – but not automatic – withdrawal of the group exemption.

This difference could be explained by the more "mature" and sophisticated nature of the EC mechanism, with the European Commission possessing much more means and skills in carrying out complex economic analysis, and thus being able to enjoy a higher degree of flexibility in assessing particular cases. Besides, this was yet another example of a relatively more rigid approach demonstrated by the Polish legislator (another example being the resort to the practice of enumerating "white clauses" expressly), perhaps more adapted to the Polish reality as a "young" market economy.

11. 2003 – a block exemption concerning vertical restraints in motor vehicle sector

On 28 January 2003, the Polish Council of Ministers issued another group exemption Regulation, concerning vertical agreements in the motor vehicle sector[326]. It was supposed to enter into force on 1 February 2004, but this date was postponed until Poland's accession to the EU by the Council of Ministers Regulation of 13 January 2004[327]. The Regulation followed the model of the Commission Regulation No. 1400/2002 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector[328].

Generally, the Polish Regulation reproduced almost literally the terms and provisions of the EC Regulation; however, there were some differences and omissions. Among the former, the Polish Regulation contained a provision not found (in the same wording) in the Commission's Regulation, namely that the group exemption was not applicable if the "black clauses" could not be separated from the agreement in its entirety (cf. § 19 of the Polish Regulation). Admittedly, this provision was quite logical and could hardly be considered as contrary to the EC law.

There were also some more important differences between the two texts, especially as regards their scope and general conditions of applicability. Thus, the Polish Regulation did not contain an equivalent of Article 2 (3) of Regulation No. 1400/2002, regarding vertical agreements between competing undertakings[329].

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include a classification based on the level of performance obtained; »
« (g) the evaluation of conformity does not impose on the applicant any expenses that are disproportionate to the costs of the approval procedure; »
« (l) the specifications and rules are applied by bodies accredited to norms in the series EN 45 000 and EN ISO/IEC 17025. »

[326]Dz. U. Nr 38, poz. 329.

[327]Dz. U. Nr 14, poz. 116. Other changes, introduced following intense lobbying by representatives of the Polish motor industry, included a 6-month transition period for the amendment of the existing agreements, and the exclusion from the scope of the new rules of the sector of motorcycle trade. Cf. Press Release of 3 February 2004, the OCCP's website.

[328]O.J. L 203/30 - 41, 1 August 2002.

[329]Article 2 (3) of Regulation No. 1400/2002 stated as follows:
"3. The exemption shall not apply to vertical agreements entered into between competing undertakings.
However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:
(a) the buyer has a total annual turnover not exceeding EUR 100 million, or
(b) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing

This could lead one to conclude that the Polish Regulation was more lenient than its EC counterpart, due to the inclusion of such agreements into the scope of the block exemption, on conditions more liberal than those set out in the Commission's Regulation.

Further, the Polish text did not have a provision corresponding to Article 3 (6) of Regulation No. 1400/2002[330], which made the benefit of a group exemption conditional upon the possibility for the parties to refer any dispute about the agreement to an independent expert or arbitrator. There was also a difference (found equally in the other Polish block exemptions) in the method of calculation of market share: while the Polish Regulation (cf. § 6.5) excluded from this calculation the sales between undertakings belonging to the same capital group, Article 3 (7) of the Commission Regulation stipulated that the market share of such connected undertakings should be apportioned equally to each undertaking having control over a joint venture.

Other important elements of Regulation No. 1400/2002, which were missing in the Polish corresponding act, included: the possibility to withdraw the benefit of the group exemption[331]; the possible non-application of the group exemption to parallel networks of similar vertical agreements covering more than 50% of the relevant market[332]; and the applicability of the group exemption where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10%[333]. Further, the Polish Regulation did not expressly foresee a monitoring and evaluation mechanism similar to that set up under Article 11 of the EC Regulation (although one could argue that such a provision would be redundant, as monitoring and evaluation was a "normal" duty of the executive).

On the other hand, following the same approach as that observed with respect to the earlier group exemption Council of Ministers Regulations, the Polish Government chose to enumerate (on a non-exhaustive basis) the authorised ("white") clauses in vertical agreements in the car sector - unlike the Commission Regulation which focussed primarily on the conditions of non-applicability of a group exemption. These "white clauses" were listed in Chapter 3 (§§ 11 and 12) of the Polish Regulation, some of them reproducing the wording used in the EC Regulation (e.g. those mentioned in Article 4 (1) (i) to (iv); Article 4 (1) (c); 4 (1) (d); 4 (1) (g) and 4 (1) (k)).

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goods competing with the contract goods, or
(c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services."

[330] The provision in question reads as follows:
"6. The exemption shall apply on condition that the vertical agreement provides for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator. Such disputes may relate, inter alia, to any of the following:
(a) supply obligations;
(b) the setting or attainment of sales targets;
(c) the implementation of stock requirements;
(d) the implementation of an obligation to provide or use demonstration vehicles;
(e) the conditions for the sale of different brands;
(f) the issue whether the prohibition to operate out of an unauthorised place of establishment limits the ability of the distributor of motor vehicles other than passenger cars or light commercial vehicles to expand its business, or
(g) the issue whether the termination of an agreement is justified by the reasons given in the notice.
The right referred to in the first sentence is without prejudice to each party's right to make an application to a national court."

[331] Cf. Article 6 of Regulation No. 1400/2002. This absence was a common feature of all Polish group exemption regulations.

[332] Cf. Article 7 of Regulation No. 1400/2002.

[333] Cf. Article 9 (2) of Regulation No. 1400/2002.

Among the "white clauses" not expressly found in the Commission Regulation, one could mention the following:

a/ setting, by the supplier, of maximum or recommended prices (unless it amounts to setting minimum or fixed prices);

b/ obliging the distributor to sell other car brands in a part of his premises separated from that in which the supplier's cars are sold;

c/ obliging the distributor or repairer to respect certain minimal standards in the sale of cars, parts and in the servicing activities, and in particular as regards the technical equipment, staff training, publicity, stock keeping, and accepting to service cars of a given brand;

d/ obliging the distributor or repairer to order the goods covered by the agreement only at given times or intervals, if this interval does not exceed 3 months;

e/ obliging the distributor or repairer to make efforts in order to sell a certain agreed minimum amount of goods within his territory and in a given period;

f/ obliging the distributor or repairer to keep a minimum agreed stock of cars and/or spare parts;

g/ obliging the distributor or repairer to display for demonstration particular car models or a set minimum amount of them;

h/ obliging the distributor or repairer to carry out warranty and/or free servicing repairs for a given brand/models of cars;

i/ obliging the distributor or repairer to provide clients with general information about the extent to which spare parts manufactured by other suppliers may be used for servicing repairs; and

j/ obliging the distributor or repairer to inform the clients about the fact of having used, in the context of service repairs, spare parts other than the original ones.

The Regulation was to remain in force until 31 May 2010 (cf. § 21) i.e. for the same period as the Commission Regulation No. 1400/2002 (cf. Article 12 (3)). This document exhausts[334], the list of Polish group exemption regulations.

[334] As of the time of writing these words.

12. 2004 – important amendments to the 2000 Act[335]

On procedural issues, an important amendment to the Civil Procedure Code, introduced by the Parliament by an Act of 2 July 2004 and in force as of 19 August 2004, brought the anti-trust procedure into full conformity with the Polish Constitution by introducing a second instance appeal from the judgments of the Court for the Protection of Competition and Consumers (CPCC) in anti-trust cases, as well as cases related with regulations concerning the energy, telecommunications, postal services and railway transport sectors[336]. Until then, judgments issued by the CPCC on appeal against decisions of the OCCP President were only subjected to a cassation appeal to the Supreme Court. These amendments coincided with a case[337], in which the Constitutional Court held unconstitutional the previous provisions of the Code, barring companies from requesting the CPCC to annul a decision of the OCCP President. According to the Constitutional Court, all subjects of law had to have the right to a full judicial review (on the merits) of administrative decisions addressed to them. Another change introduced by the aforementioned amendment was that the OCCP President was to cover the costs of proceedings in case if he lost the case; this was the consequence of the decision of the Constitutional Court of 12 June 2002 which held that the previous rules (dispensing the Office President from this obligation) violated the principle of equality of the parties to the proceedings, as the undertakings against which the proceedings were carried out had to pay the costs in case of losing their case.

Other changes to the 2000 Act, introduced as of 1 May 2004, included the possibility for the OCCP to carry out an explanatory procedure also in certain merger cases (e.g. in order to establish whether a prolongation of the validity of a clearance could have a negative impact on competition). The merger procedure was further amended by making clear that *de minimis* mergers had to be notified if they would result in creating or reinforcing a dominant position[338]. As regards restrictive agreements, their list was enlarged expressly by adding agreements between organisers and participants in public tender procedures. Another novelty was the introduction of a "plea bargaining"-type procedure, under which the OCCP President could decide to stop the proceedings and not to impose sanctions if the companies involved in a prohibited practice undertook to cease it or to take certain steps to prevent violations; it is noteworthy that this procedure could be resorted to even if the violations themselves were only found "probable" and not proved with certainty. This was justified by the objective of protecting competition, while saving the OCCP's time and resources and, at the same time, giving the companies the opportunity to correct their conduct without being punished.

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Subsequent, far-reaching amendments to the 2000 Act, related with Poland's entry to the EU (and brought into force after the Union's eastern enlargement), are presented and discussed further in this thesis (cf. Chapter III.A.3. and IV.B.).

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[335] Cf. also Chapter III.A.1.

[336] Dz. U. Nr 172, poz. 1804. Cf. also H. Fedorowicz, "Procedura cywilna. Apelacja w postępowaniu antymonopolowym. Muszą być dwie instancje", "Rzeczpospolita", 19 August 2004.

[337] Sygn. SK 27/03, concerning a complaint by Gdańsk-Pilot company. Cf. J. Kroner, "Postępowanie cywilne. Odwołania od decyzji prezesa Urzędu Ochrony Konkurencji i Konsumentów. Prawo do dwu instancji", "Rzeczpospolita", 31 January 2005.

[338] This rectified a lacuna of the original merger provisions in the 2000 Act, cf. Chapter II.B.5.e., above.

CHAPTER III: IMPLEMENTATION OF POLISH ANTI-TRUST RULES

A. Anti-trust authority

1. History, structure and powers

As already mentioned[339], the 1990 Act on Counteracting Monopolistic Practices created a competition authority called the Antimonopoly Office (AMO), which was given quite important powers. In particular, it could apply basically the same types of sanctions (including pecuniary fines) as the European Commission and the competition authorities of the EU Member States. Further, the Antimonopoly Office enjoyed a large degree of adjudicative independence, while its decisions were subject to control of an independent court of law (the Antimonopoly Court[340]).

Following important amendments introduced in 1995, the powers of the Antimonopoly Office in the administrative proceedings were additionally strengthened (Article 19 a of the 1990 Act), while at the same time enhancing confidentiality of the information gathered in the course of these proceedings (Articles 20 a and 21a). Further, the sanctions for violation of the 1990 Act were made more severe (Articles 14 - 16). In addition, the Office was given wider merger control powers[341]. A further amendment in 1996 increased the scope of the AMO's responsibilities and competence in the field of consumer protection and consequently, as from October 1996, its name changed into the Office for Competition and Consumer Protection (OCCP)[342].

On 1 January 1999, the Act of 24 July 1998 (with a long official name: Act on Amendments to Certain Acts Defining the Competence of Public Administration Bodies in Relation to the State System Reform) entered into force. Article 61 of that Act referred to the OCCP, further increasing the Office's competence and powers (mainly in the field of consumer protection)[343]. By the end of 1999, the OCCP was composed of a central office in Warsaw and 9 regional branch offices. The year had brought about important staff changes, with 38 new staff recruited and 34 who had quit the Office[344].

The legal context of the OCCP's activity changed again with the entry into force of the 2000 Act on the Protection of Competition and Consumers[345] (the 2000 Act), which contained new, detailed provisions on the OCCP in Title IV ("Organisation of competition and consumer protection").

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[339] Cf. Chapter II.B.1., and P. Skoczny, "Harmonization of the competition law of the EC associated countries seeking for EU membership with the EC competition rules. Example: Poland", paper presented at the 3rd ECSA-World Conference "The European Union in a Changing World", Bruxelles 1996, Publication Office of the European Communities - Luxembourg.

[340] Cf. Chapter III.B.2, below.

[341] Cf. L. Bieguński, "Nadzór nad łączeniem podmiotów gospodarczych w znowelizowanej ustawie o przeciwdziałaniu praktykom monopolistycznym", Biuletyn UAM Nr 8, http://www.telbank.pl/uanty.gov/AUTO/BIUL08/biu11.htm.

[342] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1996 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1996], http://www.telbank.pl/uanty.gov/AUTO/BIUL12/biul7.htm.

[343] Cf. the OCCP's website, www.uokik.gov.pl.

[344] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

[345] Cf. more on this Act in Chapter II.B.5., above.

Pursuant to Article 24 of the 2000 Act, the President of the OCCP was to be the central Government administration organ competent in the area of protection of competition and consumers, supervised in its activity directly by the Prime Minister[346]. He/she was appointed - through a competition and for the period of 5 years - by the Prime Minister, from among persons with university education, in particular in the field of law, economy or business administration, "distinguished by their theoretical knowledge and practical experience in the area of market economy and competition and consumer protection" (Article 24 (2)). Vice-Presidents of the OCCP were also appointed by the Prime Minister, upon a motion of the President (Article 25).

Article 28 of the 2000 Act confirmed the organisational structure of the OCCP, which was to be composed of the Head Office in Warsaw and of 9 regional offices (in Bydgoszcz, Gdańsk, Katowice, Cracow, Lublin, Łódź, Poznań, Warsaw and Wrocław); decisions by directors of regional offices were taken on behalf of the OCCP President (Article 28 (6)). The Head Office had 8 Departments: the Law and European Jurisprudence Department; the Market Analyses Department; the Competition Protection Department; the State Aid Monitoring Department; the Consumer Policy Department; the Market Surveillance Department; the International Co-operation and Public Relations Department; and the Assistance Funds, Budget and Administration Department.

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[346] Pursuant to Article 26 of the 2000 Act, the scope of the activities of the OCCP President included:
a/ exercising control over the observance by undertakings of the provisions of the 2000 Act;
b/ issuing, in the cases stipulated in the Act, decisions in the matters of restrictive practices, mergers or division of undertakings as well as decisions concerning fines;
c/ carrying out studies of the level of concentration in the economy and of the market behaviour of undertakings;
d/ elaborating draft Government programmes for the development of competition and of the draft Government consumer protection policy;
e/ monitoring the State aid granted to undertakings;
f/ assessing the efficiency and effectiveness of the State aid granted to undertakings as well as of the effects of granted aid in the field of competition;
g/ co-operating with foreign and international organisations and authorities in the area of competition (including with the European Commission);
h/ elaborating and submitting to the Council of Ministers draft legal acts concerning restrictive practices, development of the competition or conditions for its emergence as well as protection of consumer interests;
i/ issuing opinions on draft legal acts concerning restrictive practices, development of competition or creating conditions for its emergence as well as protection of consumer interests;
j/ submitting to the Council of Ministers periodic reports on the enforcement of Government programmes for competition development and consumer policy;
k/ addressing undertakings and associations thereof in the matters of the protection of the rights and interests of consumers;
l/ undertaking activities resulting from the provisions on combating unfair competition;
m/ addressing specialised units and relevant bodies of the State Inspectorate for undertaking control of observance of consumer rights;
n/ control of the safety of products intended for consumer use in the meaning of the Act on General Product Safety;
o/ co-operating with territorial self-government authorities and with national and international social organisations whose statutory tasks included the protection of consumer interests;
p/ providing assistance to self-government authorities on voivodship (provincial) and powiat (county) levels and to organisations whose statutory tasks included the protection of consumer interests, within the scope of the Government's consumer policy;
r/ initiating checks on products and services to be performed by consumer organisations;
s/ drafting and publishing materials and educational programmes promoting the awareness of consumer rights;
t/ enforcing the international obligations of Poland as regards co-operation and exchange of information in the field of competition and State aid granted to undertakings (including within the context of the Europe Agreement and the future EU membership);
u/ collecting and disseminating judgements pronounced in the cases concerning competition and consumer protection; and
v/ performing other tasks defined by the 2000 Act or by separate acts.

Among the tasks of the Law and European Jurisprudence Department[347], one should mention the preparation and drawing up of opinions on draft legal acts concerning the protection of competition and consumers; representing the OCCP President in judicial proceedings, especially before the Court for the Protection of Competition and Consumers[348] (in cases concerning appeals against decisions by the OCCP President), the Supreme Court[349] (in cassation proceedings) and the Supreme Administrative Court as well as before other jurisdictional bodies; issuing legal opinions concerning the interpretation of provisions of the 2000 Act and other acts which conferred certain powers on the OCCP President and on the Trade Inspectorate; providing internal legal services to other departments of the OCCP; responding to legal questions from undertakings and other persons concerning the interpretation of relevant competition and consumer protection provisions; gathering and preserving legal documentation (national and Community jurisprudence) concerning anti-trust, consumer protection and State aid cases; keeping a register of appeals and complaints to the Competition and Consumer Protection Court, judgments of and cassation appeals to the Supreme Court, and complaints to the Supreme Administrative Court; carrying out analytic studies of Polish and Community jurisprudence and of selected legal issues relative to the Polish and Community competition law; and publishing the Office's Official Journal (containing *inter alia* all decisions by the OCCP President).

The Market Analyses Department dealt with monitoring of the state of competition on the Polish market - through carrying out studies of the degree of concentration of the economy and through analysing of the market behaviour of undertakings. It also managed databases serving as a basis for the drafting of reports on the state of competition in particular sectors of the economy. Further, it provided other departments with information about sectors of the economy or undertakings which were concerned by proceedings initiated by the OCCP. Finally, its task was also to notify the OCCP President of cases of violations requiring, in the Department's opinion, the initiation of infringement proceedings.

The Competition Protection Department's main task was to prepare decisions in cases involving mergers and restrictive practices. The Department's staff carried out preliminary (explanatory) inquiries in anti-trust cases; further, it drafted opinions/positions of the OCCP President, presented in appeal cases before competent courts. In addition, it performed supervision and control duties as regards the compliance of undertakings with anti-trust and merger rules, as well as the Office's decisions and court judgments. The Department closely collaborated with the Law and European Jurisprudence Department, *inter alia* in the context of representing the OCCP in court cases, preparing and reviewing draft new acts and initiating draft amendments to the relevant provisions. The Competition Protection Department also drafted the Government annual Programmes of Development of Competition, and suggested to the Market Analyses Department the need to carry out studies of the concentration levels in the economy and of the sectoral behaviour of undertakings.

In the course of the year 2000, the OCCP continued to experience an important staff turnover, with 47 staff recruited and 34 who had left the Office[350]. Overall though, the staffing levels had increased, to reach 219 persons by the end of the year. This helped the OCCP address the increased workload, including a particularly intense legislative drafting activity.

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[347] Cf. the OCCP's website (http://www.uokik.gov.pl).

[348] Cf. Chapter III.B.2.

[349] Cf. Chapter III.B.3.

[350] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

In 2001[351], the OCCP further increased its staff complement by 5 posts (four of which had been filled), to reach 220 persons on 215 posts by the end of the year. The Office's personnel could be characterised by their relatively young age (some 60% of staff were under 30 years old, and further 18% were aged between 30 and 40). As regards training, some 40% were lawyers and approximately 30% had graduated as economists. An important staff turnover (partly due to salaries which could not compete with those offered in the private sector and international organisations) continued to be a problem, with 31 new recruitments and 27 persons who had left the Office. The OCCP's powers and mandate had not changed, despite the setting up (pursuant to other specific legislation) of regulatory bodies in energy and telecommunication sectors. As before, the OCCP President was in charge of counteracting anti-competitive conduct of undertakings and preventing excessive market concentration. In addition, a number of particular legislative provisions conferred certain tasks on the Office's President, e.g. with respect to the supervision of the operation of pension funds, monitoring of concentration operations on the investment fund market, controlling important changes of ownership structure of listed companies, etc.

The year 2002 was already the twelfth in the history of the OCCP. In the opinion of the Office itself[352], it was characterised by the OCCP's growing impact on the implementation of competition policy in Poland, as illustrated by the increasing number of anti-trust proceedings (from 50 in 1994 to some 400 in 2002). The Office underwent a thorough reorganisation in March 2002, reflecting the new administrative division of the country (into 16 voivodships, or provinces) and aiming at rendering it more efficient in the context of its new tasks. The OCCP's budget continued to grow steadily, to reach nearly 3 mln EUR. This was considered by the Office to be more than necessary[353], in view of the ongoing (since 2000) preparation of the OCCP to enter the European Competition Network (ECN – a platform for cooperation between the European Commission and all EU Member States), as foreseen in the Council Regulation No. 1/2003 (planned to enter into force on the day of Poland's accession to the EU i.e. 1 May 2004)[354]. This required *inter alia* an amendment to the 2000 Act, the draft of which was being prepared as from the beginning of 2002 at the OCCP's Law and European Jurisprudence Department. The year also saw the adoption of several executory regulations to the 2000 Act, including two procedural ones (the Council of Ministers Regulation of 3 April 2002 on notification of mergers[355], and the Regulation of 19 February 2002 setting the geographical and subject-matter competence of local offices - "delegatura" - of the OCCP). As to "group exemptions"[356], the plan was to complete their list by autumn 2003.

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[351]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

[352]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

[353]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

[354]Cf. Chapter IV.B.

[355]Dz. U. Nr 37, poz. 334.

[356]Cf. Chapter II.B.7 to 11.

In addition, for the first time, the Office's Law and European Jurisprudence Department, in co-operation with known law firms, prepared and published a number of guidelines of the OCCP President for companies (on the definition of the relevant market; on agreements of minor importance; on requirements to be fulfilled when notifying an intended merger; and on the merger control procedure); these guidelines were closely modelled on the European Commission's Notices. The Department also replied on an ongoing basis to questions on interpretation of the law submitted by companies. Most of the questions focussed on the provisions on notifications of intended mergers, including the issue of whether companies forming part of one capital group should notify the Office about planned mergers within the group.

In December 2003, the President of the OCCP met in Warsaw with Mario Monti, the European Commissioner responsible for competition matters[357]. The subject of the meeting was the OCCP's role in the context of Poland's forthcoming EU membership and the ensuing needs in terms of organisation, procedures and resources. In particular, the Polish competition authority's progress in preparing itself to operate within the ECN was reviewed. Another topic discussed was the preparation for implementation of the new EC orientations of competition policy; in this context, relevant amendments to the 2000 Act[358] were also analysed. At the end of the meeting, the OCCP President stressed the advantages of the Office joining the ECN, which would *inter alia* enable exchanging information on proceedings undertaken with respect to illegal agreements concluded by undertakings in order to divide markets, limit production volumes or avoid price competition. The OCCP was to be granted access to data gathered by competition authorities in other Member States.

The above-mentioned amendments to the 2000 Act were adopted by the Sejm in April 2004[359]. In addition to modifications on the merits already discussed in Chapter II.B, the amendments introduced new powers and procedures as regards the OCCP. These changes reflected the spirit of the Regulation No. 1/2003, which conferred a significant part of the Commission's exclusive powers upon national competition authorities. Among other modifications, the OCCP obtained more important powers of inspection and imposition of fines for violations of anti-trust provisions. Further, procedural co-operation between the European Commission and the OCCP was given a clear framework, *inter alia* obliging the OCCP to provide assistance in direct inspections carried out by the Commission officials in Polish companies (a new possibility, foreseen by the amended 2000 Act provisions as of the date of Poland's entry to the EU[360]).

The aforementioned major change in the situation of Poland (i.e. accession to the EU) and the consequent modification of the role of the OCCP has found its echo in the Office's reinforcement. By the end of 2005, the OCCP employed 280 persons on 270 posts, and its annual budget increased to over 11 million EUR. This helped attract well qualified, mostly relatively young lawyers and economists (nearly 80% of them were aged between 30 and 40), who worked essentially in 8 departments: Law and European Jurisprudence; Competition Protection; Market Analyses; Monitoring of State Aid; Consumer Policy; Marker Surveillance; International Co-operation and Public Relations; Assistance, Budget and Administration[361].

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[357] Cf. Press Release of 12 December 2003, the OCCP's website.

[358] Cf. Chapter II.B.6 and 11.

[359] Cf. Press Release of 19 April 2004, the OCCP's website.

[360] Cf. Chapter IV.B.

[361] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2005 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], http://www.uokik.gov.pl.

2. Enforcement activity[362]

a. restrictive agreements

i. general issues

In the early years of its existence, i.e. under the legal framework created by the 1990 Act, the Antimonopoly Office examined 77 cases concerning prohibited agreements, 54 of which had been initiated by the AMO *ex officio*. Most of these cases were terminated with a decision prohibiting the practice concerned, which might be seen as an illustration of the Polish competition authority's vigilance in the fight against cartels, already at the very beginnings of its operation.

The number of proceedings in cases related with possibly restrictive agreements increased significantly after the entry into force of the 2000 Act. For example, in the course of 2001 , the OCCP carried out 330 proceedings (113 of them preceded by a preliminary inquiry), as a result of which the Office issued 113 decisions ordering to cease a practice and 123 decisions in which the complaint was rejected (the remainder representing decisions closing the proceedings without deciding on the merits; there was also one decision accepting an undertaking by the incriminated companies). This would seem a large number. However, only a small proportion of these decisions concerned actual horizontal and vertical restraints.

In 2002, the OCCP issued 393 decisions on restrictive practices[363]. However, out of this number, only 40 proceedings concerned restrictive agreements: in 29 of them, the OCCP issued a decision on a horizontal agreement (rejecting the complaint in 15 cases, finding the existence of a prohibited practice in 13 cases, clearing the agreement in one case) and in 11 cases, on a vertical agreement (5 decisions rejecting the complaint and 6 decisions confirming the existence of a prohibited practice). The OCCP continued investigating and prosecuting restrictive agreements in the course of 2003. The practices discovered during that year were of a similar character as those brought to light the year before, e.g. restrictions on the publicity market. That said, as the Office pointed out in its 2003 annual report[364], there had been a decrease in the number of restrictive agreements in the telecommunications sector, which was attributed to the progress in liberalisation of this area of economic activity.

In the course of the year 2004, the OCCP carried out 59 proceedings in cases concerning restrictive agreements, 32 of which being of a horizontal character. This number was more or less similar as in the two preceding years. Among the decisions taken by the Office, 16 concerned horizontal agreements (out of which 8 in which the OCCP found the existence of a prohibited practice) and 10 were taken in respect of vertical agreements (with prohibited restraints discovered in 6 cases)[365], which was a slightly lower number than in the previous years.

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[362]The presentation of the AMO/OCCP's enforcement activity covers (with a few exceptions) the period between the AMO's setting-up and Poland's entry into the EU.

[363]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

[364]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2003 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2003], the OCCP's website (http://www.uokik.gov.pl).

[365]Cf. Decision of 16 July 2004 (nr RWA – 19/04), Dz.Urz.UOKiK Nr 4/2004, poz. 114 (as well as the

ii. horizontal restraints

Among the restrictive agreements discovered by the Polish anti-trust authority in its early period (i.e. under the reign of the 1990 Act), few could be described as classical "hard core" (e.g. price-fixing) cartels[366]; that said, where such cartels were found, the AMO tended to be "merciless". This applied also to the so-called "professional cartels", such as in the case of the Pharmacists' Council, where the AMO condemned a refusal to grant operating licenses to new pharmacies on the existing Council members' territories, stating that it represented an example of the division of markets according to territorial criteria.

The situation changed somehow after the entry into force of the 2000 Act. The newly named anti-trust authority (the OCCP) began "hunting" cartels with more energy. It soon found examples of such agreements, for example in the area of passenger maritime transport. Owners of passenger ships in one of the Polish port cities[367] concluded an agreement fixing uniform prices for short-distance passenger trips and restricting access of other companies to the market. The OCCP found the existence of a price-fixing agreement (pursuant to Article 5 (1) (1) of the 2000 Act) as from June 2000, and of a practice prohibited under Article 5 (1), points (3) and (6), of the same Act, consisting of restricting competition by giving one undertaking the exclusivity for the distribution of tickets. Further, the Office considered that a clause in the agreement in question, giving only one company the right to carry out off-season passenger transportation restricted the access of competitors to the relevant market, and was thus covered by Article (1) (6) of the 2000 Act.

A particularly noteworthy decision concerning a "classical" horizontal agreement concerned an alleged price-fixing cartel of three petrol distribution companies (PKN Orlen, BP Express and KI) on the local petrol station market in the town of Koszalin. The OCCP initiated the proceedings upon a complaint by a competing company but found no proofs or indications of the existence of a cartel. In its decision[368], the Office stressed that the mere fact that the three companies had charged similar prices (which had been increased on a number of occasions in a similar manner) gave no sufficient grounds to find the existence of an agreement or a concerted practice having as an object or effect the prevention or distortion of competition.

The OCCP examined the relevant market and concluded that it had typical characteristics of an oligopoly, where similar price policies were something entirely "normal" i.e. comprised in the notion of an economically rational conduct. Furthermore, the Office found that the three afore-mentioned companies had continued competing with each other on aspects other than price (e.g. through various fidelity schemes or through providing additional related services to clients), which played an important role in the clients' choice of particular service stations. This decision could be seen an the example of a rather sophisticated reasoning, taking into account economic arguments.

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connected Decision nr RWA – 20/04, Dz.Urz. UOKiK Nr 4/2004, poz. 115).

[366]For example, only one price-fixing cartel case (on the artificial fertilizers market) was mentioned in the AMO's 1995 Activity Report (*Sprawozdanie z działalności Urzędu Antymonopolowego w 1995 roku*, http://www.telbank.pl/uanty.gov/AUTO/BIUL0910/biu110.htm). In total, there had been only 6 price-fixing cartels found between 1992 and 1995.

[367]I.e. in Kołobrzeg. Cf. decision of 31 December 2001, Dz.Urz. UOKiK Nr 1/2002, poz. 26.

[368]Decision nr RGD – 18/2002, issued on 31 July 2002. Dz.Urz. UOKiK Nr 3/2002, poz. 127.

In other cases, where the existence of a restrictive horizontal agreement was beyond doubt, the OCCP could demonstrate its continuous determination to fight this type of restrictions. An example of this approach was the decision in a case involving four outdoor publicity companies (Marketing Syndicate, Europlakat Polska, Ströer Polska and Outdoor Promocja Plakatu)[369], initiated *ex officio*. The OCCP considered that the agreement – fixing the amount of large billboards to be installed by each company and the minimum price for advertisements placed on them – violated Article 5 (1) (1) and (2) of the 2000 Act. In the course of the proceedings, the OCCP services carried out inspections of the premises of the four incriminated companies, and found documents containing evidence that they had set supply quotas (in this case, by limiting the amount of the necessary supports i.e. billboards) and fixed minimum prices.

Another decision – which was by the way representative of a whole line of jurisprudence[370], was the outcome of an *ex officio* procedure initiated against a professional self-government body (the National Chamber of Notaries - Krajowa Rada Notarialna, KRN)[371]. The OCCP found that a clause in the Code of Professional Ethics of Notaries, adopted shortly before by KRN, represented in fact a prohibited agreement between members of an association of undertakings. The clause in question described as a flagrant example of unfair competition (resulting in severe consequences for the notaries concerned, whose membership in KRN was required by law to be able to exercise their professional activity) the practice of charging prices lower than the minimum prices set in the price list adopted by KRN. The OCCP considered this to be an agreement fixing minimum prices, prohibited by Article 5 (1) (1) of the 2000 Act.

One more decision worth mentioning in respect of horizontal agreements concerned an agreement between two neighbouring communes located in the south of Poland (Rybnik and Żory)[372], according to which the two towns were supposed to co-operate in the organisation of public transportation between them. The OCCP, which had initiated this case *ex officio* and carried out a preliminary inquiry, held that the two communes had restricted competition on the relevant market (i.e. the market of bus transportation between these two towns) by preventing smaller private bus companies from offering their services – due to the manner in which tender conditions were formulated. In practice, only the larger communal firms could participate in the tender because they were the only ones to meet the capital and size of fleet requirements (which the Office considered excessive). Further, in the OCCP's opinion, the restriction resulted in the possibility for the communal companies to charge higher prices for tickets, without corresponding service quality guarantees. This interesting case confirmed the Polish competition authority's tough stance as regards restrictive conduct of local self-government.

A typical example of a horizontal agreement – and one of many similar cases to be considered by the OCCP – was the one concluded between several taxi companies in the city of Bydgoszcz. The Office carried out an inquiry and found proofs of a classical price-fixing cartel, which was obviously prohibited. The interest of this case lay also in the fact that one of the companies avoided a fine because of having denounced itself and the agreement to the OCCP in the course of the proceedings[373].

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[369] Cf. Decision of 22 October 2002, Dz.Urz. UOKiK Nr 1/2003, poz. 230.
[370] Cf. below.
[371] Cf. Decision of 20 May 2002, Dz.Urz. UOKiK Nr 3/4/2002, poz. 120.
[372] Cf. Decision of 17 January 2003, Dz.Urz. UOKiK Nr 2/2003, poz. 250.
[373] Cf. Decision of 12 November 2003 (nr RBG – 25/03), Dz.Urz. UOKiK Nr 2/2004, poz. 8.

The OCCP issued one of its most "spectacular" decisions concerning horizontal restrictions in August 2004; this was also due to the high amount of the fines imposed[374]. The case concerned three press distribution companies - Ruch S.A. (with a nearly 50% share in the relevant market), Franpress and Rolkon - which the Office found to have engaged in a cartel as from January 2003.

The OCCP found written evidence of an agreement, which stated in its preamble that the parties intended to "jointly influence the Polish press distribution market". The three companies were supposed to coordinate their activities and to limit competition only to its service-quality aspect. Furthermore, representatives of the managing bodies of the companies involved engaged themselves to maintain confidentiality of the agreement and of all meetings between the parties. The agreement was subsequently denounced by Rolkon (in March 2003) but not by the other two parties.

The OCCP explained its tough treatment of the agreement by the particularly harmful character of the horizontal restrictions involved, exacerbated by the oligopolistic nature of the relevant market (with 6 operators, of whom only three really counted as competitors). The President of the OCCP stated in his decision that the agreement clearly had as its object the restriction of competition, and that - if fully implemented in practice - it would have a very negative impact not only on competitors but also on press publishers. Consequently, he fined Ruch 10 mln PLN (some 2.5 mln EUR). The fines imposed on the two other companies were much lower: 80.000 PLN with respect to Franpress and 60.000 PLN as regards Rolkon. This case illustrated once again a particularly critical attitude of the OCCP to cartels, especially on markets characterised by a high degree of concentration/dominance. The fine imposed was among the highest in the OCCP's jurisprudence.

Another case in the course of 2004 in which the OCCP dealt with horizontal restraints concerned an agreement between two publishing companies specialised in cartographic publications (Nowa Era and Polskie Przedsiębiorstwo Wydawnictw Kartograficznych – PPWK)[375], pursuant to which PPWK sold to Nowa Era a part of its assets together with corresponding licenses, authors' rights, trademarks and know-how. Furthermore, the two companies undertook not to compete with each other for 10 years. This allowed Nowa Era to take over a part of PPWK's activity as regards school and educative publications.

Following an inquiry initiated after media reports, the OCCP President found these clauses excessive and resulting in an important restriction of competition on the relevant market (cartographic publications in Poland) pursuant to Article 5 (1) (3) of the 2000 Act (division of markets), but at the same time recognised – in his decision of 29 October 2004 – that the practices concerned had ceased on 16 July 2004.

[374]Cf. B. CH., "Partnerstwo w tròjkącie. Ruch S.A., Franpress i Rolkon mają zapłacić ponad 10 mln zł", "Dziennik Polski", 7 August 2004.
[375]Cf. Decision of 29 October 2004 (nr RWA – 30/04), Dz.Urz. UOKiK Nr 1/2005, poz. 113.

Other cases concerning horizontal restraints referred to practices by professional self-government bodies, such as the Silesian Medical and Veterinary Chamber in Katowice[376] - an obligatory association of veterinaries (who could not practice their profession without being members of it) which had published reference tariffs containing detailed instructions as to the prices to be charged – or at least minimum prices, as opposed to general guidelines on the method of calculation of prices. In his decision[377], the OCCP President ordered these tariffs to be abolished. An identical decision concerned the Chamber of Veterinaries of Świętokrzyski Region[378], and the Office President stressed on that occasion that the harm was compounded by the fact that the prohibited practice had been imposed by a body supposed to ensure standards in a public trust profession. During 2004, the OCCP also sanctioned some "classical" cartels (fixing minimum prices and the amount of rebates), as was (again) the case with some agreements between taxi corporations e.g. in the cities of Tarnów[379] and Szczecin[380].

For the OCCP, the year 2005 was quite similar to 2004 as regards the types of horizontal restrictions discovered. For example, in July 2005[381], the Office issued a decision prohibiting yet another decision by a professional chamber of veterinary doctors (this time in the Lubuskie Province), which had imposed the use of set tariffs (and, in particular, minimum prices) on its members. Taking into account the fact that similar practices had already been sanctioned by the Office, and that this had been publicised in the media, the official publications of the OCCP and on the internet, the Office President decided to impose a fine of over 13.000 PLN on the professional self-government body concerned. Further, it was announced that inquiries concerning such practices had also been initiated in respect of all other veterinary chambers active in Poland (i.e. the national and the 16 regional chambers, with the exception of those already punished).

The OCCP also continued its fight with price cartels involving taxi companies. For example, it issued a decision[382] prohibiting an agreement between radio-taxi companies in Katowice, pursuant to which the parties had set uniform rebates for clients. The OCCP stressed that the agreement in question had to a significant degree restricted competition on the relevant market (taxi services for persons within the city limits) as it eliminated one of the main competitive practices (basic rates being to a large extent set by the town council, companies used to compete with rebates), especially as the radio-taxi companies involved employed more than 70% of all taxi drivers with a license in Katowice.

A novelty in the year 2005 – resulting from an amendment to the 2000 Act introduced in the course of the preceding year[383] – was the OCCP's investigation and punishment of horizontal agreements between participants in public procurement procedures.

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[376] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2004 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], the OCCP's website (http://www.uokik.gov.pl). This case followed the approach developed in the *KRN* case, above.

[377] Cf. Decision nr RKT-67/2004.

[378] Cf. Decision of 14 October 2004 (nr RŁO – 9/04), Dz.Urz. UOKiK Nr 1/2005, poz. 72.

[379] Cf. Decision of 31 August 2004 (nr RKR-26/2004).

[380] Cf. Press Release of 2 December 2004, OCCP's website.

[381] Cf. Decision of 27 July 2005 (nr RWR – 52/05), Dz.Urz. UOKiK Nr 3/2005, poz. 34.

[382] Nr RKT-29/2005, issued on 9 May 2005. Dz. Urz. UOKiK Nr 2/2005, poz. 245.

[383] Cf. Chapter II.B.12.

One such case[384] concerned the market of cleaning the streets in the city of Poznań and involved, in total, seven companies which were found to have agreed on the price to bid and on the conduct to adopt after the bidding procedure started. The Office concluded the existence of a prohibited practice based on indirect evidence (identically worded offers comprising even identical errors; the same way of proceeding after the offers were opened; as well as business and even – in one case – family ties between participants).

iii. vertical restraints

As was pointed out in the literature[385], the Polish anti-trust authority's early record (in the 1990s) was not particularly strong as regards vertical restraints, which were a relatively frequent occurrence in the economy and which were often left undetected[386]. This changed as from the entry into force of the 2000 Act and the subsequent reorganisation and administrative reinforcement of the OCCP. Thus several proceedings initiated in 2001 focussed on vertical restraints.

Many of these cases concerned practices observed in the cemetery and burial services sector. A characteristic feature of this market was that cemetery administrators enjoyed, pursuant to agreements concluded with cemetery owners (i.e. communes or religious congregations) exclusive rights for digging graves, as well as – frequently – other related services (exhumation, building burial monuments, etc) in the cemeteries administered by them. The OCCP stressed in several decisions[387] that cemetery and burial services should not be excluded from competition, and thus held that exclusivity clauses of the kind referred to above constituted prohibited practices in the meaning of Article 5 (1) (6) of the 2000 Act (i.e. restricting the access to the relevant market or eliminating competition from that market).

On the cable TV market, the OCCP examined, in the course of 2001, three agreements between an operator and housing co-operatives granting the operator long-term exclusivity in the provision of cable TV signal, including the obligation for the co-operatives to refrain from building their own networks. The Office found it to be a practice restricting the access to the market for other operators, fulfilling the criteria set out in Article 5 (1) (6) of the 2000 Act[388]. In fact, most of the cases were related with restrictions of market access for actual or potential competitors.

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[384]Decisions nr RPZ-20/2005 and RPZ-28/2005. Dz. Urz. UOKiK Nr 3/2005, poz. 22 and 39.

[385]Cf. *inter alia* J. Lorentzen and P. Møllgaard, "Competition compliance: limits to competition policy harmonisation in EU enlargement", Discussion Paper, Copenhagen Business School, March 2001, revised in May and July 2001, and in September 2002, www.econ.ku.dk/CIE/DiscussionPapers/2002/pdf/11.pdf.

[386]J. Lorentzen and P. Møllgaard even suggested to amend the Polish competition law so as to introduce an obligatory notification procedure for agreements containing vertical restraints, arguing that – in the context of the quite modest resources and experience of the Polish competition authority and the relative ignorance of competition rules among Polish companies (as compared with their EU counterparts) – it was not sufficient to rely exclusively on monitoring *ex officio* and investigations of complaints.

[387]E.g. in the decision of 13 July 2001, concerning a funeral services company in Olsztyn. Dziennik Urzędowy (Dz.Urz.) UOKiK Nr 2/2001, poz. 51.

[388]Cf., for example, decision of 27 July 2001 (nr RGD – 21/2001), concerning an agreement between a cable TV operator (SzelSat) and a housing company in the town of Ełk. Dz. Urz. UOKiK Nr 2/2001, poz. 120.

In 2002, the OCCP issued *inter alia* a decision concerning an agreement between three producers of fire extinguishers (Katowickie Zakłady Wyrobów Metalowych, Grodkowskie Zakłady Wyrobów Metalowych and Wytwórnia Sprzętu Pożarniczego "OGNIOCHRON")[389], who had agreed to set up a joint authorised distribution system.

The Office found that this agreement restricted market entry for competitors (i.e. other companies producing fire extinguishers) – or forced them off the market – by making it practically impossible for them to sell their products on the relevant market (defined as the national market of fire extinguishers). This was the case because the network created by the above-mentioned three companies covered nearly all distributors of fire extinguishers in Poland, and the latter distributors were prohibited from selling and servicing fire extinguishers not produced by either of these companies.

In order to be able to compete, other companies would thus be obliged to spend considerable sums on setting up their own distribution and service networks, which would represent a too high barrier to entry on the relevant market. The OCCP considered as an additional argument for its conclusion as to the negative impact of the agreement on competition the fact that many of the distributors covered by the agreement had ceased selling and servicing fire extinguishers produced by other companies (including foreign ones) after the agreement had entered into force. This decision was an interesting example of a situation where the OCCP established the existence of combined horizontal (agreement between producers) and vertical restraints (restrictions imposed on distributors).

Concerning vertical restraints, one of the most interesting cases examined by the OCCP in the course of 2003 was an agreement between Rafineria Gdańska – belonging to the largest Polish producers of motor fuels – and 12 wholesale distributors. The agreement, which concerned motor oils, contained clauses setting maximum rebates which the distributors could grant to their clients (i.e. retailers). The Office considered[390] that this represented a prohibited practice consisting of setting minimum resale prices. Furthermore, the agreements contained prohibited restrictions on distributors' passive sales in the territories of other distributors, which could lead to the partition of markets.

During the same year, the OCCP issued another decision concerning vertical restraints[391] – which received a rather wide media coverage and which, by the way, became known to the Office thanks to media reports. The agreement in question was signed between the company operating one of the few toll motorways in Poland (i.e. Stalexport Transroute, running the section of A-4 motorway between Katowice and Kraków) and four smaller companies providing breakdown, repairs and towing services. The restriction condemned by the OCCP consisted of granting the afore-mentioned four companies exclusivity (even if the client – i.e. a motorist – wished to call another company to fetch his car, this was rendered difficult by the motorway operator who demanded very high tolls from such competing companies) which allowed them to charge excessively high prices, that moreover were set collectively. The Office President ordered all these practices to cease.

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[389] Cf. Decision of 14 August 2002, Dz.Urz. UOKiK Nr 5/2002, poz. 190.

[390] Cf. Decisions of 31 December 2003 (nr RGD – 19/03 until RGD 28/03), Dz.Urz. UOKiK Nr 2/2004, poz. 87 to 96.

[391] Cf. Decision of 23 January 2003 (nr RKT – 6/2003), Dz.Urz. UOKiK Nr 2/2003, poz. 251.

As an example of the OCCP's determination to fight prohibited vertical agreements, one could quote a May 2004 decision[392] in which a huge multinational company was punished for its anti-competitive conduct (in this case, of a vertical restraint type) on the Polish market.

The case concerned the Polish branch of Johnson&Johnson, which was fined 3.8 mln PLN for having concluded prohibited agreements with two pharmaceutical wholesalers (Compol and Hurtofarm[393]) restricting the sales and fixing the price of medication based on Erythropoietin (or EPO).

The decision was the outcome of an inquiry into the market for EPO - a substance used by hospitals, outpatient clinics and dialysis stations in the treatment of anaemia. The OCCP found that EPO was marketed in Poland in the form of two medicines: Eprex (sold by Johnson&Johnson) and NeoRecormon (marketed by Roche Poland). The distribution agreements aimed at by the Office's decision concerned the sale (by wholesalers) of the Eprex drug. According to this agreement, wholesalers were to buy Eprex exclusively at Johnson&Johnson Poland, and resell it to health-care establishments only at prices previously agreed upon with the producer. The OCCP saw here a flagrant example of resale price maintenance. Moreover, the agreement contained discriminatory clauses allowing to deliver the drug only to the 18 dialysis stations expressly enumerated in an appendix to the contract, and prohibiting the wholesaler to deliver EPO to certain hospitals (in respect of some of these hospitals, Johnson&Johnson reserved for itself the right to supply them directly); the OCCP considered that this clause allowed Johnson&Johnson to control the market in an unlawful manner, and to exercise a decisive pressure on the market's structure.

The OCCP President stressed in his decision that the agreements in question had as their effect to limit the freedom of wholesalers to set prices and choose their clients, which in turn allowed Johnson&Johnson to control the important EPO market. The Office President also pointed at the prejudice to the consumers, in this case patients suffering from anaemia, whose access to EPO treatment was restricted due to the agreement concerned.

This decision was soon followed by another one[394], concerning a similar type of vertical restraints contained in an agreement between Roche Polska and its distributor - Hand-Prod. The agreement in question was concluded in respect of the same type of drug (EPO). Roche and Hand-Prod agreed to co-ordinate their actions (and, in particular, the suggested price) in tenders for purchase of Recormon and NeoRecormon organised by the Ministry of Health. Most of the public health care institutions were supplied with such medication by means of tenders. The OCCP found that the discovered practice resulted in an unacceptable restriction of the distributor's freedom of action on the relevant market. Roche was fined the equivalent of 50.000 EUR in Polish zloty's, and Hand-Prod, the equivalent of 15.000 EUR. The President of the OCCP stressed that the fine imposed on Roche Polska was higher, as this company was the only importer of Recormon and NeoRecormon in Poland, and thus had a decisive influence on the content of the agreement. On the other hand, the relatively modest total amount of the fines was due to the fact that, as the Office's investigation proved, the agreement in question had never been implemented in practice (i.e. remained on paper only).

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[392] Cf. Decision of 28 May 2004 (nr RWA – 12/04), Dz.Urz. UOKiK Nr 4/2004, poz. 30.

[393] Both wholesalers also had to pay fines, albeit much lower ones (118 thousand PLN for Hurtofarm; 33 thousand for Compol), reflecting their weaker negotiating position in dealing with Johnson&Johnson.

[394] Cf. Decision of 29 June 2004 (nr RWA 18/04), Dz. Urz. UOKiK Nr 4/2004, poz. 83.

Another vertical restraints case published in 2004 concerned a very sensitive sector, namely car distribution. In his decision[395] on an agreement between Fiat Auto Poland and 12 car dealers, the OCCP President found that the afore-mentioned agreement violated the provisions of Articles 5 (1), points (1), (2) and (6) of the 2000 Act, through setting conditions of sale (including minimum price), prohibiting passive sales in other dealers' territories and specifically preventing dealers from selling cars to one company (DCS Auto Turyn) because it was not an end user (i.e. it intended to resell further the cars purchased). The OCCP noted that the agreements were first of all restrictive as regards intra-brand competition, and that the prohibition applied to DCS was intended to further reinforce the dealers' protection on their exclusive territories (by preventing attempts to circumvent the passive sales prohibition through "using the services" of DCS). Moreover, the Office stressed the negative impact on the development of competition on the market of intermediary companies acting on behalf and in the interest of individual clients, as well as preventing effective price competition.

In 2005, one of the mediatised decisions concerning vertical restraints[396] was issued in respect of Harbor Point (a company with exclusive rights for the publishing of the fifth volume of "Harry Potter" in Poland) and six largest distributors (who held a cumulative market share of over 80%). The prohibited practice consisted in essence in resale price maintenance (the final price in bookshops was said to be no less than 10% below the price printed by the publisher on the book's cover). Furthermore, in a written agreement, the distributors agreed that they would "inform" their clients (i.e. bookstores) about this clause and require that it be respected. The OCCP stressed that the agreement resulted in a significant restriction of competition between distributors, and prevented the consumers from an opportunity of buying the same book cheaper. What is interesting here is that the OCCP once more demonstrated a very market-oriented approach (like in respect of sectors such as agriculture, health care, etc), treating the market of books in the same manner as the market of more "banal" goods. This approach might surprise some national authorities in several "old" EU Member States, where there is a historical tendency to treat certain parts of the economy as more "protected" from purely market-oriented principles (e.g. with respect to the market of books in France).

[395] Cf. Decision of 22 January 2004 (Nr RKT – 1/2004), Dz. Urz. UOKiK Nr 2/2004, poz. 127.

[396] Decision Nr RKT-17/2005, issued on 16 March 2005, Dz. Urz. UOKiK Nr 2/2005, poz. 21.

b. abuse of dominant position

i. general remarks

As regards abuse of dominant position, some authors[397] noted that the Polish anti-trust authority (the AMO) has demonstrated, in the early years of its existence (i.e. during the 1990s), a tendency to intervene on commercial fairness grounds, rather than because of concerns about the impact of the practice on competition on the relevant market as a whole[398]. Although in each case the AMO purported to examine market power and apply a rule of reason to suspected abuses of dominant position, it was not always clear[399] that markets and market power were fully analysed, or that pro-competitive and pro-efficiency effects were fully credited[400]. Thus, it appeared that the Antimonopoly Office suffered, at least at its beginnings, from a certain "deficit" of economic thinking in its approach to particular cases. The most frequent "monopolistic practices"[401] found by the AMO in these early years were the imposition of unfavourable contract terms and tied selling; a significant proportion of cases concerned restricting access to distribution networks, price discrimination, excessive pricing and predatory pricing.

By the end of the 1990s, the Polish anti-trust authority has entered its "cruising speed" with respect to investigating suspected abuses of dominant position. For example, in the course of 1999, the OCCP issued 240 decisions in cases concerning "monopolistic practices" by undertakings[402]. In 35% of these cases, the Office concluded that the company concerned had indeed engaged in a prohibited practice, in 18% of cases the decision was to stay the proceedings, in 31% of the cases the Office considered that the alleged prohibited practice had not taken place, and in the remainder of cases the OCCP closed the proceedings after having accepted an undertaking by the company concerned.

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[397] Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 112.

[398] According to J. Fingleton (cf. above), only one case of abuse of dominance considered by the AMO in 1995 – i.e. the case involving the former State Telecoms T.P. S.A. which had refused to provide other operators access to underground telephone lines - comprised clear market-wide effects, as opposed to the fairness (redistributive) effects.

[399] E.g. in the *Ruch* (former State press distribution monopoly) case, in which exclusive dealing clauses were condemned even though evidence was not found as to why competing press suppliers could not develop their own distribution outlets.

[400] Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 120.

[401] The Polish Antimonopoly Court stated that "the essence of a monopolistic practice lies in restricting the freedom of contractors, competitors and consumers, compelling them to participate in trade on terms which are less favourable than those of an unrestricted competitive environment, by an economic entity or a group or combination of economic entities, and as a result of unlawful abuse of market power derived from their position occupied on a given market" (Judgment of 10 May 1993 in a case of the SM housing co-operative in Stalowa Wola, XVII Amr 6/93). According to T. Skoczny (cited in J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 118), this definition comprised three necessary constituent elements of the offence: a/ the activity of the economic entity or combination or a group of economic entities had to cause limitation of freedom of other entities, deteriorating their position on the market; b/ this limitation had to be a consequence of abuse of market power by an entity (or entities), based on their market position; c/ the aforementioned abuse of market power had to be illegal i.e. fulfil one or more prerequisites specified in the 1990 Act and not exempted by that Act or any other statutory act.

[402] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

Again, more than a half of the discovered practices related to communal services (utilities) sector, some 15% - the energy sector, the rest relating to industry, agriculture, trade and services. The OCCP's activity with respect to "monopolistic practices" continued at a similar pace in 2000, with 230 decisions terminating proceedings[403]. The existence of such practices was found by the Office in 47% of these decisions, in 19% of cases the proceedings were terminated without deciding on the merits, in 30% the Office concluded the absence of a prohibited practice and the remaining cases ended with an agreement between the OCCP and the incriminated company. As in previous years, more than half of the practices discovered by the OCCP concerned the sector of communal services, some 10% were found in industrial undertakings, and the remaining practices were discovered in respect of trade companies.

Starting from 2001, following the entry into force of the 2000 Act[404] and the replacement of the notion of "monopolistic practices" with the more EC-compatible one of "abuse of dominant position"[405], the OCCP adjusted its terminology and approach closer to the European Commission's. However, this changed little in its actual activity, namely most of the cases continued relating to communal services, such as cleaning, removal of waste and sewage[406]. The OCCP increased the number of proceedings carried out in relation with suspected abuses of dominant position (to 353) in 2002[407]; that said, there were relatively fewer (82) decisions in which the Office concluded that there had been a practice and ordered it to cease. A similar picture could be observed in the course of the following year.

The year 2004 saw a relative decrease in the number of cases of suspected abuse of dominant position examined by the OCCP – there were 295 of them[408]; these proceedings resulted in 126 decisions, in 45 of which the Office concluded that such an abuse had indeed taken place[409]. This could already be seen as a manifestation of a downward trend. Of course, just what exactly was the reason for that remains open to interpretations – it could either be considered as a proof of higher awareness of companies of the rules on abuse of dominance, of higher efficiency of the OCCP's educative, preventive and repressive work, but also as a symptom of lowering vigilance in combating this type of violations. More generally, this change could reflect the progressing transformation of the Polish economy, with ongoing deregulation, liberalisation and demonopolisation of several sectors.

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[403] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

[404] Cf. Chapter II.B.5.

[405] For a reminder, the 2000 Act introduced – unlike the corresponding EC provisions – a clearly set, though refutable, presumption of dominance as from the moment the company attained a 40% market share threshold.

[406] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

[407] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

[408] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2004 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], the OCCP's website (http://www.uokik.gov.pl).

[409] In 31 cases, the OCCP considered that the company concerned had not abused of its dominant position, in 31 the Office refused to initiate proceedings, in 10 – stayed them and in 9 cases established that the practice had ceased.

ii. deregulation of formerly monopolised sectors

Most of the 247 decisions issued by the Antimonopoly Office between 1992 and 1995 in cases related with a dominant (or "monopolistic") position had arisen in the context of (de)regulation and/or privatisation of monopolised sectors of the (formerly centrally planned) economy, such as network industries (electricity, telecoms, railways, etc.) [410]; in these cases, the AMO played an important role in economic transformation of Poland, which was even more essential in the view of the fact that there were not yet any other independent regulatory authorities[411].

The same trend continued in the second half of the 1990s, with the vast majority of dominance abuse cases linked with natural or legal monopolies: electricity, heat or water distribution or sewage removal companies, telecoms, funeral monopolists, cable TV providers, etc. The number of cases examined continued increasing: 583 proceedings were terminated in 1996, 893 in 1997 and 1170 in 1998[412]. During the latter year, the OCCP found a practice to meet the criteria of abuse of dominance in 124 cases. In 7 cases, fines were imposed in the total amount of 266.000 PLN. Nearly a quarter of all violations were discovered in respect of companies operating on the energy market (electricity, central heating and gas), which the Office itself attributed partially to the absence of executory regulations to the recently adopted Energy Act[413]. Typical practices involved the imposition of unfavourable contract terms such as the requirement of free-of-charge transfer of ownership – for the benefit of the supplier – of connecting infrastructure built at the cost of the energy buyer, refusing to reimburse the cost of building such connections which had been required by the provider, etc.

To quote some examples of decisions taken by the OCCP in the end of the aforementioned period, reference can be made to two decisions of 1998, in which the Office President declared as prohibited the policies of excessive pricing and pricing unjustified by the actual costs by the Polish Telecom as regards inter-city telephone connections; and imposing (by the same operator) penalty payments for delayed payment of bills without any possibility given to the client to contest these penalty payments. In the fuel sector, the OCCP prohibited, during the same year, a practice by the Petrochemia Płock – the country's then largest refinery – consisting of partitioning the relevant market through the granting of a privileged treatment to companies related with the refinery. Other prohibited practices included: exerting illicit influence on the price structure through the charging of identical prices in the refinery's main office and in regional offices; imposing unfair prices on owners of small petrol stations, etc.

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[410] The percentage of such decisions as compared with their total number was as follows: 85% in 1992, 72% in 1993 and 75% in 1994.

[411] Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, pp. 107 - 111.

[412] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

[413] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

Among the prohibited practices most frequently identified in the course of 1999, the OCCP highlighted[414], in the energy sector, the exploiting of the market position by energy distribution companies on the market of construction of energy connecting lines, through the imposition on end users of the choice of undertakings which were to build these lines, granting exclusivity for such works to sub-contractors in respect of particular territories or through obliging the end-users to pay for the construction of connecting lines and to subsequently cede the property of these connections on the distributing company. In the telecommunications sector, the OCCP declared prohibited a practice by the Polish Telecom (Telekomunikacja Polska – TP) to make the conclusion of a contract of opening a telephone line conditional on the performance of an unconnected service, such as the payment of debts made by the previous user of the line. Further, TP obliged communes to participate in the cost of construction of local networks and to cede this local infrastructure free of charge to TP without offering them the possibility of partial recuperation of costs (which was offered to the TP's subcontractors).

In 2000, the OCCP *inter alia* found that energy boards (local and regional electricity and heat distribution companies) abused their dominant position on local central heating markets by imposing unfair contract terms, granting them unjustified profits for monthly fees charged from each individual client even though several clients used common main connections to the line (which resulted in a multiplication of the fee in respect of one and the same connection)[415].

The Office also focussed its attention on cases of abuse of dominant position on the market of gas supply equipment (and more precisely, the equipment necessary to connect houses to the gas network). The practices (observed by the Office in 2001) were resorted to by gas suppliers (who usually enjoyed a position of monopoly in a given commune, due to network constraints), and consisted *inter alia* of price discrimination (forcing the suppliers of equipment to offer special rebates if they wanted to win the tender for new installations), and discriminating between suppliers using the criteria (such as the country of origin or the structure of ownership and/or capital) unconnected with the characteristics of the equipment to be supplied (cf. Article 5 (1), points (2) and (3), of the 2000 Act)[416].

The following year (2002), the OCCP had an opportunity to consider a case related with the sector of gas transportation. The complaint was filed in April 2001 by Bartimpex S.A. (one of the biggest gas trading companies in Poland) against the Polish Petrol and Gas Mining S.A. (PGNiG - owner of the gas pipeline network in Poland), alleging that the latter had abused its dominant position. Shortly before, Bartimpex (together with the German company Ruhrgas Energie Beteiligungs-AG, as well as with PGNiG) prepared a project of construction of a pipeline connecting (through the Polish territory) gas networks of Western Europe and Russia.

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[414]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

[415]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

[416]Cf., for example, Decision of 31 July 2001 (Dz.Urz. UOKiK Nr 2/2001, poz. 62) concerning the communal utilities company in Września; and Decision of 29 October 2001 (Dz.Urz. UOKiK Nr 3/2001, poz. 119) concerning a private utilities company in Ząbkowice Śląskie.

The three companies signed a letter of intent to this effect. PGNiG, which was found by the OCCP to enjoy dominant position on the gas trading and supply market, was to play a major role in the agreement, as it had agreed to send an important proportion of the gas it exported through the new pipeline. However, soon after the signature of the letter of intent, PGNiG changed its view and withdrew from the deal, which made the whole project economically unviable. In its complaint, Bartimpex claimed that PGNiG had violated the provisions of the Energy Act on third party access (the so-called TPA clause), and had thus abused its position of natural monopoly (the sole owner of the pipeline infrastructure). In its decision[417], the OCCP fully agreed with this argument, ordered PGiNG to cease the practice in question and imposed a fine of 23.481 EUR.

The two other major proceedings concerning abuse of dominant position[418], carried out during 2002, referred to the markets of TV publicity and national press distribution. In the first case[419], the OCCP found that the Polish Television (TVP – a State company) indeed abused its dominant position on the relevant market (identified as the market of publicity in free nationwide TV channels). The proceedings were initiated after complaints by two competing private national TV channels (Polsat and TVN). The abuse consisted of granting special rebates to publicity companies, or media agencies representing them, in exchange for these companies' undertaking that the share of TVP in their total expenses for publicity campaigns (in all free TV channels) would reach at least 50%. This was found by the OCCP to represent a practice described in Article 8 (2) (5) of the 2000 Act, i.e. an abuse of dominant position in the form of preventing the creation of development of competition on the relevant market. At the same time, as TVP had ceased the incriminated practice before the end of 2002, no sanction was imposed.

In a second case[420], the main national press distributor (the former State monopolist – Ruch S.A.) was also found to have abused its dominant position and ordered to cease it. The proceedings were initiated upon complaints by two publishing companies (Gruner + Jahr Polska and Amer.Com), and the practice concerned consisted of imposing too high commissions (unjustified economically) for newspapers and magazines, both those sold and those returned to the publisher (because not sold). This was considered by the OCCP as an example of imposition of unfair contract terms granting unjustified profits (Article 8 (2) (6) of the 2000 Act), which was all the more harmful as Ruch's position on the relevant market (defined as the market of press distribution in Poland) was very strong (well above 50%). None of the active competitors (Kolporter, Inmedio, Franpress and Rolkon) possessed such a large network of sale outlets, and none of them could cover the whole country, which obliged the publishers to use Ruch's services. The OCCP compared the standard contract terms used by Ruch's competitors when dealing with publishers, and found their commissions to be much lower, despite relatively higher operational costs. Furthermore, Ruch was unable to present any clear and transparent method of calculating the amount of its commissions. It is noteworthy that Ruch's appeal against this decision to the CPCC was unsuccessful.

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[417] Cf. Decision of 20 February 2002, Dz.Urz. UOKiK Nr 2/2002, poz. 69.

[418] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

[419] Cf. Decision of 16 December 2002, Dz.Urz. UOKiK Nr 1/2003, poz. 237.

[420] Cf. Decision of 5 December 2002, Dz.Urz. UOKiK Nr 1/2003, poz. 235.

The OCCP's struggle with former – or still persisting – monopolists in sectors such as telecommunications, cargo rail transport and energy distribution continued also in 2003[421]. For example, the Office initiated proceedings against the Polish (formerly State) telecoms (Telekomunikacja Polska – TP), following numerous complaints by clients concerning the TP's unilateral introduction of amendments to the tariffs for ISDN services, without information to clients as regards the possibilities of terminating the agreement. The OCCP noted that TP enjoyed a very strong position on the market of ISDN services in Poland (all the competitors having together only 8% of the market) and, moreover, was the only "last mile operator" in the country (meaning that all other companies had to pay TP for access to their customers). In this context, the Office considered TP's actions as an abuse of its dominant position, consisting of the imposition of unfavourable contract terms on clients (i.e. preventing them from having a possibility to terminate the contract if TP unilaterally increases the prices for its services). The OCCP President ordered TP to cease this practice immediately and imposed a very high fine – 7.000.000 PLN[422].

In a second case, the OCCP attacked another former monopoly, this time on the postal services market. Following a complaint introduced, interestingly, by a State administration body (the *powiat* of Strzelce), proceedings were initiated against the Polish Post for the practice of charging additional fees (based on the institution's internal, unpublished regulations) for sending stamp-free (credited) letters on behalf of public administration organs[423]. Thus, in this case, the State administration was in a way considered as an "injured party". The OCCP considered this practice to be a typical example of a behaviour of a monopolist, charging extra payments unjustified by costs (the Office examined the relevant procedures and found that handling letters in this manner did not incur additional costs on the Polish Post). It is noteworthy that the decision by the Office President was expressly given a universal bearing (i.e. applicable to commercial relations of the Polish Post with its all current and future clients, not only with the complainant), which was justified with a "public-legal character" of this decision.

In the energy sector, the OCCP initiated *ex officio* proceedings against a local energy distribution monopoly (Zakład Energetyczny Kraków S.A - ZE Kraków), and found that it had abused its position by imposing unilaterally, without any possibility to renegotiate, standard contracts on individual energy buyers (who, moreover, were not even provided with copies of these general conditions of sale). This was qualified by the OCCP President as imposition of unfavourable contract terms, and prohibited[424].

The OCCP continued to fight with resolve abuse on several markets characterised by continuing dominance, such as telecommunications, also in 2004. An illustration of this could be provided with the May 2004 decision[425], in which the Office President fined the Polish Telecom (TP S.A.) 23.5 mln PLN for abuse of dominant position in its relations with companies leasing the infrastructure serving *inter alia* to transmit telephone, TV, radio and Internet signals.

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[421]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2003 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2003], the OCCP's website (http://www.uokik.gov.pl).

[422]Cf. Decision of 24 October 2003 (nr DPI – 74/03), Dz.Urz. UOKiK Nr 1/2004, poz. 278.

[423]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2003 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2003], the OCCP's website (http://www.uokik.gov.pl).

[424]Cf. Decision of 1 October 2003 (nr RKR – 28/03), Dz.Urz. UOKiK Nr 1/2004, poz. 82.

[425]Cf. Decision of 24 May 2004 (nr RPZ – 10/04), Dz.Urz. UOKiK Nr 4/2004, poz. 20.

The decision was the outcome of two sets of proceedings (joined subsequently) initiated following a complaint of a local cable TV operator ("Jim-Sat" from Słubice), and a group of companies leasing tele-technical infrastructure from TP in various parts of the country. The OCCP found that TP had exploited its dominant position[426] and imposed unfavourable contract terms on the companies concerned (e.g. excessive prices; discriminating between companies through charging much higher fees from those which had signed a lease contract for a shorter period; imposing a unilateral right to change the fees at any time, without stating reasons; preventing the potential infrastructure users from co-operating with each other, etc).

The OCCP's determination to fight anticompetitive conduct of former State monopolists in various sectors of the Polish economy could further be illustrated by the PKP Cargo case[427], in which the cargo company of the Polish railways (enjoying a 70% share on the market of railway cargo transportation) was fined 40 mln PLN[428] for imposing unfavourable contract terms on its business partners, and creating barriers for the creation and development of competition on the relevant market.

The contract clauses pointed at by the OCCP included a ban on competition (obliging the clients to undertake not to transport a certain number of goods, enumerated in an appendix to the contract, other than with the PKP Cargo trains); an obligation to transport other goods than those enumerated in the appendix with the PKP Cargo trains, if the terms proposed by the latter were not worse than those offered by competitors (the rule of preferred choice); and a unilateral right for PKP Cargo to terminate the agreement without prior notice, if the two above-mentioned clauses were violated.

The OCCP considered that these clauses were contrary to the principle that every company should be able to decide freely which transport company's services to choose. In those circumstances, companies were prevented from choosing e.g. a transport company offering lower fees. The OCCP noted that such long-term contracts were concluded with large companies which needed to transport important amounts of goods (fuels, coal, building materials, raw materials for steel industry, etc). The incriminated clauses had as their effect an increase in transport costs, and consequently also higher end prices[429]. As the goods concerned by these price increases were of fundamental importance for the economy, the Office concluded that the interests of all consumers would, in the end, suffer directly or indirectly because of these contracts.

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[426] Apart from TP, there were only a few other companies possessing the necessary tele-technical infrastructure (Telekomunikacja Kolejowa, Telefonia Cyfrowa Dialog and Tel-Energo) but at a much smaller scale (i.e. much smaller networks with a lower amount of lease contracts).

[427] Cf. Decision of 17 June 2004 (nr DOK – 50/04), Dz.Urz. UOKiK Nr 4/2004, poz. 55.

[428] As regards the amount of the fine, the OCCP explained that it was influenced by the seriousness of the violation, the economic situation of the company and the fact, that PKP Cargo had mislead the Office by wrongfully declaring that it had annulled certain of the clauses of the contracts concerned by the investigation. It is noteworthy that this was not the highest fine imposed by the OCCP so far. The "record" belonged to the case against the Polish Telecoms (TP), which had been fined 54,1 mln PLN (i.e. some 12 mln EUR) for a failure to execute the Office's decision ordering it to cease the "monopolistic practice" consisting of charging excessive tariffs for inter-zonal communications. Similarly, the former State monopolist on the petrol market – PKN – was ordered in 2000 to pay 40 mln PLN for having charged excessive prices for one of its products (a component used in the production of anti-freeze for car coolants). It is noteworthy that both of these companies were among those which had to pay the highest fines following decisions of the OCCP. Fines imposed on other companies (especially communal firms) tended to be lower, usually not higher than 1 mln PLN.

[429] The OCCP found that, in the case of goods of the kind concerned by these contracts, the proportion of transport costs in the total price was particularly high.

Further, the OCCP stressed that it could not tolerate practices consisting of abusing one's dominant position in order to prevent the emergence or the development of competition on a given market, especially in a situation when (as in the PKP Cargo case), the clients bound by the contracts represented the majority of clients (in particular, as regards the volumes transported) ordering the carriage of goods by rail.

In a commentary appended to the Press Release announcing the decision[430], the President of the Office stressed that PKP Cargo was fighting competition in a "ruthless" manner, which was prejudicial to all market actors: clients, competitors and consumers. That is also why the decision concerning PKP Cargo, ordering it to cease the application of the contracts concerned was to be immediately executable.

The OCCP recalled that transition periods protecting the Polish railways from competition on the rail cargo market would expire in the beginning of 2007; as from that date, large companies offering analogous services would be able to carry out their activity in Poland without any restrictions. In this context, the Office initiated several inquires aiming at ensuring that the conditions for market liberalisation would be fully met in due time. Furthermore, the Office President (in his commentary) stressed that, from the standpoint of competition law, it was crucial to ensure – in the context of restructuring of the PKP (Polish railways) Capital Group – a full separation between infrastructure management and cargo activity. According to the President of the OCCP, rail cargo transporters would ideally have to pay to the Polish Railway Lines (PLK – the infrastructure operator) a fee for access to the infrastructure, on conditions identical to those granted to PKP Cargo. He suggested a public debate on this subject, before final decisions were taken on the company's privatisation.

In 2004 and 2005, the OCCP has continued its fight against abusive practices by natural monopolists such as communal water companies[431], which had imposed unfavourable contract terms on individual clients (e.g. charging additional, not foreseen by law, fees for connecting houses to the water network).

iii. State and regional and local self-government bodies

From the very beginning of its activity, the Polish anti-trust authority had to tackle the issue of anticompetitive actions by public administration bodies, which – a clear legacy of the previous economic and political system – frequently distorted competition while engaging into (or influencing) economic activities. For example, in the course of 1998, the OCCP has dealt with several cases of abuse by communal firms of their dominant position on the market of waste disposal, in relation with their connected activity of managing waste discharge areas. Further, the OCCP found and banned practices of price discrimination by communal firms[432] as concerns water supply and sewage disposal (prices in respect of private households were below costs, but were then compensated by benefits obtained in respect of other services).

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[430] A practice followed in respect of certain politically and/or economically important cases.

[431] E.g. in the cases of communal water companies from Wartkowice and Namysłów ("Ekowod"). Cf. Decision of 26 March 2004 (nr RKT – 16/04), Dz.Urz. UOKiK Nr 3/2004, poz. 63.

[432] Cf. I. Bielska, "Przeciwdziałanie praktykom monopolistycznym. Ochrona konkurencji w działalnosci komunalnej", Biuletyn UOKiK, http://www.telbank.pl/uanty.gov/AUTO/BIUL0910/biu12.htm.

Also in the following year (i.e. 1999), the OCCP condemned practices by local self-government bodies, consisting *inter alia* of discriminating between their own and competing public transportation companies (refusing access to bus stops; granting subsidies enabling communal firms to charge lower ticket prices), allowing communal public transportation companies to practice excessive or discriminatory pricing, rebate policies, etc. These cases were interesting for two reasons: they confirmed the Office's attitude to local self-government bodies as economic actors subjected to the same competition rules as private business insofar as they engaged in a business-type activity, and demonstrated the OCCP's very "liberal" attitude to public transportation sector, seen as an "ordinary" business not affected by the French-type *service public* considerations.

This approach continued in 2000, when the Office punished a commune for preventing other operators of bus and minibus transport services from using bus stops which were the commune's property, thus creating a privileged situation for the communal transport company. The above-mentioned year also brought an interesting decision, in which a public health insurance body ("kasa chorych") was punished for abuse of dominant position by granting privileged contract terms to public sector nurses, preventing free-lance nurses from acceding to services reimbursed by the State. This was another example of the approach of the Polish competition authority to restrictions resulting from actions by public administration, namely that such actions were basically treated in the same manner as anticompetitive conduct by private sector companies. As regards communal services, the OCCP's decisions concerned *inter alia* actions by the communes or communal firms preventing other (mostly private) undertakings from providing funeral services (e.g. by making it impossible or excessively difficult for them to use communal cemeteries or morgues), refusing them access to communal sewage storages and waste water containers, or trying to eliminate competition by selling below costs.

In the course of 2001, the OCCP focussed *inter alia* on situations – quite frequent in practice – when local self-governments fulfilled their statutory obligations through companies of which they were exclusive owners or majority shareholders. These firms usually benefited from a privileged situation in comparison with their potential or actual competitors, who were moreover obliged to use the same infrastructure (e.g. waste disposal areas). As the very performance of waste disposal services was dependent on obtaining a license, and this in turn depended on the guarantee that the company would be granted access to the disposal area, competing companies were often in fact prevented from entering the relevant markets by the disposal area administrators, who were in practice connected (or identical) with the communal waste disposal firms. Such practices were found by the Office to meet the characteristics set out in Article 8 (2) (2) of the 2000 Act; in addition, decisions of communal councils confirming the exclusivity granted to communal companies in this respect were condemned by the OCCP on the basis of Article (1) and (2) (5) of the Act, and so were such decisions (or unilateral tariffs imposed by disposal areas administrators) imposing discriminatory prices for waste storage on competing companies.

The OCCP stressed in its 2001 Activity Report[433] that the communes acted in a double capacity i.e. as a public authority and as a market operator, and that it was unacceptable that they abused their position as a public authority in order to distort competition on the relevant markets. The Office also continued paying attention to the dominant position of numerous communal water supply and waste water removal companies, which operated in the conditions of natural monopoly (due to the characteristics of the water and waste water networks). In this context, the OCCP found several such companies to have engaged in anticompetitive practices, such as excessive pricing (Article 8 (2) (1) of the 2000 Act) and excessive penalties for the late payment of bills (Article 8 (2) (6) of the 2000 Act).

Further, the Office dealt with practices resorted to by communes which – following ownership changes leading to the transfer from the State to local municipalities – had become owners of an important number of grounds, apartments and houses, sometimes giving them a dominant position on the local real estate rental market. The high costs of building new properties with (in particular) office space for rent, as well as the fact that in many cases the communes possessed space for rent with the best location and highest potential rents, constituted additional barriers for market entry of new competitors.

In this context, the OCCP considered several cases in which it found that communes had engaged in restrictive practices by e.g. charging excessive rents for office space (Article 8 (2) (1) of the 2000 Act), unilaterally raising the rents to an unreasonable degree in the course of the contract (Article 8 (2) (6) of the same Act), preventing market entry by requiring new competitors to pay the rent (for running a guarded parking lot) much higher than the one paid by the company majority-owned by the commune (Article 8 (2) (5) of the 2000 Act) and discriminating between different companies wishing to lease space from the commune by offering more advantageous tariffs to companies connected financially with the commune (Article 8 (2) (3) of the 2000 Act).

In the course of 2001, numerous cases of abuse of dominant position were again discovered by the OCCP in the passenger transport sector, especially as regards scheduled services. As in previous years, communes were found to discriminate against private transport companies and to impose conditions which offered their own (communal) public transportation firms unjustified privileges, protecting them from competition[434]. Some of the communes continued to deny access of competing companies to bus stops administered by the communes or by the communal firms, or guaranteed to their companies (or to certain companies, with which they had special relations) exclusivity for some part of the transport network (e.g. the line between an airport and the city centre). These practices were found to fulfil the characteristics set out in Article 8 (1) and (2) (5) of the 2000 Act.

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[433] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

[434] Cf., for example, Decision of 12 July 2001 (Dz.Urz. UOKiK Nr 2/2001, poz. 50) concerning the Gniew Commune; Decision of 20 August 2001 (Dz.Urz. UOKiK Nr 3/2001, poz. 79) concerning the Bydgoszcz Commune; Decision of 2 October 2001 (Dz.Urz. UOKiK Nr 3/2001, poz. 107) concerning the Trzebownisko Commune; Decision of 20 November 2001 (Dz.Urz. UOKiK Nr 1/2002, poz. 24) concerning the Opole town, and Decision of 12 December 2001 (Dz.Urz. UOKiK Nr 1/2004, poz. 19) concerning the Commune of Żurawica.

Further, following the approach demonstrated already in the preceding year[435], the OCCP treated regional public obligatory health insurance bodies ("kasy chorych"[436]) in a manner identical to private companies enjoying monopolistic position on the relevant markets (i.e. the market of public health insurance in the provinces), and consequently concluded the existence of abuse of dominant position in a number of cases.

By means of an example, the following practices were sanctioned pursuant to Article 8 of the 2000 Act[437]: concluding agreements for reimbursement of the costs of primary health care in a manner discriminating between service providers (i.e. usually the public and private clinics and outpatient centres or doctors); restricting market entry and thus preventing competition on the market of nursing services (by making it difficult for private nurses and nurses' associations to sign cost reimbursement contracts); imposing unfair contract terms on providers of specialist outpatient care (e.g. by guaranteeing the right to change unilaterally reference prices during the contract year, and by securing the right to delay reimbursement); and refusing to pay back the cost of specialist examination and treatment of patients above a certain, unilaterally set quota, despite the fact that doctors had no right to refuse such examination or treatment (and that, as far as the public health care sector was concerned, it was forbidden to request direct payments from patients).

In the above-mentioned decisions, the OCCP also pinned down the practice of granting *de facto* exclusivity for reimbursed primary care to certain GPs (family doctors) on particular territories, thus excluding other GPs from the possibility to practice (although theoretically they could still operate, the impossibility for patients to receive free care and for the doctors concerned to be reimbursed by the health insurance body meant that they had to stay out of business).

The OCCP continued its line of jurisprudence concerning restrictions imposed by public organisations operating in the health care sector in 2002. This time, the proceedings – initiated upon a complaint by an association (Stowarzyszenie Ochrony i Promocji Zdrowia) owning and managing a private hospital in a small town of Szczyrzyc – concerned the conduct of the district State administration (Limanowa *Powiat*)[438]. The Office had thus "dared attacking" the State administration directly (as opposed to local self-government or public agencies indirectly related with the Government).

The OCCP concluded that the Limanowa *Powiat* had abused its dominant position on the market of renting premises where in-patient health-care services could be provided on the *powiat's* territory, through granting privileged conditions of operation to the *powiat*-owned public hospital and discriminating against the private hospital (i.e. demanding excessively high amounts – equal to 60% of the value of the private hospital's annual contract with the public health insurance body – for the rent of buildings of which the *powiat* was owner).

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[435] Cf. above.

[436] The regional "kasy chorych" were set up pursuant to the Act of 1997 on general health insurance and to the executory Regulation of the Minister of Health issued in 1999. They were later replaced by a National Health Fund, with regional offices in each province.

[437] Cf., for example, Decision of 6 June 2001 (Dz.Urz. UOKiK Nr 2/2001, poz. 30) and Decision of 27 December 2001 (Dz.Urz. UOKiK Nr 1/2002, poz. 24), both concerning the "Kasa Chorych" of the Mazowsze Province.

[438] Cf. Decision of 16 October 2002 (nr RKR – 26/02), Dz. Urz. UOKiK Nr 1/2003, poz. 11.

At the same time, the heavily indebted public hospital could operate further because the *powiat* authorities – using their public authority prerogatives under the legislation on health care – had reimbursed all its debts from public funds and, moreover, freed it from paying the rent for using the premises that were equally owned by the *powiat.* The OCCP concluded that the only purpose of the *powiat's* conduct was to force the private hospital out of business, and thus secure a monopoly of the public hospital. The Office stressed that such actions would also deprive the patients of their choice of a hospital in which they would wish to be treated, and would eliminate competition which could have resulted in an improvement of the quality of care.

In June 2004, the OCCP issued for the first time a decision, in which the entity which was found to have engaged in a prohibited practice was a regional government body (the Lublin Provincial – or Voivodship – Office)[439]. It was thus a continuation and a development of the line of jurisprudence according to which public administration bodies could, insofar as their actions distorted competition, be sanctioned under the anti-trust provisions.

The practice in question consisted of eliminating from the relevant market companies providing passenger inland waterway services on the Vistula river in Kazimierz Dolny (a popular weekend and summer destination), and consequently restricting the consumers' choice of the best offer. Companies offering afore-mentioned services had to use the city's port facility, which was the only place in the area where persons could be taken on/off board. The port installations belonged to the regional administration, and all shipping companies were required to sign leasing agreements with it.

After investigation, the OCCP concluded that the regional authorities had abused their dominant position by refusing, without a justification, to sign such contracts with several companies, despite the fact that there was spare capacity in the port. This prevented the emergence of a free competition on the relevant market (as only a few companies were given access to the port facilities) and created a prejudice to the consumers, who had no choice of an offer best suited to their expectations as regards the price, route, timetable, etc.

The OCCP President ordered the Lublin Voivodship to cease the practice concerned, and - due to the risk of creating irreversible market consequences (i.e. a lasting distortion or elimination of competition) - rendered the decision immediately executable. Further, the regional administration had to pay a fine of 50.000 PLN.

Also in the summer of 2004, a discussion took place concerning a closely related aspect of the OCCP's jurisprudence, namely the capacity (passive legitimation) of communes to be the party in competition proceedings. This was an important issue because, as mentioned above, the Office had since long taken the position that communes and other public administration bodies could be considered as undertakings in the sense of the 2000 Act when they operated on the market (in fact) in the same manner as private companies or, even more importantly, when they took decisions in which they abused their powers as public authorities in order to modify the conditions of competition and to offer a privileged treatment to their own companies, companies in which they had shares or with which they closely co-operated.

[439]Cf. Decision of 23 June 2004 (nr RLU – 22/04), Dz.Urz. UOKiK Nr 4/2004, poz. 70.

The polemic erupted in relation with a July 2004 case[440], in which the OCCP initiated proceedings against the Zakopane Commune for restricting competition on the market of local passenger transport services by granting only the communal transport company access to the municipal bus terminal. The Mayor of Zakopane opposed the Office's action by stating that a commune could not be treated as an undertaking (entrepreneur) because it did not carry out any economic activity; consequently, the proceedings in question should have been terminated without decision on the merits.

In response, the OCCP referred to the jurisprudence of the Court for the Protection of Competition and Consumers (previously the Antimonopoly Court), established since the early 1990s, according to which the competition legislation should be applied to the activities of communes and bodies subordinated to communes if their conduct, although in principle carried out in the framework of their public authority functions, had consequences analogous to anti-competitive practices by business entities. The Office stressed that the definition of an undertaking ("entrepreneur") in the 2000 Act was broader than that contained in the Act on Economic Activities; namely, the 2000 Act stated, in its Article 4 (1) (a), that the notion of "entrepreneur" could also include a natural or legal person, or an entity without legal personality, which organised or performed public utility services not included in the notion of "economic activity" in the meaning of the Act on Economic Activities. Public utility services could include activities aiming at meeting the needs of local communities. Among those activities, the Act on Local Self-Government expressly mentioned local public transportation.

Consequently, anti-trust rules applied not only to companies providing public utility services, but also to the subjects which founded/owned/controlled such companies i.e. the communes themselves. The OCCP stressed that this interpretation was compatible with the jurisprudence of the European Court of Justice, which held that undertakings (entrepreneurs) were all entities carrying out an economic activity, irrespective of their legal form and manner of financing. However, communal organs had no standing as a party in anti-trust proceedings if they considered, by means of an administrative decision, individual cases remaining within the context of their public administration function, even if these decisions had as their effect the prevention of conditions necessary for the creation or development of competition. In such cases, the only procedure available was the usual administrative appeal, as well as a complaint to the administrative court.

Another interesting decision, issued in 2005, concerned abusive practices by the Regional Directorate of State Forests (RDSF) in Wrocław[441]. This is one more example of the OCCP's resolutely pro-market approach, treating State administration bodies in the same way as private companies, insofar as they operate on the market and engage in economic activities. In this case, RDSF was found to use discriminatory, unobjective criteria of selecting clients (timber wholesalers), which resulted in the division of markets and prevented free competition on the relevant market (i.e. wholesale timber market in the Lower Silesia region), as it forced some of the wholesalers to leave the market or to buy timber from local suppliers (where amounts were smaller and prices higher).

[440]Cf. S. Bellitzay, "Postępowanie antymonopolowe przeciwko Zakopanemu. Gmina jak przedsiębiorca. Polemika", "Rzeczpospolita" Nr 159, 21 July 2004.
[441]Cf. Decision of 30 December 2005 (nr RWR – 74/2005), Dz. Urz. UOKiK Nr 1/2006, poz. 189.

The OCCP pointed at the fact that the selection criteria imposed by RDSF (which enjoyed a quasi monopoly on the relevant market) privileged large firms and were basically unattainable for smaller, medium-size companies. These criteria were e.g. turnover, investments, employment levels, etc. Furthermore, one of the criteria – support of local self-government bodies – "provoked" the latter to intervene in the competitive game instead of remaining impartial. For the OCCP President, such a state of affairs was particularly unacceptable, especially as it helped reinforce the existing structure of the market where a few large firms prevented new players from entering the market.

The attitude of "zero tolerance" towards abuse of dominant position by entities related with the State (be it State-owned companies or organs of public administration carrying out some form of economic activity) could be further illustrated by the case in which the OCCP punished the Skawina commune for abusing its dominant position on the market of garbage removal on its territory[442]. The incriminated practice consisted on imposing on companies which wanted to enter the above-mentioned market a requirement that each building they were servicing had to possess a certain number of garbage containers, calculated on the basis of arbitrarily set criteria; further, the commune obliged the interested companies to accept payment based on a lump sum set by the communal council. The OCCP President stressed that such a system also eliminated to a large extent the competition between garbage companies themselves, because they could not compete with prices or methods of calculation of these. Thus, what the OCCP was really concerned about was the action of a public administration body which distorted actual or potential competition. This – as was already several times illustrated above – was in fact one of the main issues for the Polish competition authority, not only in the context of dominant position.

iv. other sectors

Throughout its up-till-now history, the Polish anti-trust authority has dealt with a number of abuses of dominant position by companies operating in different sectors of the economy. For example, a series of 1998 cases related to cable TV operators and their practices consisting of the abuse of dominant position on local cable TV markets: imposing a choice of programmes and their change without prior warning, unfair procedures of settling complaints and refusing compensation for interruption of transmission, arbitrary and excessive pricing. In 1999, the OCCP considered as practices exploiting cable TV operators' "monopolistic position" the introduction into standard contracts of clauses making it impossible for clients to seek discounts for low quality or interrupted transmission, giving the operators a full freedom in setting and changing programme frequencies and limiting the clients' right to refuse promotional materials.

In agriculture (a sector that, under the Polish competition legislation, was not excluded from the operation of general rules!), the OCCP declared as a "monopolistic practice" the imposition by large food processing plants of unfair contract terms (e.g. the right to change unilaterally previously agreed prices or the prohibition of supplying other plants) on colza and sugar beet producers. In the industry sector, the prohibited practices discovered by the OCCP consisted of resale price maintenance, and of abuse of dominant position by a metallurgical plant, which discriminated between retailers by excluding those who were not part of its own distribution network.

[442] Cf. Decision of 10 March 2005 (nr RKR – 12/05), Dz. Urz. UOKiK Nr 2/2005, poz. 130.

During 2002, the OCCP carried out proceedings upon complaint by a group of farmers and food producers delivering food to the Polish capital. The Office considered that Warsaw's largest food wholesale market (Warszawski Rolno-Spożywczy Rynek Hurtowy S.A. - WRSRH) had abused its dominant position on the relevant market (defined as the market of renting selling outlets in food wholesale centres in Warsaw area) by artificially restricting farmers' and producers' access to these outlets through limiting willingly the amount of the latter[443]. The Office established that WRSRH had recently bought over two major competing wholesale centres in the Warsaw area, and closed them down shortly afterwards; as a result, it had obtained a share of over 80% in the relevant market. In this situation, farmers and food producers were basically obliged to sign contracts with WRSRH which demanded excessive fees and, moreover, made it conditional upon the farmers/producers buying shares in WRSRH. The OCCP ordered these practices to cease.

A July 2004 decision[444] provides an illustration of the OCCP's approach to restrictions of competition related to intellectual property rights. In the decision in question, the OCCP President fined the Polish Authors' Association ZAiKS 500.000 PLN for having restricted the freedom of authors to decide about the manner of making use of their rights to music compositions. The practices pointed at in the decision consisted of obliging music composers to grant ZAiKS exclusivity for the management of their rights to music compositions as regards their public performance, mechanical recording and radio and TV broadcasting (without which ZAiKS would not undertake to protect the authors' rights). The proceedings were initiated upon a complaint by members of a popular folk rock group "Brathanki".

The Office President noted that the development of modern technologies (thanks to which the same song could be broadcast simultaneously by several performers in several places and through several technical means) made it impossible, or at least economically unreasonable, for authors to safeguard their rights to music compositions individually. This is why the task of protecting authors' rights has been undertaken by specialised entities managing these rights (and, in particular, granting licenses for public performances/broadcasting and collecting fees for these) collectively. ZAiKS was the biggest such organisation in Poland, managing the rights of some 8 thousand Polish authors and editors, as well as over 2.5 mln foreign authors and composers (in respect of some 14 mln compositions, i.e. some 96% of the world repertoire); it was beyond doubt that it enjoyed a dominant position on the relevant market.

In the course of the inquiry, the Warsaw branch of the OCCP established that ZAiKS had prevented authors from choosing the degree of protection of their rights (as well as from selecting other specialised organisations to safeguard their rights in respect of some part of their artistic creation, e.g. music compilations or text/music note albums). The President of the OCCP considered this conduct as an abuse of ZAiKS's dominant position, consisting in particular of "tying" (i.e. forcing contract partners to accept an obligation unrelated with the object of the agreement).

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[443] Cf. Decision of 20 March 2002, Dz.Urz. UOKiK Nr 2/2002, poz. 87.

[444] Cf. Decision of 16 July 2004 (nr RWA – 21/2004). Cf. Press Release of 30 July 2004, as well as *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2004 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], the OCCP's website (http://www.uokik.gov.pl).

The President of the Office disagreed with ZAiKS's argument that an efficient defence of authors' rights required exclusivity for the management of the rights to a musical composition in respect of all fields of its possible exploitation/performance. The President noted that, as of the beginning of 2004, ZAiKS had ceased to resort to the above-mentioned practices in relation with those authors who were not members of the association – these authors had been given a possibility to exclude the rights to mechanical broadcasting from the scope of the contract with ZAiKS. However, they were still obliged to grant ZAiKS exclusivity for the management of their rights to public performances.

The President of the OCCP stressed that his position was compatible with the jurisprudence of the European Commission, especially the *GEMA* decision[445] – concerning a German organisation similar to the Polish ZAiKS – in which the Commission had stated that collective management of authors' rights should create the least possible restrictions for authors' freedom of decision in this respect.

The Office President explained that the fine imposed on ZAiKS was meant to have a preventive impact, as well as to represent a sanction for actions which had been an obstacle to the emergence of competition on the relevant market. He expressed the view that efficient competition in this field was very important for the economy, which had become increasingly dependent on intellectual property rights.

In October 2004[446], the OCCP President fined a press publishing company (Edytor) 350.000 PLN for having abused its dominant position on the regional press publicity market in north-eastern Poland. Edytor – a publisher of 23 regional titles including two major ones ("Gazeta Olsztyńska" and "Dziennik Elbląski") – was found to enjoy a share of nearly 80% of the market of daily press in the region concerned, and more than 60% of the relevant i.e. press publicity market. The incriminated practice consisted of forcing publicity agencies to grant Edytor exclusivity for all press campaigns carried out by these agencies, the "sanction" for breaking this exclusivity being that Edytor could oblige the agencies to pay back all previously granted rebates. The OCCP President considered that clauses of this type allowed Edytor to secure a very significant share of the market, with the intention of eliminating all printed media of the region that were still independent of Edytor.

The OCCP continued to deal with abuses of dominant position on the media market also in 2005. One of such cases concerned a private round-the-clock news channel (TVN 24), which was found to have engaged in prohibited practices set out in Section 8 (1) and (2) (6) of the 2000 Act[447], by forcing a company operating cable TV networks in several smaller cities (Inowrocław, Nakło n/Notecią, Trzemeszno, Konin, Brodnica, Gniewkowo and Szubin) – which were found by the OCCP to be functionally and technically separate from each other – to buy a broadcasting license in respect of all these networks (although the company concerned – "Automatic Serwis" – only wanted a license for two networks) and obliging it additionally to buy a license for a second channel owned by TVN[448]. The relevant market was defined as the market of pay TV Polish-language information channels.

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[445]Decision of 2 June 1971, Case IV/26.760, O.J. No. L 134 of 20 June 1971. This OCCP's decision provides an illustration of the reliance on the jurisprudence of the Community Courts in the Office's enforcement activity.

[446]Cf. Decision of 15 October 2004 (nr RBG – 30/04), Dz.Urz. UOKiK Nr 1/2005, poz. 73.

[447]Cf. Decision of 15 April 2005 (nr RBG – 15/05), Dz. Urz. UOKiK Nr 2/2005, poz. 190.

[448]Namely TVN Meteo (specialised channel broadcasting weather forecasts round the clock).

c. mergers

i. general remarks

The Polish competition authority's approach to mergers was relatively "mild" in the early 1990s. During that period, almost all of the 21 merger cases considered by the AMO (including 10 following a voluntary notification) ended with a positive decision. As pointed out by certain authors[449], this tendency was to continue in the following years: while occasionally unnecessarily harsh to local mergers on the Polish market[450], the Antimonopoly Office tended to show much more understanding in cases of transnational mergers and acquisitions of Polish companies by large multinationals[451]. This could be seen as the expression of the will to support the process of growth of large firms of European dimension having their main offices in Poland[452].

The number of merger cases considered by the AMO (and later the OCCP) has gradually increased in the second half of the decade. For example, 215 decisions were issued in the course of 1998[453]; however, the bulk of these decisions (i.e. 132) concerned procedural violations, that is a failure to notify intended mergers. On the merits, the vast majority of the notified mergers continued to be assessed favourably by the Office. The actual volume of work caused by merger procedures was very important, representing some 60% of all the staff and time resources available to the OCCP[454]. The Office explained this phenomenon by the fact that many companies had mistakenly notified their intended mergers although they were in fact not obliged to do so, or by the fact that they had abandoned their merger plans in the course of the proceedings.

In terms of sectors concerned, the biggest number of notifications concerned companies from metal and machine industry sector, as well as from the food processing sector, financial services and insurance sectors. There had also been – in comparison with the early 1990s – an increase in the number of mergers in building industry, media and publicity sectors. Despite the very small number of negative decisions, the OCCP stressed that it wished to remain vigilant in the area, including through following up the implementation of mergers[455].

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[449]Cf. S. Sołtysiński, "Antitrust laws in a country in transition: The Polish experience", in: J. – F. Bellis (ed.), *La politique communautaire de la concurrence face à la mondialisation et à l'élargissement de l'Union européenne*, Nomos, Baden-Baden 2001, pp. 149 – 153.

[450]Like in the *Spółdzielnia Zaopatrzenia Rolnictwa "Samopomoc Chłopska"* case, where the AMO blocked the creation of a new co-operative of farmer co-operatives for the purpose of joint supply. Cf. S. Sołtysiński, "Antitrust laws in a country in transition: The Polish experience", in: J. – F. Bellis (ed.), *La politique communautaire de la concurrence face à la mondialisation et à l'élargissement de l'Union européenne*, Nomos, Baden-Baden 2001, p. 149.

[451]E.g. in the *ZWAR/ABB* and *Heineken* cases. Cf. S. Sołtysiński, "Antitrust laws in a country in transition: The Polish experience", in: J. – F. Bellis (ed.), *La politique communautaire de la concurrence face à la mondialisation et à l'élargissement de l'Union européenne*, Nomos, Baden-Baden 2001, p. 153.

[452]NB. an industrial policy objective.

[453]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

[454]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

[455]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

The end of the 1990s confirmed a rapid increase in the amount of merger cases considered by the Office[456]: 1079 such cases were examined in the course of 1999, 85% of which were terminated by an official notice that the Office had no objections to the intended operation. No decision prohibiting a merger was issued in 1999, and in the remaining 15% of cases, the OCCP simply provided explanation on the rules in force to companies which were not certain whether they were obliged to notify, or returned notifications to companies that had notified although they did not need to do it. Sector-wise, the biggest amount of merger notifications concerned construction companies, IT companies and wholesale and retail trade (mostly as regards food, chemicals and pharmaceuticals). However, the biggest increase in the number of notified concentrations was observed with respect to banks, insurance companies, pension and investment funds. As in 1998, there were many such operations on the media and publicity markets.

The situation did not change much in 2000, with 1107 notifications received and 82% of intended merger operations cleared[457]. Once again, no negative decision prohibiting a merger was issued and, in 17% of notified cases, the OCCP explained to the companies concerned that they were not at all required to notify. Thus, the problem of a poor level of knowledge about merger regulations among the Polish business community persisted. The list of economic sectors most affected by the merger issue continued to be broadly similar: food processing, energy, construction, IT, media, motor and chemical industry. New sectors concerned by merger operations included financial and personnel consulting, internet provision, outdoor publicity and sugar industry.

The introduction of the *de minimis* rule into merger control[458] resulted in an important drop – down to 542 – in the number of cases examined by the OCCP in the course of 2001[459]. This downward trend continued also in 2002, with 169 decisions issued (all but one positive)[460]. The one exception in question was a conditional clearance (in the animal foods sector[461]); thus, there were again no negative decisions on intended mergers during the whole year.

In the light of the above, it would not be unjustified to conclude that the Polish competition authority has consequently followed a quite tolerant approach to mergers. In the beginning of the 21st century, the industrial policy preoccupation of reinforcing certain sectors of the economy in the context of globalisation was, it would seem, additionally strengthened by the objective of consolidation of some branches of Polish industry in the ever-approaching perspective of joining the EU and competing with similar industries in the Member States.

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[456]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

[457]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

[458]Cf. Chapter II.B.5.e.

[459]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

[460]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

[461]Cf. Decision of 8 July 2002 (Dz.Urz. UOKiK Nr 3/4/2002, poz. 153), concerning the planned takeover of Rolimpex by Provimi Polska.

The number of merger cases started increasing again in 2003[462]. During that year, the OCCP considered 194 cases and issued 151 decisions – as previously, none of them negative. Among those 151 decisions, there were only two conditional clearances. As to sectors concerned, the amount of mergers had fallen in the media and telecommunications markets. On the other hand, the Office observed an increased merger activity in several industrial sectors (steel, pharmaceuticals, cement or chemicals), which the OCCP attributed to a reaction of companies to the forthcoming EU accession and to the related joining of the internal market. In the transport sector, there were some mergers of airlines, in the energy sector – horizontal operations stemming from the Government's sectoral programmes or extraterritorial mergers on the petrol market. Further, there was a lot of merger activity on the agricultural product and food market, on the market of retail chains (hypermarkets), hotels and pharmacies.

The number of merger cases examined by the OCCP rose further in 2004, with 256 proceedings, 175 positive, one conditional and – for once – two negative decisions, based on Article 20 of the 2000 Act[463]. As for sectors of the economy, the biggest number of proceedings concerned companies active in trade (23 decisions), printed and electronic media (18), energy and chemical industry (15 decisions in each respective sector), food industry (13), construction (9), mining (6), car industry (5) and telecommunications (also 5 decisions).

ii. transnational mergers and acquisitions of Polish companies by foreign companies (including large multinationals)

As already mentioned, the OCCP has tended to view with an approving eye operations in which Polish companies were taken over by large foreign firms, especially multinationals. Examples of this approach could be found in the energy sector. One of the "biggest" cases considered by the Office was the planned purchase of 85% of shares of the Warsaw energy distributor STOEN by the German company RWE Plus AG[464].

Having analysed the situation, the President of the OCCP issued a decision in which he stated that the operation would not have a negative impact on the Warsaw electric energy market. STOEN already had a 99,99% share in the relevant market (acting in the conditions of legal monopoly), thus the ownership change would not bring about any modification of the company's market position.

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[462]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2003 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2003], the OCCP's website (http://www.uokik.gov.pl).

[463]The proceedings were stayed in 10 cases, notification returned to sender in 19 cases, and another conclusion (i.e. not on the merits) found in 11 further cases. Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2004 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], the OCCP's website (http://www.uokik.gov.pl).

[464]Cf. Decision of 11 December 2002 (nr DDI – 107/02), Dz.Urz. UOKiK Nr 1/2003, poz. 73.

This was a very typical argumentation, found in most of the merger cases[465], e.g. in the one concerning the planned merger of five electric energy distributors[466], where the OCCP President concluded that the operation would not have an impact on the relevant markets of the companies about to merge. This was due to the specificity of the sector, in which all participants were already natural monopolists on their respective markets – therefore, the merger would only mean an ownership change.

The afore-mentioned case was additionally interesting as the President of the Office expressly mentioned political and industrial policy arguments (i.e. the fact that the five energy companies were too weak to compete on the future open EU internal energy market on their own) to justify his decision[467].

The 2002's only case in which a conditional clearance was given concerned the planned taking of control over the Provimi S.A. company (active in the sector of animal foods) by two other companies – CVC Capital Partners S.A. and PAI Management S.A.S., operating on the financial services market. In the course of preliminary inquiry, the OCCP found that participants to this operation would, in its result, reach a position in the relevant market coming near to the threshold of presumed dominance.

Although there were some hundreds of producers of animal foods (of varying types) on the relevant market, all of them had a much weaker market position than the participants to the operation in question. Further, due to the existence of protective import duties (20%), the relevant market was in fact limited to the territory of Poland. The Office noted that Poland's future entry to the EU would have a positive impact in this respect, as the above-mentioned customs duties would be abolished and the market would be opened for competition from other EU firms. In this context, the OCCP President decided to authorise the takeover.

However, this was conditional of the undertaking that, prior to the entry of Poland to the EU on 1 May 2004, the participating companies would not consolidate on the territory of Poland the activity of companies from the Provimi group with the animal food activity of any other company controlled by the companies taking control over Provimi, or firms for which these companies provided consulting or management services. Both the CVC and the PAI were obliged to periodically report to the OCCP on the fulfilment of these conditions[468].

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[465]In the case of a planned takeover of Praxair Polska by BOC Gazy (a producer of technical gases, especially liquid nitrogen), the OCCP used the same agruments. However, it must have been a little less certain of its case, as it stressed in the decision that it had carefully analysed both the geographical and product market and, especially, consulted „all competent market actors and sectoral associations". Cf. Decision of 31 December 2002 (nr DDI – 120/02), Dz.Urz.UOKiK Nr 1/2003, poz. 105.

[466]Energetyka Poznańska, Energetyka Szczecińska, Zakład Energetyczny Gorzów, Zakład Energetyczny Bydgoszcz and Zielonogórskie Zakłady Energetyczne. Cf. Decision of 13 December 2002 (nr DDI – 108/02), Dz.Urz. UOKiK Nr 1/2003, poz. 78.

[467]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl). Furthermore, the operation in question was intended to implement an instruction issued on 29 July 2002 by the Treasury Minister, as a part of the amended Government's Strategy of Poland's Energy Policy until 2020.

[468]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

One of the two conditional clearances issued in March 2003 concerned the planned takeover of 19 regional waste disposal companies (including Zakład Robót Komunalnych – ZRK – located in the city of Łódź) by Rethmann Recycling[469]. The condition was that Rethman had to relinquish control over ZRK before 31 December 2004 – a rather long deadline by the way – and inform the Office of the manner in which this would have been done, within 30 days. The OCCP justified its decision by stating that the takeover of ZRK would result in gaining a share of over 53% on the relevant market (i.e. the market of waste disposal in Łódź and its close surroundings[470]), which would restrict competition to a significant degree.

In 2005, the OCCP did not prohibit any merger, and only one was authorised conditionally (all other ones were cleared). The conditional clearance concerned a planned huge merger on the spirits (vodka) production market[471]. Carey Agri International Poland (CAI), part of the Central European Distribution Corporation (CEDC) group, wanted to take over one of Poland's largest vodka distillers – "Polmos" Białystok (Polmos). The OCCP agreed to that on two conditions: (a) that no less than 35% of the own domestic vodka production of Polmos and Bols Poland (another spirits producer belonging to the same group) will be sold outside the network belonging to the CEDC between 2005 and 2008, on conditions and according to criteria analogous as those applying to the sale via CEDC companies; (b) that during the same period, the same percentage of sales outside CEDC group would be ensured with respect to four most popular vodka brands produced by Polmos and Bols (Bols, Soplica, Żubrówka and Absolwent), calculated separately for each brand.

The OCCP President stressed that the above-mentioned merger could significantly restrict competition on the market of wholesale distribution of spirits (especially vodka) because the CEDC group would then possess two out of the three largest distilleries in Poland, producing and selling several vodkas in the top 10 of best sold brands. By distributing the entire production of Polmos Białystok and Bols via its own distribution network, CEDC would restrict access of other wholesalers to direct supply sources (i.e. the producers). The conditions imposed by the OCCP would thus allow all wholesalers to continue purchasing vodkas produced by Bols and Polmos directly at the source; this was particularly important with respect to Bols, Soplica, Absolwent and Żubrówka brands, which were until now offered by every vodka wholesaler in Poland. Further, by stressing the need to offer to all wholesalers the same conditions as those offered to companies from the CEDC group, the Office President considered that situations in which companies would be obliged to do business under different competitive conditions would be prevented.

[469] Cf. Decision of 6 March 2003 (nr DDF – 11/2003), Dz.Urz. UOKiK Nr 2/2003, poz. 46.

[470] The OCCP considered that the product market was identical in each case, but that the geographical markets were distinct because of the distance between the cities, restrictions in access to communal waste landfills, transport costs and the absence of a commercial practice of transporting waste between cities over such distances.

[471] Cf. Decision of 30 September 2005, nr DOK – 123/2005.

iii. national mergers and industrial policy considerations

Generally speaking, it could be stated that throughout its enforcement activity, the Polish anti-trust authority has not been totally "immune" to industrial policy considerations, also when examining national merger operations. For example, in a case involving a merger of Poland's major table porcelain producers (Zakłady Porcelany i Porcelitu "Chodzież" and Zakłady Porcelany Stołowej "Lubiana")[472], the OCCP pointed at the extremely competitive international environment (based on the data obtained from PricewaterhouseCoopers and the Foreign Trade Chamber) and concluded that the planned consolidation would be beneficial to Polish industry, helping it better face the ferocious competition from China.

A similar reasoning played an important role in a case of a planned takeover of the Polish magazine publisher Prószyński-Czasopisma by one of the largest daily press publishers – Agora S.A. The operation would only involve some of the assets of Prószyński, namely its rights to publish 23 titles, most of them already benefiting from a strong market position. The OCCP considered that both parties were active on different relevant markets (magazines and daily press), aimed at a different public. Consequently, the planned takeover would not lead to the reinforcement of Agora's position on the daily press market, and would not significantly diminish competition on the market of magazines. The operation was thus given a green light[473].

The OCCP continued its well-established approach to mergers in the course of 2003, based on the notion of dominant position and impact on competition. For example, it cleared a takeover by Agora[474] of two local radio stations (from małopolskie and świętokrzyskie provinces), considering that it would have no negative impact on competition on the relevant markets (i.e. radio broadcasting and radio publicity in the two above-mentioned provinces) as they were both highly competitive and Agora had no shares in any of the competitors in these provinces[475].

The approach demonstrated by the OCCP in its positive decisions was basically the same as previously, i.e. concentrating on the issue of acquiring or reinforcing of dominant position on the relevant market, and the related restriction to competition. Thus, in June 2004, the OCCP President authorised a merger between a pharmaceutical wholesaler (Polska Grupa Farmaceutyczna – PGF) and a chain of pharmacies (Apteki Polskie)[476], because the operation did not cause a restriction to competition on the relevant market (defined as the retail market of pharmaceuticals in the towns in which the pharmacies belonging to Apteki Polskie were located). The Office considered that pharmacies usually only competed with other pharmacies in the same town (a quite risky statement, as – in the author's view – situations could vary on a case-by-case basis, for example in highly urbanised regions with several towns situated close to each other) and went on to establish that Apteki Polskie had no more than 20% of the market in each of the towns concerned. As PGF operated on a different level of trade, there was no risk of this share increasing due to the operation.

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[472] Cf. Decision of 29 August 2002, Dz.Urz. UOKiK Nr 5/2002, poz. 199.

[473] Cf. Decision of 3 April 2002, Dz.Urz. UOKiK Nr 2/2002, poz. 93.

[474] A major player on the media market, cf. above. Cf. also Decision of 7 April 2003 (nr DPI – 22/2003), Dz.Urz. UOKiK Nr 2/2003, poz. 72.

[475] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2003 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2003], the OCCP's website (http://www.uokik.gov.pl).

[476] Cf. Decision of 28 June 2004 (nr DOK – 54/04), Dz.Urz. UOKiK Nr 4/2004, poz. 79.

For the same reason (i.e. operating on different levels of business), the OCCP cleared[477] an acquisition of Ferrostal Łabędy – a steel mill – by a scrap metal dealer (Złomrex). In addition, the Office considered that both companies were active on different product markets (new metal products and scrap metal) and, moreover, the operation would not help either of them gain or reinforce a dominant position on these markets.

iv. extraterritorial mergers

A decision in the beer sector can be given as an example of the OCCP's attitude to extraterritorial mergers. The case concerned a takeover of an Austrian beer producer (Getränke Beteiligungs AG) by the Dutch brewing giant Heineken, and the Office had been notified because both companies had daughter companies in Poland. The OCCP, which defined the relevant market as the beer production market in Poland, cleared the merger because of the highly competitive market structure with several equally strong competitors; besides, the share of the market after takeover would be of 37% i.e. below the Polish legal threshold of presumed dominance. Furthermore, the Office anticipated that the market would become even more open to competition after Poland's entry to the EU and the related removal of import restrictions[478].

v. negative decisions

Perhaps the most noteworthy among the decisions by the OCCP are those in which a planned merger was not authorised. Two such decisions were issued in 2004, both primarily taken as "reprisals" for the companies' failure to notify the intended operations, and for having gone ahead with the mergers despite the lack of notification. The Office took advantage of the recently adopted Article 20 (2) (2) of the 2000 Act, authorising the OCCP President to order, through an administrative decision, a divestiture of the whole or of a part of the acquired assets, if effective competition on the relevant market could not be reinstated in any other way.

The first of these cases[479] concerned a takeover by Polskapresse (a large press group, which also included a publisher of some national dailies – namely Orkla Press) of a regional press publisher (Dolnośląskie Wydawnictwo Prasowe – DWP – from Wrocław). The OCCP identified the relevant market as the market of daily press in Wrocław region (and, additionally, the market of press publicity in the same region) and found that Polskapresse had acquired a strongly dominant position on it. As a result, Polskapresse was ordered to sell DWP within 6 months.

On the same day[480], a press publishing group from Poznań (Oficyna Wydawnicza Głos Wielkopolski – GP) was ordered to sell a competing press publishing company from the same town (Prasa Poznańska – PP), which it had acquired without prior notification to the OCCP. Interestingly, the Office invoked not only procedural and economic arguments, but also a political one, namely the restriction of the freedom of expression and pluralism of the media caused by the merger of the two most important daily newspapers in Poznań.

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[477] Cf. Decision of 19 February 2004 (nr RKT – 9/2004), Dz.Urz. UOKiK Nr 3/2004, poz. 20.
[478] Cf. Decision of 22 September 2003 (nr DDF – 32/03), Dz.Urz. UOKiK Nr 1/2004, poz. 65.
[479] Cf. Decision of 11 February 2004 (nr RWR – 7/2004), Dz.Urz. UOKiK Nr 3/2004, poz. 301.
[480] Cf. Decision of 11 February 2004 (nr RPZ – 2/04), Dz.Urz. UOKiK Nr 3/2004, poz. 300.

As already stressed before, prohibition of a merger has so far been a real exception in Poland. One might conclude that this is a proof of the OCCP's lax attitude, due to the different preoccupations and considerations (industrial, development or social policy, or simply politics) referred to earlier in this text. However, one need not necessarily view this in a negative light at the stage of development of the Polish economy at which it has been in the 1990s and up until the entry to the EU. Besides, the OCCP could – where necessary – "show its teeth" and punish even relatively large companies for having ignored the applicable regulations[481].

Of course – as pointed out in a recent study by the European Commission of mergers on the media market[482] – a lot depended on the manner in which the OCCP defined relevant markets. In this respect, the Commission's experts pointed at a tendency to "regionalise" geographical markets, which was not unrelated with the manner in which the Office was organised (i.e. in nine branch or regional offices[483]) and in which it allocated the cases between the central office in Warsaw and the regional offices[484]. Accordingly, the Warsaw headquarters were dealing with nationwide and otherwise significant mergers, while the branch offices examined, for example, all mergers involving companies providing communal services (cable TV included).

[481]This point of view was expressed *inter alia* by J. Hölscher1 and J. Stephan in "Merger Control and Competition Policy in Central East Europe in view of EU Accession", www.met-network.org.uk/papers/jholscher_2.pdf. Moreover, having completed a comparative study of the performance of competition authorities of the ten EU candidate countries in respect of mergers, they concluded that OCCP had been the most successful of all of them in its enforcement activity.

[482]Cf. http://europa.eu.int/comm/competition/publications/studies/media/2005/conclusion.pdf

[483]Cf. Chapter III.A.1.

[484]It is noteworthy that the OCCP was not free to allocate cases as it pleased: the rules were set out in a Regulation on the Geographical and Material Competencies of the Branch Offices, issued by the Prime Minister.

3. Other activities

a. involvement in policy issues

From its very origins, the Polish competition authority has assumed a strong position, going beyond just enforcing the existing provisions of law but also reaching for policy-making activities, influencing the Government and business and social actors on issues that had to do more generally with the restructuring of the economy in transition from a "socialist" to a "market-type" one; in doing so, it was quite unique among competition authorities of the former Communist States of Central and Eastern Europe[485]. For example, unlike e.g. the Hungarian authority, the Antimonopoly Office was actively involved in the privatisation process, criticising the manner in which it was sometimes being done, pushing for more restructuring, liberalisation and market-oriented changes in relatively numerous cases. On the other hand, as already mentioned, the AMO's activity did, from the very beginning, take into account industrial policy objectives, such as the Government's desire to protect certain ailing industries (for example, mining and metallurgy) from too rapid, politically and socially costly changes[486], or the resolve to create strong, consolidated market players capable of competing with European companies.

b. non-enforcement activities pursuant to relevant legislation

The AMO's (and later the OCCP's) tasks – as formulated in the relevant legislation – were quite numerous[487] and included the participation in several Governmental committees, providing opinions on draft legislation in various economy-related fields, carrying out research, communication and international co-operation. Last but not least, the AMO/OCCP has played a very important role in the EU membership negotiations, in particular on matters closely related with competition policy. One would almost tend to think that it was perhaps a little too much for this relatively modestly staffed and equipped institution, taking away some part of the precious time and resources from its main job i.e. enforcing the competition (including anti-trust) rules and policy.

By means of an example, in the course of 1998, the OCCP prepared and presented to the Council of Ministers a programme document, adopted subsequently by the Government, called "Counteracting Monopolies and Strengthening Competition – a Partial Strategy"[488]. The document defined the objectives of the Government's activity in this field as well as the means to achieve them. It also set out deadlines and responsible institutions for the implementation of particular tasks. The OCCP's document foresaw a monitoring mechanism, allowing for the ongoing supervision and remedial action if the implementation of a particular task were to be endangered or significantly delayed. During the same year, the OCCP submitted to the Council of Ministers three implementation reports of the above-mentioned Strategy, pointing at the problems and suggesting actions to be taken to address them.

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[485] Cf. A. Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe*, Cambridge University Press, 1998, pp. 117 – 119.

[486] Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, pp. 153 – 159.

[487] Cf. Chapter III.A.1.

[488] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

Further, the OCCP prepared several drafts of new provisions (or amendments to the existing ones) in the anti-trust field, and in particular modifications to the 1990 Act aiming at liberalising merger control and allowing the Office to focus on mergers with important potential impact on competition in a given market (the *de minimis* rule)[489]. These provisions were subsequently adopted by Parliament and entered into force on 1 January 1999. Simultaneously, the OCCP initiated work on the completely new competition law, which was later to become the 2000 Act[490]. The OCCP also actively participated in the legislative activities of other competent organs and institutions: it issued opinions on 202 drafts submitted to the Economic Committee of the Council of Ministers, 250 drafts discussed by the Social Committee of the Council of Ministers, as well as 445 drafts submitted to inter-ministerial consultations.

The OCCP actively participated in the drafting of acts having an important impact on the promotion of competition in the traditionally monopolised sectors of the economy[491]. In particular, it issued its opinions on the draft acts on economic activities, telecommunications and postal services; most of the OCCP's remarks were reflected in the final versions of these drafts. The OCCP also assisted the Ministry of the Economy in preparing executory regulations to the Energy Act (in force as of 5 December 1997), using the experience from its own case-law on restrictive practices by local and regional electric power distributors. The Office also presented several remarks on the draft regulation by the Minister of Transport and Maritime Affairs concerning licenses for the production and distribution of vehicle registration plates, criticising certain provisions granting the companies concerned a monopolistic position.

In addition, the OCCP participated during the year 1998 in drafting legal acts and programmes important for the Polish economy, concerning *inter alia* privatisation, restructuring of certain sectors (fuel, energy and chemical industry) and liberalisation of telecommunication and postal markets[492]. In this context, the OCCP drew the Government's attention to the need to respect the provisions of competition law, ensuring adequate cost evaluation and pricing mechanisms excluding the possibility of cross-subsidising, as well as protecting the consumers' interests.

Representatives of the Office took part in numerous meetings of expert committees, inter-ministerial task forces, etc. Pursuant to the legislation in force, they participated in meetings of the Stock Exchange Commission, in order to assess from the standpoint of competition law the draft prospecti, as well as to analyse the process of trading of securities. Representatives of the Office also participated in the activities of the Task Force for De-bureaucratisation of the Economy, *inter alia* through a comprehensive analysis of the existing rules on licensing certain economic activities; these remarks were later taken into account in the process of drafting amendments to the Act on Economic Activities.

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[489] Cf. Chapter II.B.4., above.

[490] Cf. Chapter II.B.5., above.

[491] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

[492] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

Other bodies, in the activities of which representatives of the OCCP participated in the course of 1998, included[493]: the Inter-ministerial Committee for Preparing Proposals of Changes to the Tariffs and Regulations of Economic Activities (set up by the Minister of the Economy); the Council for Transfer Prices in the Electric Energy Sector (an advisory body to the Minister of the Economy); the Electric Energy Sector Privatisation Co-ordination Team (created by the Treasury Minister); the Council for the Standards of Economic Regulation, Accessibility of Services and Methodology of Setting Prices in the Utilities Sector (set up by the President of the Office for the Housebuilding and Urban Development); the Economic Team of the Council of Ministers for the Energy Sector; as well as the Inter-Ministerial Team for Monitoring Concentration Processes in the Mass Media Sector (created by decision of the Prime Minister and led by the OCCP's Vice-President).

In the course of 1998, in about a dozen cases, the OCCP carried out comprehensive examinations of the degree of concentration on local product markets (electric engines and machinery for mining industry; fibres; glass containers; agricultural machinery; electrodes; beer; animal foods; timber; medical publications; legal publications), as well as of the organisation of wholesale and retail trade in agricultural machinery and spare parts; of the distribution of pharmaceuticals; and of the activity of cable TV operators. It should be stressed that the OCCP's involvement in such non-enforcement activities has continued at an unabated pace also in the following years[494].

c. activities related with the fulfilment of Poland's obligations under the Europe Agreement

Another aspect of the OCCP's activities was related with the execution of Poland's obligations under the Europe Agreement and with ongoing accession negotiations with the EU[495]. In this context, two so-called "sub-teams' had been set up in 1998, in order to prepare the documentation for the Polish negotiating team in respect of competition and consumer policies. Their work focussed on the screening of Polish legislation from the standpoint of its EU compatibility, as well as the drafting of proposals for negotiating positions. The sub-teams also collected relevant legislation and jurisprudence of the European Institutions in the fields concerned, and the corresponding Polish legislation and jurisprudence.

The screening of Polish competition law[496] took place in October 1998. Subsequently, in co-operation with the European Commission, bilateral and multilateral screening sessions were held and the final Polish negotiating position formulated.

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[493]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

[494]As can be read in the OCCP's annual activity reports in respect of the years 1999 to 2006, cf. the OCCP's website (www.uokik.gov.pl).

[495]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1998 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1998], the OCCP's website (http://www.uokik.gov.pl).

[496]Cf. also Chapters I.D.3. and II.A. (especially II.A.11.).

The OCCP representatives also took part in the screening carried out by other Ministries and Central Organs in the following areas (in chronological order of sessions): science and technology; telecommunication; training and education; culture and audio-visual; industrial policy; SMEs; CFSP; company law; free movement of goods; fisheries; statistics; external relations; agriculture; customs; social policy and employment; transport; energy; free movement of capital; economic and currency policy.

During the year 1998, the OCCP staff participated in two (April and June) meetings of the competition working group with representatives of the European Commission's Competition Directorate General. Another consultative meeting took place in December. In the course of the latter meeting, the screening report covering competition policy was approved, together with conclusions on the use of PHARE funds for programmes concerning anti-trust.

d. involvement in the programming and law-drafting activities of the Polish Government

The OCCP continued to participate intensely in the legislative drafting activity of the Government[497]. The focus was on four draft Acts and two Council of Ministers regulations, including the draft new competition Act (i.e. the 2000 Act), the draft Council of Ministers Regulation on the procedure of inspections of undertakings (pursuant to Article 20 (5) of the 1990 Act), and a draft Council of Ministers Regulation on merger notifications (pursuant to Article 11 (e) of the said Act). Further, the OCCP issued opinions on 1897 (!) various draft acts introduced either by the Government or in the Parliament; out of this number, 1367 opinions concerned drafts to be submitted for discussion at the Council of Ministers, the remaining drafts having been sent for inter-ministerial consultations. In this context, the OCCP issued critical remarks of substantive nature to 72 drafts, including draft Acts on large-surface trade outlets; on aviation; on postal services; on toll motorways; on environment protection; on amendments to the Code of Civil Procedure; on the protection of tenants; on regional development; on prices; on sugar markets and industry; on amendments to the Act on Special Economic Zones; and on State Aid.

The OCCP has, in the course of 1999, monitored the implementation of the Government's 1998 Programme of Counteracting Monopolies and Strengthening Competition[498]. Based on the information received from the sectoral Ministries, the Office prepared and presented to the Council of Ministers four periodic reports on the Programme's progress, focussing *inter alia* on the assessment of the state of competition on selected markets (petrol, gas, banking, domestic trade, etc). The OCCP concluded, among other things, that there had been progress in the telecommunication sector (thanks to the granting of licenses to three independent operators), in the energy sector (preparing of the integrated timetable for the introduction of an energy market and privatisation of energy companies), and in the mining sector (continuing restructuring pursuant to the Government's action plan covering the period 1998 – 2002). In other areas (among others, petrol and gas sectors), the OCCP also noted ongoing restructuring and privatisation.

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[497] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

[498] Cf. Chapter III.A.3.b.

In the course of 1999, the OCCP issued opinions on a number of Government programmes covering different sectors of the economy[499] (e.g. the development of chemical industry until 2010; the policy in respect of SMEs; the energy policy until 2020; the telecommunications in rural areas until 2004; the transport policy; the spatial development; the railway restructuring; the restructuring of coal and steel industries; and the customs and quotas). Remarks were also communicated concerning other Ministries' and Central Organs' reports on the implementation of ongoing programmes (*inter alia* on the restructuring and privatisation of petrol industry; on investment projects financed by the Government; on privatisation of property of the State Treasury; on internal trade; and on intervention by the Agricultural Market Agency).

In its opinion on the energy policy document prepared by the Minister of the Economy, the OCCP criticised the envisaged administrative control of coal prices, which could, in the Office's view, endanger the successful adaptation of the coal sector to the requirements of market economy. These remarks were taken duly into account, and the draft submitted for discussion by the Council of Ministers Economic Committee did not include such proposals. As regards the draft Government strategy of the development of telecommunications in rural regions until 2004, the OCCP pointed at the need to fully exploit the possibilities offered by competition between operators, including the setting of more clear criteria and procedures of public procurement, and to tackle the issue of inter-operator agreements. With respect to the Government's intervention on agricultural markets, the OCCP stressed that the level of intervention on the grain market was too high and that all milk producers should be allowed to benefit from Government intervention (instead of the existing system, which only concerned milk cooperatives).

e. market studies

The OCCP carried out, in the course of 1999, a series of studies[500] of the degree of concentration and price-fixing polices on selected markets (LPG for cars; petrol industry; fixed-line telephony; concrete; colza; sulphur). Further, the degree of concentration on the markets of press distribution, cable TV, daily press, real estate credits, electricity supply, removal of waste, gas supply to households, milk and yoghurt production, cardboard production, meat processing and steel production was examined. Similar activities were carried out each year, the OCCP attempting to cover the most wide range of product and geographical markets[501].

[499] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

[500] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

[501] As can be found in the OCCP's activity report in respect of the years 2000 – 2006 (www.uokik.gov.pl).

f. 2000 – involvement in the drafting of the 2000 Act and the State Aid Act, as well as opinions on other related Government drafts and programmes

In 2000, two basic new acts in the OCCP's core activity areas i.e. the 2000 Competition Act and the State Aid Act were adopted by the Parliament[502]. The OCCP also provided its opinion on 3225 various draft Government documents, in addition to 900 documents of the Sejm and 486 drafts resulting from inter-ministerial consultations[503]. These drafts included new laws on: water supply and sewage disposal; State control; health requirements for foodstuffs; cosmetics; pharmaceuticals; genetically modified organisms; mining and geological activity; electronic signature, etc.

For example, the OCCP's remarks to the latter draft referred to provisions on certification bodies, and were meant to ensure better control of anti-competitive agreements and concentrations of such undertakings. The Office was successful in that the final draft referred to the general rules of the 2000 Act for these matters. The OCCP also managed to bring about a modification of the draft Pharmacy Act, thanks to which the provision requiring at least 5.000 inhabitants for each chemist's in each commune was removed. This helped prevent the partition of the market of pharmaceuticals and related materials and eased access to this activity for new entrants.

During the same year, the OCCP provided its opinions on several Government programmes[504] concerning *inter alia* the restructuring of the mining, iron and steel industries; the development of light industries and of electronics; the setting up and development of a modern land registry system; the development of energy supply; and programmes relating to environment and public health.

Further, pursuant to the relevant legislation, the OCCP participated as opinion-giving body in several anti-dumping and quota proceedings initiated by the Minister of the Economy (e.g., the Office made known its views in 6 anti-dumping proceedings, concerning synthetic fibres, steel, potassium, electric irons, lighters and X-ray film, mostly imported from China and the countries of the former USSR). Regarding the quotas, the OCCP issued positive opinions in 20 cases, referring *inter alia* to the importation of goods, machinery and equipment for automobile, pharmaceutical, electronic, telecommunication, metallurgical and food processing industries, as well as the medical, military and police equipment. Further, the Office issued 48 opinions on motions by the Treasury Minister for privatisation of State enterprises[505].

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[502] Cf. Chapter II.B.5.

[503] A truly impressive workload, especially in view of the fact that it concerned an area beyond the OCCP's core mandate.

[504] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

[505] These examples illustrate well the OCCP's involvement in industrial policy activities.

g. supervision over the implementation of the Government Programme of Counteracting Monopolies and Strengthening Competition

The year 2000 was the third since the adoption of the Government Programme of Counteracting Monopolies and Strengthening Competition, and the OCCP prepared (based on the information received from the competent Ministries) three periodic reports on the Programme's implementation. The Office pointed, among other issues, at the progress in privatisation and in the introduction of competition in the electric energy sector; in the restructuring of the gas supply and distribution, as well as at the ongoing process of issuing licenses to inter-zonal telecommunications operators, which would allow for the creation of real competition on this market. The OCCP also presented to the Council of Ministers' Economic Committee two information documents about the degree of concentration in the petrol industry.

As in previous years, representatives of the Office participated in the work of several inter-ministerial teams[506] (such as the Team for the Assessment of the Quality of Legislation, appointed by the Prime Minister in September 2000 in accordance with an OECD recommendation; and the competition policy and public procurement teams). The OCCP President chaired a permanent working group for the reform of the energy sector (set up in 1999), which prepared the draft timetable for privatisation of companies from the sector and for the introduction of electric energy market (adopted by the Council of Ministers on 16 May 2000). Further, the Office President chaired the Task Force for Deregulation and De-monopolisation of the Economy, set up by the Council of Ministers' Economic Committee in October 2000 and focussing on telecommunications, fuel, energy, transport and postal services sectors. The team's final report was adopted by the Council of Ministers in January 2001.

The OCCP has participated in the implementation of the Government project consisting of an analysis of domestic trade from the standpoint of its degree of concentration and co-operation between national producers and distributors[507]. The outcome of this survey, adopted by the Council of Ministers' Economic Committee, served as basis for the internal trade development programme until the end of 2003. In this context, the OCCP President chaired an inter-ministerial team, the task of which was to elaborate proposals of regulations aiming at finding the proper balance between the position of large supermarket chains and small or medium-size retailers[508]. Among the proposals made by the afore-mentioned team, one could mention a prohibition of resale by retailers at a price equivalent to or lower than the price of purchase from the producer or wholesaler; draft amendments to the 2000 Act were prepared in this direction in the end of the year.

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[506] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

[507] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

[508] This issue was subject to a lot of heated debates among local and regional politicians and in the media throughout the 1990s, the expressed fears being that large – mostly multinational – chains would eliminate small retailers from the market.

h. involvement in the EU membership negotiations

As from 1999, the OCCP staff participated in the work of the EU membership negotiation team, and took part in inter-ministerial consultations in order to prepare negotiating positions[509]. The OCCP's involvement covered, naturally, the areas of competition and consumer policies but also other fields, such as taxation, regional policies, transport, etc. Besides, the Office's Vice-President was a member of the Polish negotiation team.

The Office co-operated on an ongoing basis with the Polish Mission at the EU, informing it of the progress in transposition and implementation of the competition *acquis* and receiving information on the current work on draft new EU legislation in the competition field.

The Office also collaborated with the Sejm's Competition and Consumer Protection Committee, *inter alia* by submitting several information documents (on prices of central heating; on the situation on the telecommunications market; on monopolistic practices discovered in Poland as regards pricing, etc); the OCCP's representatives participated in all sessions of that committee. The OCCP was sending its representatives to meetings of the Sejm's Economic Committee, in order to discuss matters related with the situation in the fuel and energy sector (and especially the restructuring of coal mining industry and of the industry of extraction and distribution of natural gas), the privatisation of energy companies and the restructuring of steel industry. Regarding the draft new Telecommunications and Postal Services Acts, the OCCP took part in meetings of the Telecommunications Committee of the lower chamber of the Polish Parliament.

In 2000, the OCCP carried out analyses of the degree of concentration on the markets of: prescription medicines; distribution of CD's and audio cassettes; coolants; optical lenses; grain elevators; sugar; processed deep-frozen vegetables; paper and animal food. Further, it paid closer attention to the pricing trends on the markets where competition was limited, such as: telecommunications (including internet services); fuel components; sugar beet processing; water supply and sewage disposal in communes of less than 50 thousand inhabitants; public transportation; central heating and morgues[510].

On the international level, apart from the ongoing participation in the EU accession negotiations and in efforts towards the transposition of the *acquis* (already referred to before), the OCCP also remained active in multilateral fora (in particular, the Competition Law and Policy Committee of the OECD and relevant bodies of WTO and UNCTAD) and continued bilateral cooperation with competition authorities of the EU Member States (especially the French authority)[511].

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[509] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

[510] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

[511] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

i. preparation of draft executory regulations to the 2000 Act

In the course of 2001[512], the OCCP prepared draft executory regulations to the 2000 Act, concerning the fees for applications to initiate anti-trust proceedings, the procedure of carrying out inspections of undertakings, the calculation of turnover of undertakings participating in a merger, and the new statute of the Office. Further, work had begun on draft block exemption regulations, described earlier[513].

j. contribution to the preparations for EU membership

As every year since the entry into force of the Europe Agreement, the OCCP's priority task on the international level during 2001 was contributing to Poland's future EU membership[514]. There were frequent contacts with representatives of the European Commission, an intense exchange of correspondence (information, clarification, reports on legislative developments and jurisprudence, etc), ongoing cooperation with the Committee for European Integration (including the participation of the Office's management in the Committee's meetings), and finally participation in the work of the Polish negotiation team. One of the more time-consuming and challenging tasks was the preparation of translations of the Community acts in the competition field, as well as translation of relevant Polish acts into English. The OCCP staff participated in training sessions financed by PHARE, in TAIEX seminars and in sessions held at the Academy of European Law in Trier.

k. participation in the International Competition Network and in the work of the Polish Parliament in the area of competition

As from November 2001, the OCCP was member of the newly set up International Competition Network. On the bilateral level, contacts and exchange of trainees and experiences took place with the Russian, Hungarian, French and Swedish competition authorities. It is also noteworthy that the year 2001 saw the beginning of the publication of the OCCP's Office Journal[515], in which main decisions by the Office President and the judgments of the CPCC and of the Supreme Court (in competition cases) were published.

Throughout the year 2002, representatives of the OCCP participated in all meetings of the Sejm's Competition and Consumer Protection Committee, as well as in meetings of other Parliamentary committees (economic, telecommunications, public finance, agricultural, SME, etc) concerning aspects of relevance for the Office's mandate[516].

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[512]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

[513]Cf. Chapter II.B.7 – 11.

[514]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

[515]Already referred to earlier in this text, cf. in particular Chapter II.A.22.

[516]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

The OCCP issued opinions and remarks on several draft acts (on radio and television; on telecommunication; on bankruptcy proceedings; on cinema industry, etc). For example, as concerns the Radio and Television Act, the OCCP had critical remarks to the planned procedure for issuing licenses (which would include an automatic rejection of applications from undertakings which already broadcast at least one national channel); in the Office's view, this would amount to applying a definition of dominant position incompatible with the one used pursuant to the 2000 Act. As to the draft Bankruptcy Act, the President of the OCCP stressed that agreements between creditors and debtors on writing off debts in exchange for shares should be subjected to the assessment by the OCCP (and not only by the bankruptcy court, as foreseen in the draft), due to their potential for increasing the degree of concentration in the economy.

l. preparation (and implementation) of the Report on the state of competition and on competition policy for the years 2002 – 2003

In April 2002, the Council of Ministers adopted the OCCP's report on the state of competition and on competition policy for the years 2002 – 2003[517]. The main aim of competition policy according to this document was to implement and reinforce mechanisms of competition in the economy, and to adjust the regulatory and institutional framework to the requirements of the internal market. The report also formulated sectoral competition policy objectives, stressing the need to continue the processes of de-monopolisation and liberalisation.

Further, the OCCP focussed its attention on the situation in the telecommunication sector, where two main projects were realised: the preparation of a CD-ROM database with all decisions by the OCCP President from the years 1991 to 2002 concerning the sector; and the issue of a comprehensive report on the jurisprudence of the Office relating to the telecommunication sector, together with a description of the most common restrictive practices encountered by the OCCP in this area and the assessment of future prospects. Other reports drafted by the Office concerned *inter alia* restrictive agreements and abuse of dominant position in the light of the jurisprudence of the OCCP, of the CPCC and of the Supreme Court; concentration in the Polish economy in the context of the Office's jurisprudence; evaluation of the state of competition in certain sectors of the Polish economy; and of the degree of competition in regulated sectors.

m. information for the business, the public administration and the general public

The OCCP has prepared several brochures for the general public, e.g. on the OCCP's role in the formulation of competition policy; on the Polish competition legislation; on restrictive practices; and on merger control. Further, the Office has issued documents analysing the Polish policies with respect to abuse of dominant position and to mergers in the financial sector, in the context of the jurisprudence of the European Commission and of the European Courts.

[517]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

In the latter document[518], the authors stressed that the issue of control of concentrations in the financial sector was a very broad one, covering all types of financial institutions. Attention was also drawn to the different scopes of respective EU and Polish legislations on the matter, the former concerning operations with a Community dimension. This set the borderline between the EU and national competence. The document presented the rich jurisprudence of the European Commission on the issue, forming a basis for interpretation of the Community secondary legislation, and attempted to give examples of typical cases concerning various kinds of institutions and operations. On this background, the Polish legislation and decision-making practice were presented, highlighting the relative lack of coherence in the approach to concentrations of financial institutions.

First of all, there were specific anti-trust provisions with respect to pension and investment funds, while such special provisions were missing as regards banks and insurance companies. This was criticised for the absence of logical grounds for such a differentiation, and for the ensuing lack of legal certainty. Furthermore, despite the existence of the above-mentioned specific rules regarding pension and investment funds, the Polish legislator had not followed the Community example by replacing the general turnover criteria with indicators better suited to assess the market position of such funds (e.g. the income or contribution amounts). Instead, additional criteria for merger control had been introduced, which - combined with procedural modifications brought about by the specific acts - contributed to the creation of a fairly complex merger control procedure.

4. Report on Competition Policy for the Years 2004 – 2005

The OCCP's policy-oriented activities have further increased in their intensity at the time of Poland's accession to the EU. In June 2004, the Council of Ministers adopted the Report on Competition Policy for the Years 2004 – 2005, prepared by the Office[519]. The Report set out the main objectives of competition policy (reinforcement and protection of competition in the Polish economy; consumer protection and preventing negative impact of State aid on the development of competition), each of them divided into several priorities grouped into two categories (i.e. sectoral and horizontal ones). In order to give the document a more operational character, a number of concrete actions were attached to each priority.

a. horizontal and sectoral priorities

As regards actions within particular priorities (until 31 December 2005), these were divided into short- and medium-term ones. It was stressed that all these actions, priorities and objectives had to be entirely compatible with the Community competition policy.

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[518] "Kontrola koncentracji w sektorze instytucji finansowych w świetle przepisów i orzecznictwa wspólnotowego - odniesienie do prawa polskiego", Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2003. The document was prepared by the Linklaters, T. Komosa i Wspólnicy law firm, and financed in the framework of PHARE, project No PL0004.03.

[519] "Polityka konkurencji na lata 2004 - 2005", the OCCP's website (www.ukie.gov.pl). Cf. also K. Niklewicz, "Konkurencja tylko na papierze", "Gazeta Wyborcza", 29 June 2004, and *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2004 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], the OCCP's website (http://www.uokik.gov.pl).

The horizontal priorities included combating cartels and abuse of dominant position, and merger control. This was to be realised through co-operation in the framework of the European competition policy (in the context of the European Competition Network and through ongoing legal harmonisation, where still required), through the increased efficiency of competition policy (*inter alia* thanks to the improved co-operation between the OCCP and various sectoral regulatory bodies; introduction of effects assessment for new regulations from the standpoint of competition, and monitoring of implementation of the planned actions in the competition policy field) and through the promotion of principles of competition among the business community, the administration and the general public.

As for the sectoral priorities, they consisted of promoting liberalisation and creating the conditions for the creation and/or development of competition in particular sectors of the economy. They were identified on the basis of the analysis of the number and types of interventions of the OCCP during the years 2002 – 2003, the results of market studies and the current EU priorities.

These priorities were as follows: creating the conditions for the development of competition in regulated infrastructural sectors (telecommunications, energy, postal, rail and air transport sectors); in sectors subjected to specific regulations due to their exceptional importance for the economy and social life; and implementing competition rules on local markets where, due to the network-related character of many of the services (provision of drinking water and heat, waste water removal) or specific infrastructure (local transportation) concentration on the supply side was very frequent[520].

The OCCP has noted that, despite recent regulatory changes, former monopolists maintained their dominant position on most of the infrastructure markets, and their conduct continued to represent a threat to the competition in the whole economy. Further liberalisation was also required in certain other sectors characterised by an excessive degree of regulation or self-regulation, such as the pharmaceutical sector and most of the so-called "public trust professions".

b. preparation for participation in the European Competition Network

The first action within the framework of the horizontal priority of co-operation in the context of the European competition policy was preparation of the OCCP for functioning as a part of the European Competition Network (based on the Council Regulation No. 1/2003). These actions are described in more detail further[521]. At this stage, suffice it to say that the OCCP's structure was reorganised before Poland's accession to the EU in order to make such co-operation possible, i.e. special work teams (responsible for particular co-operation areas within the ECN) were set up and internal coordination procedures were established.

The second short-term action within the afore-mentioned horizontal priority was the preparation of amendments to the 2000 Act, their adoption and implementation of the amended Act as well as of all executory regulations.

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[520] Thus, the main sectoral priorities were basically similar to those pursued since the very beginning of the Polish competition authority's activity – an indication of how difficult it was to obtain results in this area!

[521] Cf. Chapter IV.B.

Such amendments[522] were prepared in the course of 2003. In the main, they included the following changes to the legal framework, aimed at rendering the OCCP's work more efficient: excluding from the scope of the *de minimis* rule certain particularly "dangerous" types of horizontal agreements, in particular those aiming at the partition of markets and fixing prices, volume of production or sales; adjusting the criteria for assessing mergers to those set out in the Community law (introduction of the "double test" i.e. prohibition of concentrations which have as their effect a significant restriction to competition on the relevant market, in particular as a result of creation or reinforcing of a dominant position); and raising the fines *inter alia* for abuse of dominant position, failure to provide information requested by the OCCP President and failure to co-operate in the course of an inspection.

Further, a "leniency programme" (i.e. possibility for the OCCP President to reduce or refrain from imposing a sanction in respect of an undertaking participating in a prohibited agreement, if its conduct rendered possible or made significantly easier the discovery of the practice in question) was introduced.

The amendment package also included a new Article 25a of the 2000 Act, according to which the President of the OCCP was to be the executive organ performing tasks under the EC Treaty and under the Regulation No. 1/2003. This would *inter alia* allow the President of the OCCP to impose fines on Polish companies violating Articles 81 and 82 EC. The new Article 61a of the 2000 Act authorised the Office President to carry out an inspection of an undertaking refusing to allow the European Commission's inspectors access to its premises, and to provide assistance to the Commission if requested to do so.

Under the amended Article 65 of the 2000 Act, the OCCP was to be allowed to transmit information gathered in the course of proceedings to the European Commission and/or competition authorities of other Member States, on conditions set out in the Regulation No. 1/2003; the same provisions made it possible for the President of the OCCP to use the information transmitted by the above-mentioned organs in the course of his own proceedings.

The amendment contained a new provision requiring the President of the Office to stay proceedings when the case has been taken over by the Commission, and allowing him to do so when the case has already been opened by another competition authority in the EU; he was also allowed to refuse to initiate proceedings if the same case has already been opened by the European Commission or by another competition authority in the EU. The amendment package in question was adopted by the Council of Ministers on 3 February 2004, and by the Parliament on 16 April 2004. It entered into force on the day of Poland's accession to the EU (i.e. 1 May 2004)[523].

c. increasing the efficiency of competition policy

Regarding the priority of increasing the efficiency of competition policy, the OCCP considered that the main point was to improve market monitoring (and the early detection of potential anticompetitive conduct), increase the importance of economic thinking and market analysis in the decision-making (at the stage of preparation of decisions) and reinforce the operative powers of the Office during the investigation stage.

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[522] Cf. also Chapter II.B.6.

[523] Cf. also Chapter IV.B.

With respect to the first of the afore-mentioned actions, the OCCP noted the increasing importance of economic thinking (as compared with the purely "legalistic" one) in the jurisprudence of competition authorities in the US and the EU. This was mainly reflected in the process of defining relevant markets and market position of undertakings, where consumer preferences had taken up a leading role as a factor of assessment. In this context, the OCCP pointed at the creation, in the course of 2002, of a Department of Market Analyses at the Office. In the period until the end of 2005, it was planned to involve economists to a higher extent in concrete particular proceedings, and to rely to a higher extent on results of economic analyses as evidence in such proceedings.

As concerns the reinforcement of inspection powers, the OCCP acknowledged that, in practice, it was very rare for the Office inspectors to request the assistance of the police; this was to change, especially with respect to investigations into the most serious violations of competition law such as large cartels (the fight with which was to be one of the OCCP's main objectives in the years 2004 – 2005). It was also expected that the training provided to the OCCP's inspectors by staff of the German competition authority (in the framework of the twinning programme) would help increase the efficiency of the Office's inspections.

Another planned action consisted of improving the – admittedly rather low – efficiency of the fight against cartels via the creation of a specialised anti-cartel unit within the OCCP and via the introduction of the (already mentioned) "leniency programme". The new anti-cartel unit was to be attached to the jurisprudence department, and was to be composed of staff specially trained by the German competition authority in discovering cartels even if there was only indirect evidence of their existence (especially, collusion on oligopolistic markets). The Office noted that both solutions (i.e. specialised units and leniency programmes) had recently been successfully applied by both the European Commission and competition authorities of several EU Member States (e.g. in Sweden and the United Kingdom).

Concerning the reinforcement and better definition of the procedures for the OCCP's co-operation with other regulatory bodies, the Office pointed at the existence of several such organs, competent in one or several sectors previously covered by a State monopoly and currently undergoing liberalisation. This group included the Office for Regulation of Telecommunications and Postal Services (Urząd Regulacji Telekomunikacji i Poczty - URTiP), the Office for Regulation of Energy Sector (Urząd Regulacji Energetyki - URE) and the Rail Transport Office (Urząd Transportu Kolejowego - UTK). These bodies had an important impact on competition in sectors regulated by them. The OCCP's mandate partly overlapped with the mandates of these offices, which created the risk of over-intervention or, on the contrary, lack of intervention. In order to prevent this, the OCCP intended to conclude agreements with these bodies, which would define the organisational framework of co-operation in cases foreseen by law, the procedures for co-operation in particular cases (to avoid the risk of double intervention or absence of it), and the rules for the exchange of information and the use of collected data.

Another planned action consisted of the introduction of a principle of assessing, on a periodic basis, the fulfilment of tasks identified in competition policy reports, in order to draw up necessary conclusions for annual competition reports. Further, the OCCP intended to introduce, on a systematic basis, an assessment of the expected impact of draft laws and regulations (sent for inter-ministerial consultations) on competition on the markets concerned.

This would in particular apply to drafts modifying the conditions for competition in a given sector or a number of sectors, and the preparation of such an assessment would be the duty of the organ or subject which proposed a new act or an amendment to an existing act.

The OCCP attached a high importance to the priority of promoting the rules of competition, understood as the widest possible dissemination of information about the importance of competition to the development of the economy to companies (especially those from the SME sector, where awareness in this area was relatively low), consumers and administrative bodies. In this context, it was planned to organise further information campaigns, support initiatives by groups of undertakings aiming at the drafting of codes of good practices as well as educational programmes, etc. This was to be done in co-operation with other subjects such as local self-government and consumer organisations.

d. main sectoral priority - development of competition in regulated infrastructural sectors

Regarding sectoral priorities, the main set of actions foreseen by the OCCP was related with the priority of creating conditions for the development of competition in regulated infrastructural sectors. The first such sector was telecommunications and electronic media. The OCCP has noted that, although the former State monopolist Telekomunikacja Polska (TP) had lost its exclusivity as of January 2003, the situation on the market concerned was still far from ideal. In particular, as regards fixed-line telephony, the problems for actual or potential competitors were no longer due to any legal obstacles but to the extraordinarily strong market position of TP, thanks *inter alia* to its ownership of the overwhelming majority of relevant infrastructure and to the fact that it remained the "last mile operator" for over 90% of subscribers in Poland.

Although some 145 operators had a license for fixed-line telephony services, only a few (e.g. Netia, Dialog and Szeptel) could be considered as actual competitors of TP, and even that was on local markets only. On the inter-zonal and international telephony markets, the dominance of the former monopolist was even greater, among others due to some initial technical problems (inter-connectivity of centrals).

As far as the legal framework was concerned, the OCCP considered that the Act of 21 July 2000 – Telecommunications Law was, following the October 2003 amendment, basically compatible with the EC law. The few remaining incompatibilities or gaps were to be eliminated in a new Telecommunications Act, which was sent to the Parliament in March 2004. However, the Office acknowledged that an effective implementation and enforcement of the new rules was even more important that the legal amendments. In this context, it was pointed out that TP belonged to the category of particularly "difficult clients" of the Polish competition authority, with more than 100 proceedings initiated against it since the authority's creation[524]. The situation was much better on the mobile telephony market, where there were at least three strong competitors; however, the OCCP noted that the market had recently begun to show to a growing extent the characteristics of an oligopoly. Consequently, the Office intended to monitor the developments on this market more closely, in co-operation with the Office for Regulation of Telecommunications and Postal Services.

[524] Cf. also Chapter III.A.2.b..

Regarding competition in the energy sector, the OCCP stated with regret that, despite numerous changes in recent years, one could still not speak of an effective competition. One of the main obstacles in this respect was the existence of so-called "long-term contracts" (in Polish abbreviation: KDT). Their introduction was intended to help secure financial resources for the Polish power stations to modernise; however, as a secondary result, competition on the relevant market was significantly restricted by the fact that most of the energy producers had concluded such KDT's with the national power grid, fixing prices artificially; only some 2.5% of the energy prices were set according to the full market principle. Furthermore, the existing legislative provisions aimed at encouraging competition (e.g. the timetable for opening the energy transmission market to competition; rules foreseeing third party access – TPA – to the power grid, etc.) remained largely on paper. As a result, the Office estimated that a very small percentage of the subjects entitled to the TPA actually took advantage of it; on the other hand, as the OCCP noted, the situation was hardly different in this respect in the majority of the other Member States of the EU.

Faced with this situation, the OCCP (or rather the Government as a whole) intended to abolish the KDT's, although this proved to be quite complicated in practice (the main issue being of how to compensate power stations for the lost income without violating the EC rules on State aid); it was thus still unclear when exactly this would happen and how. The Office has also noted the ongoing process of horizontal concentration as well as the existence of some vertical concentration projects. In this context, it criticised the approach of the Treasury Ministry (i.e. the legal owner of majority shares in most of the companies from the sector) reducing itself to creating large undertakings without due attention being paid to the criteria of efficiency. As regards the gas sector, the most urgent task was to open it to outside competition, mainly through the separation of transmission and distribution operators, foreseen before 1 July 2007.

In the transport sector, the OCCP has noted that competition had so far been limited in rail and air transport; however, this was to change following Poland's accession to the EU. Air transport was to become fully liberalised on the day of accession, while the rail sector would be opened to competition as of the beginning of 2007. In this context, the Office considered it a primary task to ensure non-discriminatory access of all operators to the necessary infrastructure i.e. the rail network – currently managed by the Polskie Linie Kolejowe company, member of the PKP (Polish Railways) Group[525] – and the airport infrastructure. It was essential to prevent practices favouring companies belonging to the same capital group, as was still the case in the rail sector. There was also a potential risk of such practices occurring in the air transport sector, as certain ground handling, airport operating and airline companies were financially and operationally related with each other.

In the postal services sector, the principle of gradual liberalisation was introduced by the Postal Services Act of 12 June 2003[526], which *inter alia* significantly reduced the scope of the monopoly of the Polish Post – to letters and parcels not exceeding 350g. However, in the OCCP's opinion, competition on the postal services market remained very restricted, even with respect to other mail than the one mentioned above.

[525] This was a quite difficult task in practice, as illustrated by the *PKP Cargo* case. Cf. Chapter III.A.2.b., above.
[526] Dz. U. Nr 130, poz. 1188, with subsequent amendments.

This was at least partly due to the very strong market position of the Polish Post and the extensive infrastructure it possessed; the Office added that the Polish Post had already violated competition law provisions on a number of occasions in the past. Therefore, constant monitoring of the situation, both by the competition authority and the sectoral regulatory body, was required.

e. sectors subjected to specific regulations due to their special importance for the national economy and social life

One of the OCCP's priorities was to create conditions for the development of competition in sectors subjected to specific regulations due to their particular importance for the national economy and social life. These included the so-called "public trust professions" such as lawyers, legal counsellors, chartered surveyors and tax counsellors, where the character of the profession required to collect sensitive, private data of clients and which were – *inter alia* for this reason as well as for the purpose of the protection of public interest – subjected to compulsory self-regulation by professional self-government organisations.

In order to open these professions for competition, while at the same time maintaining the necessary professional standards, the Polish Government was preparing a number of draft regulations which would *inter alia* liberalise recruitment procedures, enable foreign professionals from other EU Member States to practise in Poland, create wider publicity and information possibilities and introduce supervision of the responsible Ministers over the activity of professional self-governments. In this context, the OCCP declared that it would make efforts to ensure that all these changes increase significantly competition on the relevant markets, without diminishing the quality of services provided.

Another specific sector, in which the degree of competition was still far from satisfactory, was the pharmaceutical sector, with its regulations concerning, among others, the list of medicines refunded by the State (and its decisive impact on the development on the pharmaceuticals market in Poland). The OCCP stressed in this context, that the afore-mentioned list represented a form of State intervention on the market, and that it was thus necessary to consider carefully the impact on competition of every decision (by the Minister of Health) to include or remove a particular drug on/from that list. An additional difficulty for the Office was the existence of several "smaller" relevant markets in the pharmaceutical sector i.e. the fact that, while examining possible violations of competition rules, it was necessary to take into account not the whole market but (very frequently) markets of specific preparations, on which (sometimes) only one of a few companies were operating. As a consequence of this, the percentage of discovered violations was in practice relatively high. The OCCP added that the pharmaceutical market was particularly important for the society and was likely to undergo radical change in the period following Poland's accession to the EU; it was thus very important to continue to monitor the situation closely.

Concerning the financial services market, the OCCP noted a constant rise in the degree of competition in the recent years, due *inter alia* to an increasing integration with the international market and to the reform of the social insurance system. The Office pointed at the necessity to continue implementation of the Government's Financial Services Action Plan, aiming at integrating Poland into the EU single financial services market.

From the standpoint of competition policy, the main challenge was the ongoing concentration in the sector (especially as regards banks), with the related danger of abuse of dominant position and other prohibited practices. This required some legal changes as well as closer monitoring, in co-operation with the financial market regulatory bodies.

Another important challenge facing the OCCP was to implement the rules of competition on local and communal markets. Succeeding in this task was all the more difficult as many of these markets (e.g. the local funeral services) were characterised by a very strong position of just one or two undertakings, leaving hardly any alternative for the consumers. On other markets (e.g. sewage disposal or local public transportation), communes or communal firms enjoyed a dominant position, allowing them to engage in prohibited practices such as granting preferential conditions to certain companies or preventing potential competitors from having access to the necessary infrastructure (waste dump sites, bus stops, etc)[527]. Among local markets, there were also those where the very technical characteristics prevented to a large extent an emergence of competition, e.g. in case of network monopolies. One example of such a market was the market of communal central heating, where clients had no possibility to get connected to another network. In such cases, the task of the OCCP and – as applicable – of sectoral regulatory bodies, was to ensure that companies did not abuse their dominant position e.g. by charging excessive prices. The Office intended to continue monitoring this area, mainly through its branch offices which benefited from a better knowledge of local markets.

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As can be seen from the above, the OCCP was very ambitious in its plans to further contribute to the deregulation of the economy and, in the new context created by Poland's EU membership, to ensure that it functions in full conformity with the EC law and policies. The Office has engaged in the implementation of these plans in the course of 2005, *inter alia* by preparing new draft laws and regulations and providing opinions on drafts drawn up by other services of the Government. Until August 2005, the OCCP President issued opinions on 2.446 such drafts[528], including draft laws on: court fees in civil cases; freedom of economic activity; professional self-government; postal services; banks; trading in securities; restructuring of iron and steel industry, and toll motorways.

More generally, it can be said that the Polish anti-trust authority has, from its very beginning, opted for a resolutely "pro-competition" and "pro-market" approach in its enforcement and other activities, trying to follow as closely as possible the principles of EC competition policy (in its anti-trust aspect) and – more precisely – the rules set out in the jurisprudence of the European Commission, the Community courts and in the non-jurisprudential documents issued by the Commission. One could even venture a statement that, in some respects, the Polish anti-trust authority has proven more radical in its approach than its Community counterparts, e.g. treating certain sectors (agriculture, health care, education) and actions of certain types of operators (State administration, regional and local self-government bodies) without a "reduced tariff". One could explain this approach – certainly not contrary to the principles of EC law and competition policy – by the determination to overcome the heritage of the previous political and economic system.

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[527] As illustrated by the case-law of the OCCP, cf. Chapter III.A.2.b.

[528] Cf. Press release of 25 August 2005, the OCCP's website.

Interestingly, the very same reasons seemed to play a somewhat lesser role in respect of mergers, where the Polish anti-trust authority has demonstrated a relatively lenient attitude. Thus, one sees on the one hand a genuine will to create a structurally sound market where free competition is fully enabled and, on the other, certain industrial policy considerations according to which Polish companies should be allowed to benefit from capital, technology and know-how "injections" possible through a marriage with larger European or even multi-national businesses.

B. Courts[529]

1. General remarks

Since the beginning of the 1990s, the Polish judiciary has played an important role in the process of approximating the legal system to the requirements of the *acquis communautaire*[530]. Naturally, prior to Poland's accession to the EU, the scope of activity of the Polish courts with respect to the Community law was limited by the fact that the latter did not constitute a part of the Polish legal system, and therefore the principles of supremacy, direct applicability and direct effect of the EC law could in practice not be applied by Polish courts. Furthermore, there was no mechanism in the Polish law similar to the preliminary reference procedure set out in Article 234 EC, and consequently no handy tool to dissipate possible doubts about how to interpret situations with a link to the Community legislation.

As could be seen from the description made earlier in this text[531], the law approximation process in Poland has essentially been of a legislative and regulatory (executive) character, with an indirect only participation of the courts. However, the judiciary has also gradually involved itself in the process, *inter alia* through resorting to the so-called "pro-European interpretation" of the existing Polish legislation[532], which was considered by some experts as "the cheapest and the fastest instrument of approximation of the [Polish] legal system to Western European standards"[533]. Naturally, this indirect "approximation" could only be of a subsidiary nature, and was not very helpful in cases of clear differences or contradictions between the Polish and the analogous EC legal provisions. Moreover, it could be considered as somewhat "risky" from the point of view of the coherence of the legal system. On the other hand, the Polish courts already had some experience in applying such "creative" interpretation as they had done something similar with certain of the remaining provisions dating back to the times of the Communist regime (such as the infamous decrees on basis of which the Communist authorities had confiscated property from citizens in the aftermath of WW II), interpreting them in the spirit of new times. Moreover, such an interpretation had a well established tradition also in the EU itself[534].

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[529] With some minor exceptions, this chapter covers the period 1990 – 2005 (i.e. shortly after Poland's entry to the EU).

[530] Cf. A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, Sussex European Institute Working Paper No 45, May 2001, pp. 21 - 23.

[531] Cf. Chapter II.A.

[532] Cf. M. Safjan, *Prawo Wspólnot Europejskich a prawo polskie - prawo spółek, wprowadzenie*, Instytut Wymiaru Sprawiedliwości, Warszawa 1996, pp. 9 - 28.

[533] Cf. S. Sołtysiński, "Dostosowanie prawa polskiego do wymagań Układu Europejskiego", Państwo i Prawo, No 4 - 5/1996, p. 39.

[534] Cf., for example, Case 14/83, *Von Colson and Kamann v. Land Nordrhein – Westfalen*, [1984] ECR 1891; and Case C-106/89, *Marleasing S A v. La Comercial Internacional de Alimantación S A*, [1990] ECR I-4135. Cf. also P. Craig and G. de Burca, *EU law. Text, cases and materials*, Oxford University Press, 2nd ed., 1998, pp. 198 – 206; and S. Weatherhill and P. Beaumont, *EU law*, Penguin Books, London 1999, p. 413.

The question that arose in this context was the degree of discretion which the courts could enjoy in applying this method of interpretation. Among representatives of the Polish doctrine[535], the predominant view seemed to be that the courts had little margin of manoeuvre when the Polish provisions were clear and unambiguous (also when they were contrary to the EC law, in which case not much could be done without an intervention of the legislator).

Further, their task was quite straightforward when a Polish provision was a literal transposition of a corresponding Community provision – the way was then open for referring to the interpretation of the Community norm established by the Community Courts and the European Commission. The main intellectual challenge that lay before the Polish judges was thus the "grey area" of ambiguity, where the Polish law could be interpreted in various ways. Taken into account the sometimes poor quality of legislative work of the Polish Parliament (where drafts submitted by the Government often passed through the Sejm and the Senate with numerous, not infrequently contradictory, amendments introduced by various MPs and groups of MPs[536]), such ambiguity was a relatively frequent occurrence.

In practice, the "pro-European interpretation" has been applied by Polish courts of all types and instances, including the Supreme Court and the Constitutional Tribunal. However, this has happened less frequently than one might have expected. The reasons behind this attitude were numerous, and the relative reluctance of the judiciary to apply external legal systems and especially public international law was not the least important of them.

Prior to the entry into force of the 1997 Constitution, there was no general rule defining the relationship between the Polish legal system and public international law, and the issue attracted little attention in the jurisprudence[537]. The prospect of Poland joining a number of international organisations, and in particular the EU, has led the drafters of the Constitution to suggest the introduction of provisions dealing expressly with this issue into the prepared text.

Thus, pursuant to Article 9 of the Constitution, Poland respects the rules of international law. Further, as stated in Article 91 (1) of the Constitution, a ratified international treaty, after publication in the Official Journal (*Dziennik Ustaw*) becomes a part of the Polish legal order and is directly applicable. If it is ratified as a law with the permission of the Parliament[538], it takes precedence over domestic laws (acts)[539].

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[535] Cf. *inter alia* M. Safjan and S. Sołtysiński, above.

[536] At least until the spring of 1999, cf. Chapter II.A.13.

[537] Although there were several examples of cases where Polish courts accepted a possibility of application of international law in the Polish legal system. Cf. A. Preisner, "Prawo międzynarodowe w orzecznictwie sądòw polskich", in: *Prawo międzynarodowe i wspòlnotowe w wewnętrznym porządku prawnym*, Wydawnictwa Sejmowe, Warszawa 1997, pp. 127 - 144. Cf. also J. Łętowski, "Polski sędzia wobec prawa europejskiego", in: *Stosowanie prawa Unii Europejskiej w wewnętrznym porządku prawnym państwa*, Centrum Europejskie Uniwersytetu Warszawskiego/Ośrodek Informacji i Dokumentacji Rady Europy, Biuletyn No 3-4/1998, pp. 9 - 20.

[538] Which is required when an international treaty deals with one of the issues enumerated in Article 89 of the Constitution.

[539] Moreover, pursuant to Article 90 of the Constitution, treaties that confer State powers on an international organisation must be adopted by a two-thirds majority in both the Sejm and the Senate, or in a national referendum. This is the same procedure as that required by Article 235 (4) of the Constitution for amending the latter; thus, in the opinion of certain representatives of the doctrine, the hypothesis of supremacy of the EC law not only over the Polish statutory law but even over the Constitution itself finds its justification here. Cf. M. Wyrzykowski, "Die Europaklausel der polnischen Verfassung - Souveränität in Gefahr?", in: Walter Hallstein-Institut für Europäisches Verfassungsrecht (ed.), *Grundfragen der europäischen Verfassungsentwicklung*, Nomos, Baden-Baden 2000, p. 107; and F. Hoffmeister, "International Agreements in the Legal Order of the

The 1997 Constitution has therefore, in principle, dissipated doubts about the relationship between the domestic and the (ratified) international acts. However, at least initially, the Polish courts continued to display a reluctant attitude to the direct application of international treaties[540].

Nevertheless, as already mentioned, the "pro-European interpretation" has been used in several cases before Polish courts. By way of an example, in Case No. III CZP 22/9, the Supreme Court explicitly referred to the provisions of the Directive No. 19/94 of 30 May 1994. Further, in its judgment No. K 15/97[541], the Constitutional Tribunal made reference to ex-Article 119 EC (now Article 141 EC) and to the relevant jurisprudence of the Community Courts. Examples of such approach could also be found in the jurisprudence of lower instance courts, e.g. the Katowice District Court which, in its judgment of 16 July 1996, analysed the provisions of the Polish Commercial Code and of the German Act on the Limited Liability Company in the light of the Directive No. 667/89 of 21 December 1989[542]. These cases illustrated a growing interest of Polish courts in looking at the Community law and in referring to it while interpreting corresponding provisions of the Polish law. Naturally, the situation has changed significantly since Poland's entry to the EU, insofar as the obligation to interpret the law in force in a manner compatible with the EC law can be considered as forming part of the general obligations of Poland as a member of the European Union[543].

2. Antimonopoly Court/Court for the Protection of Competition and Consumers (CPCC)

The "pro-European interpretation" of Polish law has been widely resorted to by the specialised jurisdiction in the matters relating to competition law, and this since its very creation – in the early 1990s – as the Antimonopoly Court. The Antimonopoly Court was a department of the Voivodship (Provincial) Civil Court in Warsaw served by six judges (only two of whom were permanently delegated to this activity). The Court could overrule the AMO/OCCP decisions or refer them back to the AMO/OCCP for re-examination whilst its own judgements could be appealed in the Supreme Court.

Candidate Countries", in: A. Ott and K. Inglis (eds.), *Handbook on European Enlargement*, T. M. C. Asser Press, The Hague 2002, p. 218. This represents a fundamental difference as compared with the status of the EC – Poland Europe Agreement in the Polish legal order. As a treaty ratified prior to the entry into force of the 1997 Constitution, it was – pursuant to Article 241 (1) of the latter – regarded as an international agreement ratified on the basis of an authorisation issued by the Parliament in the form of an act. Falling within the category of international treaties enumerated in Article 89 (1) of the Constitution (i.e. a treaty concerning the freedoms, rights and obligations of citizens as well as matters in respect of which the Constitution requires the form of an act), it took priority over national acts but stood below the Constitution in the hierarchy of domestic acts. Cf. A. Łazowski, "International Agreements in the Legal Orders of the Candidate Countries - Poland", in: A. Ott and K. Inglis (eds.), *Handbook on European Enlargement*, T. M. C. Asser Press, The Hague 2002, pp. 302 - 303.

[540] Cf., for example, the judgment No. 429/96 of the Kraków Court of Appeal, in which the court refused to apply directly a provision of the European Convention on Human Rights, in addition to wrongly classifying the latter Convention as part of the Community law. Cf. also W. Czapliński, "Z praktyki stosowania prawa międzynarodowego w polskim systemie prawnym", Państwo i Prawo No. 2/1998, pp. 82 - 85.

[541] OTK 1997/3-4/37.

[542] This judgment was subsequently appealed and finally reached the Supreme Court (Case No II CKN 133/97, judgment of 28 April 1997, published in Przegląd Prawa Handlowego of February 1998).

[543] Cf., for example, Case 224/01, *Köbler v. Austria*, [2003] ECR I-10239, in which the ECJ established the principle of responsibility of the EU Member States for violations of EC law committed by national courts adjudicating at last instance. Cf. also M. Breuer, "State liability for Judicial Wrongs and Community Law: the case of Gerhard Köbler v. Austria", ELR [2004] 2, 243-254.

As already mentioned, following the entry into force of the 2000 Act, the Antimonopoly Court was renamed into the Court for the Protection of Competition and Consumers (CPCC). Pursuant to the provisions of Title VII of this Act (Article 107), the Code of Civil Procedure[544] was amended so as to reflect the existence of such a specialised court, competent in cases based on the 2000 Act as well as those based on the Energy Act, Telecommunications Act and the provisions on rail transport.

The amended Article 47928 (1) of the Code of Civil Procedure expressly stated that the CPCC – a division of the Regional Court in Warsaw – should be the competent forum in the matters of:

a/ appeals against decisions of the President of the OCCP;

b/ complaints against resolutions issued by the OCCP President in the course of proceedings conducted by virtue of the provisions of the 2000 Act or pursuant to separate provisions;

c/ complaints against resolutions issued by the President of the OCCP in the course of preliminary proceedings (as regards protective measures) conducted by virtue of the 2000 Act; and

d/ complaints against resolutions issued in the course of execution proceedings carried out in order to enforce obligations resulting from decisions and resolutions issued by the President of the OCCP.

Appeals against decisions by the OCCP President were to be lodged through the OCCP's intermediary within 2 weeks from the date of service of the decision (Article 47928 (2) of the Code of Civil Procedure)[545]. According to Article 47929 of the Code of Civil Procedure, the parties to the proceedings before the CPCC were the President of the OCCP, the undertaking which had been a party to the proceedings before the OCCP President, and the person who had lodged the complaint (who could, but need not necessarily have been, the same person as the said undertaking). Other undertakings/companies, who had taken part in the proceedings before the OCCP President as interested third parties, could take part in the court proceedings in the same quality. The President of the OCCP was, in practice, represented by an authorised employee of the Office.

The CPCC could, upon a motion by the appellant, suspend the enforcement of the contested decision by the OCCP (Article 47930 of the Code of Civil Procedure). The CPCC could either dismiss the appeal on procedural grounds (Article 47931 (1) of the Code of Civil Procedure) – due to the expiry of the time-limit for its submission, inadmissibility for other reasons or errors in the appeal which were not eliminated within the set deadline – or admit the appeal and issue a decision on the merits, changing the decision of the OCCP President in its entirety or in part (Article 47931 (3) of the Code of Civil Procedure).

[544]Dz. U. Nr 43/1964, poz. 296, with numerous subsequent amendments.

[545]As to complaints against procedural resolutions by the President of the OCCP, issued in the course of the proceedings before the Office, they had to be lodged with the CPCC within one week from the date of delivery (Article 47932 (1) of the Code of Civil Procedure).

Further specific provisions of the Code of Civil Procedure referred to the CPCC's obligation to respect business secrets "and other secrets protected by virtue of separate provisions" such as intellectual property and know-how (Article 47933 (1) of the Code of Civil Procedure), except if the circumstances had changed significantly since the time of the proceedings before the President of the OCCP or if the party concerned had given its consent for the disclosure (cf. paragraph 2 of the same Article). The necessity to protect these secrets could justify restricting other parties' access to the file (paragraph 3); however, this did not apply to the OCCP President (paragraph 4).

The judgments of the CPCC had to be motivated and were, in principle, immediately executable (Article 47935 (1) of the Code of Civil Procedure). However, parties had the right to issue an appeal to the Supreme Court, irrespective of the value of the subject of complaint (Article 47935 (2) of the Code).

The legal framework of the CPCC's work changed quite importantly due to the judgment of the Constitutional Tribunal of 12 June 2002[546], which held that Article 47931 of the Code of Civil Procedure Code was unconstitutional in that it foresaw a one-instance procedure before the CPCC. Following that judgment, the Code of Civil Procedure was amended[547] by introducing the possibility of a full (i.e. also on the merits) appeal to the Court of Appeal, followed by a cassation appeal to the Supreme Court.

The CPCC followed, in principle, the provisions of the Civil Procedure Code while considering complaints against decisions by the OCCP President. However, this principle was qualified by the fact that the subject matter of these complaints – as regards their merits – belonged to the area of administrative law[548]. The choice of civil procedure was due to the legislator's will to subject decisions by the OCCP's President to a scrutiny on the merits (unlike in the case of control of administrative decisions by administrative courts, which was on the form only)[549].

From the standpoint of civil procedural law, proceedings by the CPCC were considered as first-instance ones, i.e. the Court was obliged to consider the case in its entirety, from the very beginning (meaning that it could not limit itself to reviewing the evidence gathered by the OCCP and the correctness of reasoning contained in a decision by the OCCP's President). On the other hand, the CPCC has developed a practice of abstaining from concluding about the existence of a different restrictive practice than that mentioned in the OCCP decision; instead, it has systematically annulled the decisions concerned, ordering the Office President to reconsider the case in order to check whether such a different practice had indeed taken place[550].

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[546] P 13/01.

[547] This amendment entered into force on 18 August 2004.

[548] On this subject, cf. A. Turliński, "Miejsce Sądu Ochrony Konkurencji i Konsumentów w systemie organów ochrony prawnej. Wybrane zagadnienia procesowe pierwszoinstancyjnej sądowej kontroli decyzji administracyjnych Prezesa Urzędu Ochrony Konkurencji i Konsumentów", *in:* C. Banasiński (red.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawno-ekonomiczne)*, OCCP 2005, available on the OCCP's website (www.uokik.gov.pl).

[549] Cf. above.

[550] Cf. A. Turliński, "Miejsce Sądu Ochrony Konkurencji i Konsumentów w systemie organów ochrony prawnej. Wybrane zagadnienia procesowe pierwszoinstancyjnej sądowej kontroli decyzji administracyjnych Prezesa Urzędu Ochrony Konkurencji i Konsumentów", *in:* C. Banasiński (red.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawno-ekonomiczne)*, OCCP 2005, available on the OCCP's website (www.uokik.gov.pl).

The reason behind this was that the CPCC considered that it could not carry out a review and conclude about the existence of a given practice if the issue had not previously been examined in the course of an administrative procedure and subject to an (administrative) decision by the OCCP President.

Turning to substantive law, the CPCC (and, previously, the Antimonopoly Court) has *inter alia* referred to and relied on the Community legal acts and jurisprudence (which, as the Polish competition court has formulated it, should be applicable by analogy in the Polish legal order[551]) in the application of the Polish competition law[552] in cases involving such important legal problems as:

a/ the definition of a dominant position[553];

b/ the notion of "monopolistic agreements"[554]

c/ the concept of a substitute product on the side of market demand[555];

d/ restrictions of competition consisting of the granting of discounts[556];

e/ the agreed intention to restrain competition (as opposed to action and its effects) and the possibility of considering it as an unlawful practice[557];

f/ the definition of relevant market[558];

g/ the applicability of anti-trust provisions to franchising agreements[559]; and

h/ the particularly harmful (to the development of competition) character of the so-called "tie-in" contracts[560].

Further, as pointed out by certain representatives of the doctrine[561], the Antimonopoly Court (Court for the Protection of Competition and Consumers) has referred on a nearly systematic basis to the Community competition law in cases involving a party or parties from the EU. The following description illustrates the most important elements of the doctrine developed through the CPCC's (Antimonopoly Court's) case law in the context of the Community law[562]:

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[551]Cf. P. K. Rosiak, "Prawo wspólotowe w orzecznictwie polskich sądów i Trybunału Konstytucyjnego", Kwartalnik Prawa Publicznego Nr 4/2002, pp. 229 – 240.

[552]Cf. E. Piontek, "New Polish Competition Law", News Letter No 2/2001, Piontek, Rymar, Ślązak, Wiśniewski&Associates Law Office, Warsaw.

[553]Judgments of 8 October 1997, XVII Amr 33/97 and 39/97, as well as of 3 February 1999, XVII Amr 76/98. The court applied the notions and reasoning of the European Court of Justice set out in its *Hoffman-La Roche* case.

[554]Judgment of 6 July 1994, XVII Amr 8/94.

[555]Judgment of 21 October 1998, XVII Amr 42/98.

[556]Judgment of 3 August 1994, XVII Amr 18/94.

[557]Judgment of 9 March 1994, XVII Amr 48/93.

[558]Judgment of 4 October 1993, XVII Amr 29/93.

[559]Judgment of 21 July 1992, XVII Amr 12/92.

[560]Judgment of 12 February 1993, XVII Amr 33/92.

[561]Cf. *inter alia* E. Piontek, "New Polish Competition Law", News Letter No. 2/2001, Piontek, Rymar, Ślązak, Wiśniewski&Associates Law Office, Warsaw.

[562]Cf. E. Piontek, above. Many elements of this jurisprudence were incorporated to the Polish statutory competition law through the amendments of 1995 and through the adoption of the 2000 Act.

a/ as regards the objectives and the scope of the protection of competition

The Antimonopoly Court (and, subsequently, the CPCC) has consequently dealt with general and specific objectives of the Polish competition legislation in a manner consistent with the Community's case-law and doctrine, stressing the need to secure the "development of competition" and to ensure "free competition". Just like in the EC law, this was not done merely in the interest of the parties to the proceedings but in the "public interest"; it was the competition as such rather than the interests of competitors that were being protected[563].

The Antimonopoly Court/CPCC has had some difficulty in delimitating in a clear manner the subject matter, the object and the territorial scope of the Polish competition law, although the latter posed relatively the least problems due to the formulation contained in Article 1 of both the 1990 and the 2000 Acts (which pointed at the territory of Poland as the geographical zone concerned). That said, the exact interpretation of the geographical scope of application of the Polish competition law has not always been easy, and the Polish competition judges tended initially to be rather "shy" as regards the extent to which the "effects doctrine" could be applied[564].

It took very long – until October 2005[565] – before the OCCP clearly stated that the provisions of the Polish competition law could also cover a foreign company carrying out its activity outside the Polish territory (in this case, in the Netherlands Antilles). Interestingly, the afore-mentioned company was considered as an injured party, entitled to protection against anticompetitive conduct by the Polish Telecoms (TP), which had abused of its dominant position by refusing to deal with the said company (i.e. to provide automatic international connections for audio-text services).

The CPCC – which had taken five years to consider an appeal against the original decision by the OCCP President (issued on 15 September 2000) stated that the 2000 Act had an "extraterritorial" application when the effects of restrictive practices manifested themselves on the Polish territory. This reasoning applied *a fortiori* to companies registered abroad but carrying out economic activities in Poland.

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[563] Cf., for example, the judgment of the Antimonopoly Court of 2 April 2002, XVII Ama 88/01.

[564] According to this doctrine, domestic competition laws are applicable to foreign firms – but also to domestic firms located outside the State's territory, when their behaviour or transactions produce an "effect" within the domestic territory. The "nationality" of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality. The "effects doctrine" was embraced by the Court of First Instance in *Gencor* when stating that the application of the Merger Regulation to a merger between companies located outside EU territory "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community." Cf. Judgment of 25 March 1999, Case T-102/96, *Gencor Ltd v Commission*, (1999) E.C.R. II-0753.

[565] Cf. XVII Ama 19/01, and Krak., "Precedens z Antylami w tle", "Rzeczpospolita", 12 October 2005.

As regards the substantive scope, the 1990 Act was particularly ambiguous, as it did not contain any (even vague) definition of "monopolistic practices". The Antimonopoly Court has gradually developed a jurisprudential definition[566], according to which "the essence of a monopolistic practice lies in restricting the freedom of contractors, competitors and consumers, compelling them to participate in trade on terms which are less favourable than those of unrestricted competitive environment, by an economic entity or a group or combination of economic entities, and as a result of unlawful abuse of market power derived from their position occupied on a given market". This definition contained all the elements of the definition of restrictive practices as applied in the EC law.

Another aspect of the substantive scope of the Polish competition legislation was the extent to which it applied to actions of communes and municipal legal persons. As already described earlier in this text, the jurisprudential line of reasoning finally worked out has been that the 2000 Act (and, prior to its entry into force, the 1990 Act) was to be applied *mutatis mutandis*, but "in a prudent manner"[567]. In practice, the Antimonopoly Court and the CPCC have not hesitated to apply the competition legislation to situations when communes carried out an economic activity. The same approach has been applied to activities of professional bodies, such as pharmaceutical chambers, which were assimilated by the above-mentioned courts with associations of undertakings.

b/ as regards the definition of restrictive agreements, the prohibition of hard-core cartels and the scope of economic analysis of vertical agreements

The 1990 Act described, in its Article 1, certain agreements (since the 1995 amendment, in a non-exclusive manner) as "monopolistic practices". In practice, the Antimonopoly Court (and, subsequently – under the regime of the 2000 Act – the CPCC) has adopted the attitude of low tolerance to restrictions of competition in the forms of such practices, which corresponded to the approach of the European Commission and of the Community Courts. In particular, it has made relatively little use of the "rule of reason" provided for in Article 6 of the 1990 Act. On the contrary, especially with regard to horizontal agreements (cartels) – and in particular to price cartels – it has usually upheld the appealed decisions of the Antimonopoly Office (and, subsequently, the OCCP) ordering the cessation of such practices. One example of such an attitude is the judgment in the "sugar cartel" case[568]. The Polish competition court has also followed the jurisprudence of the Community Courts as regards indirect proofs of concerted practices/cartels[569]. Further, the CPCC considered that a restrictive agreement could also be concluded via a tacit (silent) approval by the parties[570]. Moreover, in conformity with the spirit of the EC competition law, the CPCC held that restrictive agreements were prohibited (and null and void) because of their very objective, even if the parties had not begun implementing them[571].

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[566]Set out explicitly for the first time in a case concerning the S.M. housing co-operative in Stalowa Wola. Cf. E. Piontek, "New Polish Competition Law", News Letter No. 2/2001, Piontek, Rymar, Ślązak, Wiśniewski&Associates Law Office, Warsaw.

[567]Cf. E. Piontek, above.

[568]Cf. E. Piontek, above.

[569]Cf. for example the judgment of 15 July 1998, in which the Antimonopoly Court held that the existence of coordinated actions by companies may provide an important indication of the existence of a confidential agreement. XVII 27/98.

[570]Cf. the 2004 judgment in *DCS Auto Turyn* case, in which Fiat Auto Poland representatives had orally told several Fiat dealers – during a meeting – that they should not trade with DCS; the CPCC considered that the dealers had tacitly agreed with this proposal. XVII Ama 26/04.

[571]Cf. for example the judgment of 10 September 2003, XVII Ama 136/02.

Regarding particular restrictions, the Antimonopoly Court and the CPCC has traditionally been very critical (even more so than the Community Courts) of exclusivity clauses restricting market entry for competitors of companies enjoying a monopolistic or a dominant position.

It is also noteworthy that, even before the adoption of the 2000 Act which brought this part of the Polish legal framework into full conformity with the EC law, the Antimonopoly Court has applied in its jurisprudence the qualification as null and void of prohibited practices which "have as their object or effect the elimination or restriction of competition on the national or local market". The 1990 Act stated merely that such practices "are prohibited by this Act", without such a qualification. This creative jurisprudential practice allowed the Antimonopoly Court to avoid the apparent contradiction between the general definition of Article 2 of the 1990 Act and the provision in Article 9 of the same Act, referring to specialisation and co-operation agreements, which seemed to indicate that the latter agreements were not automatically prohibited but, instead, that their implementation could be prohibited by a separate administrative decision of the Antimonopoly Office (and, therefore, that such agreements remained valid until prohibited). The 2000 Act finally brought about legal certainty in this respect, by eliminating the provision of Article 9 of the 1990 Act.

One particularly delicate issue facing the Polish competition court, especially in the pre-2000 legal context, was the attitude to be adopted to vertical agreements, e.g. exclusive or selective distribution agreements and franchising agreements. The imperfect legal base before the adoption of the 2000 Act (and of the group exemption on vertical restraints[572]) offered few instruments for the Antimonopoly Court to apply the doctrine analogous to that developed in the Community context (i.e. that vertical agreements, although leading to the restriction of intra-brand competition, may often help increase inter-brand competition, which is beneficial for the economy and the consumers). In practice, the court did its best to use maximally the "rule of reason" (Article 6) and the possibilities of Article 9 of the 1990 Act. However, only the 2000 Act, with its provisions allowing for individual and group exemptions, and with the introduction of the *de minimis* rule, permitted to definitely remove the discrepancies in the legal framework and jurisprudence between Poland and the EU in this respect.

c/ as regards the definition of the relevant market and of market dominance, as well as the prohibition of abuse of dominant position

Until the amendment of 1995, the Polish competition legislation prohibited not only the abuse of monopolistic and dominant position (Articles 5 and 7 of the 1990 Act) but also "monopolistic practices of economic entities not enjoying a qualified market position" (ex-Article 4 (1) (1) and (2) of the 1990 Act). However, this difference with the EC law was eliminated by the Antimonopoly Court, which made clear in its jurisprudence that the prohibition contained in the Act could not be applied irrespectively of the position a given undertaking enjoyed on the relevant market[573].

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[572] Cf. Chapter II.B.7.

[573] The Antimonopoly Court reiterated subsequently its view that provisions on anticompetitive conduct could not be invoked – and *a fortiori* sanctions applied – unless the relevant geographical and product market was identified and the company's position on this market established. Cf. for example the judgment of 9 April 1997, XVII Ama 4/97.

In practice, the former Article 4 (1) (1) and (2) of the 1990 Act had only been applied to companies with a particularly dominant or monopolistic position, usually to natural monopolists. Pursuant to the above-mentioned 1995 amendment, practices covered by these provisions (i.e. imposing onerous contract terms[574] and tie-in obligations) were prohibited only if they constituted an abuse of dominant position.

Another example of the situation where the rules of the Polish competition law (before the 2000 Act, which brought them fully in conformity with the Community rules) were approximated to the EC law through the jurisprudential activity of the Antimonopoly Court could be found with respect to the practices of undertakings with a monopolistic position (subject to an absolute prohibition under the 1990 Act) and those of undertakings enjoying a dominant position (which were only relatively prohibited, and could be exempted). In practice, the Antimonopoly Court treated both situations in a very similar manner, thus bringing the *de facto* state of affairs closer to the system put in place in the Community in application of Article 86 (now 82) EC. The court also followed the Community Courts as regards the manner of identifying the relevant product market (including the criterion of "close substitution"[575]) and the definition of a dominant position as a capacity to act "to a large extent independently of the competitors and clients, thus also the consumers"[576].

d/ as regards merger control

Under the 1990 Act, the inexistence of the obligation to notify implemented capital and property mergers or personal unions rendered the prohibition of such mergers, considered, pursuant to ex-Article 4 (1) (3) and (4), as "monopolistic practices", totally ineffective in practice[577]. Furthermore, the law did not foresee an obligation to notify intended mergers (pursuant to ex-Article 11 of the 1990 Act), which made it impossible to develop a system of preventive merger control.

The situation changed radically with the 1995 amendment to the 1990 Act[578], which adopted the solution based on the EC law, namely that – as a principle – mergers were authorised but had to be notified prior to their implementation and could be prohibited by means of an administrative decision if they could result in obtaining, maintaining or reinforcing a dominant position on the relevant market (Article 11 (1) and Article 11a (4) (1) of the amended 1990 Act).

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[574] Such as obliging the other party to the agreement to accept standard tariffs, without providing the latter party with a copy of these (cf. judgment of 17 April 2002, XVII Ama 81/01), or imposing differentiated and discriminatory tariffs on clients belonging to the same category (cf. judgment of 23 April 2003, XVII Ama 64/02).

[575] In this respect, the Antimonopoly Court *inter alia* held that apparently similar products could be considered as not substitutable because of differences in quality and price. Cf. the judgment of 20 July 1994 (XVII Amr 14/94), where the issue arose in relation with rents for office space in the centre and in the suburbs of town. It is noteworthy that the assessment of whether products were substitutes had sometimes caused difficulties even to the Polish court specialised in competition matters. For example, in a judgment of 9 May 2001 (XVII Ama 91/00), the CPCC considered that, from the consumer perspective, cable and satellite TV were substitutes, and that consequently the local cable TV provider did not enjoy a dominant position.

[576] Cf. E. Piontek, above. The Antimonopoly Court made clear once again that it was only possible to speak of abuse of a dominant position in relation with a relevant product and geographical market. Cf. judgment of 18 September 2002, XVII Ama 116/01.

[577] Cf. E. Piontek, above.

[578] Cf. also Chapter II.B.2.

The amendment in question also brought about other positive changes: the introduction of a statutory definition of concentrations subject to control (i.e. mergers and acquisitions), and clarifying the scope of the obligation to notify the intention to merge (covering only mergers bearing a high significance to competition on the relevant market).

In its jurisprudence, the Antimonopoly Court (followed by the CPCC) has generally followed the interpretation of the merger provisions which was consistent with the principles of merger control in the Community. For example, in a judgment of October 1997[579], it held that the information to be included in a notification of an intended merger should correspond with the requirements set out in the Council Regulation No. 4046/89, even though (at that time) neither the Polish Act not the Council of Ministers executory Regulation enumerated expressly such information. More generally, on the same occasion, the Antimonopoly Court stated that – as far as possible – the interpretation of the Polish anti-trust law should follow the EC law[580].

That said, some differences in interpretation did persist, even after the entry into force of the 2000 Act. For example, the Antimonopoly Court (and the CPCC) held in a number of, even recent, cases that there was no obligation to notify the Polish competition authority of an intended establishment of a wholly-owned subsidiary. The court was of the opinion that in such cases, the merger was taking place between a dominated and a dominating undertaking i.e. within the same capital group, which was indifferent from the point of view of competition law.

The Antimonopoly Court has gone even further[581], suggesting in one of its judgments and in articles and commentaries published by its President that there was no obligation to notify an intended subscription for shares in a newly established company, even if it would not be a wholly owned subsidiary, provided that one of the future shareholders intended to subscribe for such a number of shares that it would dominate the company. This interpretation was to apply only if, at the same time, none of the remaining future shareholders intended to subscribe for over 10% of the company shares each, i.e., none of their subscriptions would reach the lowest threshold of the number of shares qualifying the transaction for an obligatory notification.

In this context, it is important to stress that judgments of the Antimonopoly Court (and of the CPCC), although providing useful guidance in the application of the Polish competition law, do not have any precedential value. Therefore, especially in cases when there was an important difference of opinion between the OPCC and the CPCC, representatives of the doctrine and of legal practice[582] warned that it would not be safe to rely on the court's rulings too much. In the case referred to above, the reason why the judgment of the court was not appealed by the competition authority was that the outcome of the case was favourable to the OCCP, rejecting the plaintiff's appeal against the Office's decision to impose fines.

[579] XVII Amr 33/97.

[580] Cf. also the Judgment of 8 January 1998, XVII Amr 65/96, and P. K. Rosiak, "Prawo wspólotowe w orzecznictwie polskich sądów i Trybunału Konstytucyjnego", Kwartalnik Prawa Publicznego Nr 4/2002, pp. 229 – 240.

[581] Cf. E. Piontek, above.

[582] Such as E. Piontek.

Another controversial issue which the Antimonopoly Court has dealt with in respect of merger control was the question of the statute of limitations for imposing sanctions on undertakings (and members of their managing bodies) which had failed to notify the Antimonopoly Office (OCCP) about the intended merger. On this subject, the Antimonopoly Court suggested, in two separate judgments of February 1998, that the statute of limitations that should apply in such cases should be the same as that applicable to "monopolistic practices", i.e. one year from the end of the calendar year, during which the given practice had ceased. This interpretation, as pointed out *inter alia* by E. Piontek[583], went beyond the literal wording of the 1990 Act. The issue was finally resolved by the 2000 Act, which set the statute of limitations for sanctions for a failure to notify a merger at five years from the date at which the obligation to notify arose.

e/ as regards the procedural and organisational issues, as well as sanctions for violation of the competition rules

The 1990 Act contained very few procedural provisions[584]. This was partially remedied by the 1995 amendment, which strengthened the powers of the Antimonopoly Office in administrative proceedings while, at the same time, reinforcing the protection of confidentiality of the information gathered in the course of the proceedings. A further remedy to this *lacuna* was brought about by the 2000 Act[585]. The Antimonopoly Court and – subsequently – the CPCC have rendered the procedural standards even more precise, for example by stressing that, when gathering evidence in the course of its proceedings, the OCCP should apply the rules set out in Articles 227 to 315 of the Code of Civil Procedure, i.e. prove the existence of the incriminated practice to the company concerned[586].

In its jurisprudence, the Antimonopoly Court (and, subsequently, the CPCC) has tended to be quite critical of the sometimes rather "soft" treatment of companies violating competition rules demonstrated by the Antimonopoly Office (OCCP). At least in the early 1990s, this reflected the preoccupation of the Polish competition authority not to impose too tough standards on the nascent private sector and on the privatised companies learning to operate in conditions of a free market economy. One example of such an approach was the *Drewbud* case, in which the Antimonopoly Office refrained from imposing a fine for failure to comply with the earlier judgment of the Antimonopoly Court. The rules concerning fines and penalties were subsequently rendered more strict by the above-mentioned amendment of 1995 (Articles 14 to 16 of the 1990 Act). A further reinforcement of sanctions (and especially fines) came with the 2000 Act.

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[583] In: "New Polish Competition Law", News Letter No. 2/2001, Piontek, Rymar, Ślązak, Wiśniewski&Associates Law Office, Warsaw.

[584] Cf. E. Piontek, above.

[585] Cf. Chapter II.B.5. and following, in particular II.B.12.

[586] Cf. judgment of 2 July 2003 (XVII Ama 78/02), and M. Błachucki, "Prawo konkurencji. Dowody w postępowaniu przeciwko kartelom. Trzeba udowodnić", "Rzeczpospolita", 5 October 2005.

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The Polish competition court (Antimonopoly Court/CPCC) has, from its very origins, performed a very important function of "quality checker" of decisions by the competition authority (of course, only those that have been appealed against). In this regard, the statistical data available would indicate that the Antimonopoly Court and, subsequently, the CPCC, has fulfilled this task well. For example, out of 87 decisions by the OCCP President appealed against in the course of 1999, the Antimonopoly Court upheld nearly half, modified entirely 16%, annulled entirely 18% and partially 8% of them, and stayed or suspended the proceedings in some 8% of the cases[587]. For the year 2000, the figures were as follows: 81 appeals in total, 57 judgments (32 upholding the OCCP's decisions, 8 annulling them entirely and 7 partially, 5 judgments modifying the Office's decision entirely and 4 judgments modifying the original decision partially; the Court stayed the proceedings in one case) and 24 decisions closing the proceedings without deciding on the merits (in 4 cases) and rejecting the appeal for admissibility reasons (in 20 cases)[588].

A similar trend – indicating a tendency to subject the OCCP's decisions to a relatively severe scrutiny – continued also in 2001, which moreover witnessed an impressive increase in the number of appeals (sign of a growing awareness by companies of their procedural rights in competition proceedings). During that year, the CPCC considered 134 appeals against the Office's decisions, issuing 72 judgments and 62 decisions (the latter mostly refusing to hear the case for procedural reasons, such as missing the deadline, etc). Out of these, the Court upheld the decision by the OCCP President in (merely) 39 cases[589]. In 8 cases, the CPCC annulled entirely the decision, for a variety of reasons e.g. imprecise or wrong definition of the relevant product and/or geographical market; procedural violations such as delivery of the summons to an unauthorised person; insufficient proof of the precise mechanism of the alleged restrictive practice; lack of reference to the arguments of the company suspected of the practice in question; and, finally, omitting the fact that - pursuant to Energy Act - the criterion of economic rentability is to be taken into account when assessing the participation of the commune in the cost of construction of a gas supply network (the OCCP President wrongly assumed that such a participation was never lawful).

In 17 cases, the CPCC altered totally the original decision by finding that there was no restrictive practice, in one case it ordered the President of the OCCP to initiate administrative proceedings, and in another case it found the existence of a restrictive practice where the OCCP had not found one. The reasons why the court did not follow the OCCP were again numerous, but one may quote as examples the fact that the Office had relied on an interpretation issued by the Finance Ministry instead of carrying out its own analysis; and the fact that the OCCP was not allowed to refuse to initiate proceedings just because it had already once refused to initiate proceedings in the same case (the court considered that only a previous decision in the same case on the merits would justify a rejection of the second request).

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[587] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 1999 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 1999], the OCCP's website (http://www.uokik.gov.pl).

[588] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2000 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2000], the OCCP's website (http://www.uokik.gov.pl).

[589] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

In 6 cases, the Court modified partially the OCCP decisions, disagreeing with some of the findings of the OCCP President as to the existence of restrictive practices – for example, in one case it did not follow the OCCP which had considered the obligation imposed on the clients to expressly (i.e. by a registered letter) refuse the reception of a certain part of the cable TV package to constitute an instance of abuse of dominant position by the cable TV operator.

As to procedural decisions taken by the CPCC in 2001[590], it is noteworthy that some of them annulled procedural decisions by the OCCP President, refusing interested parties access to parts of the file in a pending case. In this context, the Court stressed that the protection of business secrets should be interpreted widely, including the information of an organisational and logistical nature.

The number of appeals against decisions by the OCCP President continued increasing rapidly also in 2002, with 203 appeals in total[591]. The CPCC issued 92 judgments, including 51 in which it upheld the contested decision and 21 modifying the decision by the OCCP President. The bulk of the remaining judgments consisted of annulments of decisions by the competition authority, on a variety of grounds: lack of proof of public interest as opposed to private interest of the complainant[592]; lack of *locus standi* by a professional association[593]; the need to prove specifically that a company had abused its dominant position and obtained unjustified profits (as opposed to merely establishing the fact that the company enjoyed such a position, and assuming that a given practice represented an abuse)[594]; and lack of sufficient proof of abusive practices (discriminatory or unfavourable contract terms)[595].

The CPCC remained very active in reviewing the OCCP decisions also in 2003, with 89 judgments (including 42 confirming decisions by the OCCP President, 30 modifying them, and the remainder annulling them totally or partially) and 68 other decisions (including 25 rejecting a complaint on procedural grounds)[596].

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[590]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

[591]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

[592]Judgment of 25 November 2002, XVII Ama 106/01. Cf. also the judgment of 23 October 2002 in the "Samopomoc Chłopska" case (XVII Ama 133/01).

[593]The OCCP did not check whether the association's legal interest as an undertaking had been directly affected. Judgment of 6 December 2002 (XVII Ama 131/1) concerning an association of pharmacists of Western Pomerania region.

[594]Judgment of 27 November 2002 (XVII Ama 10/02), issued in the context of a conflict opposing a communal water distribution company (Rzeszowska Gospodarka Komunalna) and a housing co-operative (S.M. "Projektant" in Rzeszów) about who had to pay for the cost of connection between a newly-built housing estate and the town network. It is noteworthy that the CPCC had been obliged to reconsider this case after it had returned from the Supreme Court, and – following the latter court's indications – modified its earlier jurisprudence (cf. XVII Ama 69/93, XVII Ama 8/93 and XVII Ama 28/97) on this point. The result was that the OCCP had from then on to apply a higher standard of proof to establish abuse of dominance.

[595]Judgment of 16 December 2002 (XVII Ama 21/02), concerning an electricity company (Zakład Energetyczny Toruń).

[596]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2003 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2003], the OCCP's website (http://www.uokik.gov.pl).

It is noteworthy that both the number of appeals (just over 150) and the percentage of OCCP decisions annulled had dropped as compared with previous years, which could be interpreted as a sign of improvement of the quality of the OCCP's enforcement efforts.

This trend appeared to continue in 2004, with only 131 appeals lodged against decisions by the OCCP President and merely 17 decisions annulled or modified by the CPCC (38 were confirmed, appeals were rejected in 28 cases, other judgments or decisions being of a procedural nature)[597]. Among the 17 judgments annulling or modifying an OCCP decision, one could mention the judgment of 24 March 2004[598], in which the Court suggested to the OCCP to check whether a restrictive practice (depriving other parties from access to information necessary to defend their rights, i.e. a specific type of the imposition of unfavourable contract terms) could not be added to the list of "sins" of a local monopolist. In a second case[599], the CPCC – although confirming the actual outcome of the proceedings before the OCCP – criticised the too superficial manner in which the relevant market (of automatic slot machines) had been defined, stressing that factors such as the relationship between the machines' price, size and weight and the transport costs, as well as the existence of any possible restrictions on international trade, should have been analysed in a more detailed manner. Overall, however, the CPCC has, in the course of the year, confirmed and praised the reasoning and work standards of the OCPP much more often than criticised it.

In 2005, the CPCC issued 47 judgments in anti-trust cases[600], including 39 in cases concerning abuse of dominant position, three concerning horizontal restraints, three on vertical restraints and two concerning mergers. In most of these cases (32), the appeals against decisions by the OCCP President were rejected. The CPCC modified the Office President's decisions in 12 cases and annulled three of them. Further, 14 appeals against judgments by the CPCC were considered by the Appellate Court in Warsaw.

Among interesting cases, one can quote the judgment of 5 October 2005 on appeal by several yeast producers against the decision of the OCCP President who had found the existence of a price-fixing cartel[601]. The main issue in this case was the existence of an indirect proof of a prohibited agreement. The court agreed with the OCCP that the fact that price increases had occurred at the same date, had followed a procedure that was identical and at the same time different from previous conduct of the companies concerned, and that the fluctuations of the price of base product (i.e. melasa) did not justify such conduct, gave the Office President sufficient grounds to conclude the existence of an agreement (even if there was no written or otherwise recorded proof of it). The court went on to say that it was enough to establish that the companies involved (which together held 93% of the relevant market) consciously co-ordinated their behaviour and adopted a method of co-operation that resulted in restricting competition.

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[597] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2004 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], the OCCP's website (http://www.uokik.gov.pl).

[598] XVII Ama 29/03. The case concerned a practice by a local natural monopolist (a company – Zamojska Korporacja Energetyczna – running the electric power grid in the town of Zamość) obliging individual clients to sign contracts with a clause that the rights and duties of the parties were set out in a separate document, the copy of which was not provided to clients.

[599] Jugdment of 1 September 2004, XVII Ama 13/03.

[600] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2005 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2005], the OCCP's website (http://www.uokik.gov.pl).

[601] VI ACa 1146/04.

In another case[602], the CPCC, considering an appeal against a decision by the OCCP President concerning a professional association of cable TV operators[603], added further clarification to the issue of what a prohibited agreement can be; in this case, it was a decision by an association of companies. First of all, the court stressed that professional chambers (like those regrouping doctors, veterinarians, lawyers, etc) were associations of undertakings within the meaning of the 2000 Act, and thus their decisions could be assessed under the provisions of the said act. Further, the CPCC agreed with the OCCP President that a decision by the above-mentioned professional association to recommend a standard-type license agreement to its members, including the recommended license fees and period of validity of the agreements, represented a prohibited practice as it restricted competition on the market of pay TV cable channels. Moreover, as a consequence of the standardisation of the behaviour of market players, customers had a restricted choice between offers of different cable TV companies.

In November 2005[604], the CPCC made clear that, when establishing the existence of a prohibited practice (in this case, abuse of dominant position by a producer of plant protection chemicals, by obliging its distributors to maintain a minimum resale price, refrain from selling abroad and buying the products concerned from abroad), the OCCP must carry out a full inquiry and look itself for proofs (including those supporting the chosen definition of the relevant market and the position of the company concerned on that market), instead of just relying on the data submitted by the parties; in this particular case, the data on which the OCCP President relied was provided by a private research institute and a professional association of producers of phytosanitary products. In the court's view, private expert opinions drawn up on request by the parties or third persons before or in the course of the proceedings could not be considered as proofs but only as arguments supporting the positions of the parties.

In 2005, the CPCC issued a judgment[605] confirming the OCCP's view that competition rules apply equally to State bodies which enjoy a legal monopoly. This was the outcome of an appeal against a decision of the OCCP President[606], in which the state health insurance body (regional "Kasa Chorych" of Silesia Province, subsequently transformed into the regional branch of the National Health Fund) had been punished for abusing its dominant (in fact, monopolist) position by setting the rules of contracts for nursing services which *de facto* eliminated private nurses from the market. It is noteworthy that the court made clear that the very fact of enjoying a monopoly provided by the State in a law (as was the case with the National Health Fund) was not *per se* illegal; that said, entities enjoying such a position had a particular responsibility which required them to refrain from any conduct that might have as its object or effect the restriction or elimination of competition on the relevant market.

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[602] Judgment of 12 October 2005, XVII Ama 53/04.

[603] Decision Nr DDI-71/03 of 31 October 2003.

[604] Judgment of 2 November 2005 (XVII Ama 72/04), on appeal against a decision of the OCCP President of 17 May 2004 (Nr RWA-11/2004).

[605] Judgment of 25 May 2005, XVII Ama 82/03.

[606] Decision of 15 September 2000, Nr RKT-28/2000, discussed already earlier in this text (cf. Chapter III.A.2.b.).

3. Supreme Court

To begin with, the Supreme Court has – like the CPCC – played an active role in adjusting the Polish legal system (including competition law) to the requirements of integration with the EU; thus, it has engaged in the practice of the "pro-European interpretation" referred to earlier[607]. Perhaps the most clear expression of this attitude could be found in a judgment of 2001, concerning the interpretation of Article 69 of EC – Poland EA[608]. In the afore-mentioned judgment, the Supreme Court expressed a general view that Poland's obligations under the Europe Agreement could be fulfilled both through legislative action and through appropriate interpretation – by the judiciary – of the existing provisions of the Polish law, the objective being to achieve, through a functional interpretation, a result compatible not only with the letter of the EC law but also with the jurisprudence of the Community Courts.

Another example of such attitude – albeit not in respect of the Community law but a national legislation of another EU Member state – was provided by the judgment of the Supreme Court of 11 August 2004[609], in which the court interpreted *inter alia* Article 1143 of the Polish Civil Procedure Code concerning the method of establishing the contents of a foreign law. The case concerned a dispute between a German and a Polish company and related to the failure to pay for delivered goods. According to the contract, the applicable law was to be the appropriate German legislation i.e. the German Civil Code (BGB).

The appellant (i.e. the German company) considered, among other things, that the Polish first and second instance courts had committed an error in interpretation of the BGB. On this, the Supreme Court agreed with the German company and stressed that the first and second instance court could have established of their own motion the exact contents and the jurisprudential practice concerning the Articles of BGB concerned (i.e. Articles 244 and 245 BGB). However, in case of doubt, the lower instance courts should have applied the rule set out in Article 1143 of the Polish Civil Procedure Code, that is, refer the question to an expert or request the Ministry of Justice to provide it with information about the text of the law and the practice of its implementation in the foreign country in question. This Supreme Court decision was also of interest as, in a certain way, it paved ground for the use by the Polish courts of the EU preliminary reference procedure.

Turning more specifically to anti-trust, it should be stressed that for obvious reasons, i.e. because of its position as a "third instance" (cassation) jurisdiction in the system of judicial protection of competition, the Supreme Court has had relatively fewer occasions to express its views on these matters. By means of an example, the Supreme Court issued only 13 judgments in competition proceedings in the course of 2001[610].

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[607] Cf. Chapter III.B.1., above.

[608] Judgment of 29 May 2001, I CKN 1217/98. Cf. also P. K. Rosiak, "Prawo wspólotowe w orzecznictwie polskich sądów i Trybunału Konstytucyjnego", Kwartalnik Prawa Publicznego Nr 4/2002, pp. 229 – 240.

[609] Cf. I. Lewandowska, "Prawo cywilne. Obcy kodeks badany przez biegłego. Zasada walutowości u nich i u nas", "Rzeczpospolita", 17 August 2004; Sygn. II CK 489/03.

[610] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2001 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2001], the OCCP's website (http://www.uokik.gov.pl).

In two of these judgments, the Supreme Court returned the case to the CPCC with instructions as to how it should proceed (modify a decision by the OCCP President by imposing a fine on a company that had failed to notify an intended merger, even if the decision of the merits was likely to be that the merger had no negative impact on competition; and annul the decision of the OCCP President, in which the latter had considered that the Bar Association had engaged in a monopolistic practice by preventing the applicant from opening a practice in the city concerned[611]; the Supreme Court estimated that there was insufficient public and legal interest in the case, which was of an individual character and which had no impact on the functioning of the relevant market).

In three cases, the cassation appeal was rejected on procedural grounds, including in one case where the cassation had been introduced by the OCCP President (the reason for rejection in the latter case was that the President of the OCCP had issued his decision to impose a fine for failure to notify an intended merger after the legal deadline for such decisions). In 6 cases (including one introduced by the OCCP President), the cassation appeal was rejected due to insufficient motivation, and the judgment of the CPCC was partially annulled in 2 cases (for having issued a judgment on matters that were not covered by the appeal against the decision of the OCCP President; and for having failed to prove sufficiently the existence of an abuse of dominant position).

There were more (17 in total) judgments concerning competition matters in 2002, but in only two of them were earlier judgments of the CPCC annulled; this was clearly an improvement over the preceding years[612]. In one of these cases – concerning Poland's largest petrol company (PKN Orlen), the Supreme Court considered that the CPCC had failed to prove sufficiently that the fact of charging standard prices all over the country by a dominant company – despite different transport costs – was in itself an abusive practice[613]. In the Supreme Courts' opinion, it could as well be that PKN Orlen – which was operating on all levels of the market (production, wholesale and retail) – could compensate relative losses on one market with profits on another.

In another judgment[614], the Supreme Court expressed the view that even a natural monopolist (in this case, a communal heat distribution company) could not be expected to engage in an economically unjustified, loss-making activity. Thus, its decision to stop providing heat to a housing co-operative ("Energetyk" in Wejherowo) could not be considered as abuse of dominant position, even though the communal company had not taken steps to ensure an alternative source of central heating. As can be seen from the above, the Supreme Court could on occasion act as a "moderator" of perhaps a little over-zealous competition authority and court, engaged in a "crusade" against monopolists.

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[611] In this case, the Supreme Court reiterated that the objective of competition law was to protect economic competition as such, not private business interests. Cf. judgment of 29 May 2001, I CKN 1217/98.

[612] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2002 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2002], the OCCP's website (http://www.uokik.gov.pl).

[613] Cf. judgment of 21 February 2002, I CKN 1041/99.

[614] Of 7 February 2002, I CKN 1002/99.

The tendency to engage more in competition cases continued in 2003, with 21 judgments, out of which 7 considered as unfavourable by the OCCP[615]. Among others, the Supreme Court reproached to the CPCC (and the OCCP) an incorrect delimitation of the relevant market and a failure to consider the impact of the practice on competition in economic terms (as opposed to individual interests of companies concerned)[616]. The involvement of the Supreme Court in competition matters has continued increasing – 31 judgments in this area were issued in the course of 2004, 9 of which were considered unfavourable by the OCCP[617]. In one of the most interesting judgments, the Supreme Court produced a very broad definition of an undertaking (or a company, or an entrepreneur) for the purposes of competition law, which included a private institution of higher education[618]. Further, the Supreme Court criticised the CPCC for having failed to carry out a thorough analysis of the impact of the incriminated practice on all the actual and potential players on the relevant market – and not only companies directly involved in the agreement and the complainant[619]. As can be seen from the above, the Supreme Court has – like the CPCC – become more sensitive to economic (as opposed to purely "legalistic") arguments in assessing anti-competitive conduct.

[615]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2003 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2003], the OCCP's website (http://www.uokik.gov.pl).

[616]Cf. judgment of 24 July 2003 (I CKN 496/01), in a case concerning the imposition on a housing co-operative of a particular method of calculating water consumption by a municipal water company.

[617]Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2004 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], the OCCP's website (http://www.uokik.gov.pl). On this background, it is somehow surprising that the Supreme Court did not issue a single judgment in competition cases during the whole year 2005 (cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2005 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2005], the OCCP's website).

[618]Judgment of 7 April 2004, III SK 22/04. Students of this private school (High School of Human Sciences and Journalism in Poznań) were considered as consumers.

[619]Judgment of 13 May 2004, III SK 44/04.

CHAPTER IV: CHALLENGES OF INTEGRATION OF THE COMMUNITY ANTI-TRUST RULES INTO THE POLISH LEGAL AND INSTITUTIONAL SYSTEM

A. The position and impact of the Polish competition authority vis-à-vis other political, administrative and judicial structures

It could be argued that a successful integration of the Community anti-trust rules and policy into the Polish institutional and legal system would require that the main body empowered to draft, implement and enforce competition policy in Poland enjoys a sufficient degree of independence and carries a necessary weight in relation with other political, administrative and judicial structures, to a certain extent analogous to the position of the European Commission in the EU context. This in turn has an important impact on the overall credibility and consistency of the activities of the Polish competition authority[620].

In this respect, the position of the Antimonopoly Office (and, subsequently, the OCCP) has been somewhat intermediate as compared with its counterparts in the other candidate countries – between the very strong standing of the Hungarian authority and the relatively weak position of the Slovak one. The Antimonopoly Office's first President remained in office during five years, having survived a few Governments of different political "colour" and taken a number of politically difficult and controversial decisions[621]. However, she finally resigned due to the impossibility of working effectively with the new left-wing Cabinet. Subsequently, the Office (followed by the OCCP) went through a period of instability, but this ended in 2001 with the appointment of the new OCCP President, Mr Cezary Banasiński[622].

While assessing the degree of independence of the Polish competition authority, one could also point at the manner in which its budget was being decided. In this context, there is no doubt that the OCCP has had a secured financial independence, its budget being set by the Parliament and not by the executive. The budget has constantly risen since the early 1990s, although it may be argued that this increase has not always followed the increasing workload and scope of the OCCP's mandate.

Another aspect of the Antimonopoly Office's/OCCP's relative strength has been the comparatively wide scope of its activity, and especially the range of matters over which it has had direct decision-making power (as opposed to the right of recommendation). For example, the Polish competition office has traditionally adopted a strong, proactive stance with respect to the politically and economically important (for an economy undergoing transition, as has been the case with Poland) issue of privatisation; in particular, it has taken a number of decisions in which large State-owned companies were broken up prior to being privatised.

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[620] Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 162.

[621] Such as in the *Ruch* case, where the Office fined a newspaper distribution company for practices directed against a publisher (Mr Urban) vociferously critical of the Government in office at the time.

[622] Mr Banasiński's term of office ended definitively in March 2007. He was followed on this post by Mr Marek Niechciał, a 38-tear old economist formerly employed in the Chancellery of the Prime Minister's Office. In this context, some voices of concern were raised about Mr Niechciał's independence from the executive; these accusations were energetically denied by him in the media. Cf. for example, E. Usowicz, M. Kosiarski and A.Krakowiak, "Banki i komórki do kontroli", "Rzeczpospolita", 17 April 2007; and A. Krakowiak, "Życie po życiu w Urzędzie", "Rzeczpospolita", 23 March 2007.

In this respect, other competition authorities of candidate countries (e.g. in the Czech Republic, Hungary and Slovakia) only had the right to express an opinion, and - in addition - some of them have been quite reluctant even to make use of these limited powers (as, for example, in Hungary)[623].

Furthermore, despite the fact that the President of the Antimonopoly Office and, subsequently, of the OCCP, has enjoyed a lower degree of formal, institutional independence from the Government than the Head of the Hungarian Competition Office (although higher than the Czech Competition Minister, who has been a Cabinet member), a lot has in practice depended on the style of carrying out his/her mandate. In other words, the Polish Office has been able to demonstrate considerable substantial independence in spite of having no full formal independence[624]. This has even sometimes reached proportions rarely encountered among competition authorities in "old" EU Member States, with well-established market economies. For example[625], when in the early 1990s[626] the Antimonopoly Office failed to win its case against a car manufacturer whom it had accused of abuse of its dominant position by blocking car sales and thus forcing a price increase, the Office initiated a formal procedure with the Council of Ministers, aiming at the reduction of import duties for cars. This was indeed done, which brought about an increased competition and a reduction of prices on the relevant market.

The Antimonopoly Office has also played a major role in devising various programmes of restructuring of ailing sectors of the Polish economy, thanks to which the interests of competition (and, ultimately, consumers) have been taken into account to a larger extent (to the detriment of the interests of different industrial and trade-union lobbies). This could perhaps be considered as the Antimonopoly Office's greatest achievement in the time of its existence[627]. On the other hand, some authors[628] consider it regrettable that the Polish Office has had to devote so much time and resources to, for example, the regulation of natural monopolies. In their view, this has diverted the Office's resources and led to a "confusion between the roles of price control and the policing of competition, the protection of competition and the protection of competitors".

As regards accountability, the Antimonopoly Office and, later, the OCCP, has developed the practice of publishing its decisions and making them available free of charge to experts, law firms, companies and the general public. Summaries have also been prepared for the most important cases and press releases issued, with approximately 50% of the decisions (or summaries thereof) translated into English. All these documents as well as the Office's annual report have been made available on the Internet[629].

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[623] Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 163.

[624] Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 164.

[625] Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 168.

[626] In the *FSO* case of 1993.

[627] It is noteworthy that this "crusade" in the name of competition has continued after the setting up of the OCCP, mostly with respect to certain formerly monopolised and recently liberalised sectors of the economy. Cf. *inter alia* the OCCP's Report on Competition Policy for the Years 2004 - 2005, commented upon in Chapter III. A.4.

[628] E.g. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 172.

[629] On the OCCP's official website, www.uokik.gov.pl.

In addition, the President of the Office has occasionally published his/her commentaries on important case-law and on the main competition policy issues; further, the OCCP has been publishing a regular bulletin with its jurisprudence.

All decisions by the Polish competition authority contained a statement of reasons of, on average, 6 to 12 pages, depending on the complexity of the decision. The quality of the Office's reasoning has often been questioned by the companies concerned by its decisions, and used as an argument in the appeals to the Antimonopoly Court/CPCC[630].

Regarding the accountability aspect of the activity of the Polish competition office, it is important to consider one more issue, namely the interaction between the Antimonopoly Office/OCCP and other parts of the State administration[631]. As has already been made clear in earlier parts of this text[632], a significant proportion of the OCCP's time and resources has been devoted to the drafting of position papers (or opinions) on draft legislation prepared by various departments of the Government, with a particular focus on the potential impact which these drafts could have on the competition in Poland. The Antimonopoly Office, and subsequently the OCCP, has also maintained external relations, nationally and internationally (chiefly with the competent EU, OECD and national bodies in the EU Member States). The Office has considered it as one of its primary roles to advocate the importance and the objectives of competition policy, both at the level of the authorities, the business community and the general public. This has been done by means of publications, awareness campaigns, lectures, seminars and media events, often sparked by the issue of an important decision[633].

Generally speaking, the communication between the Antimonopoly Office/OCCP and other State institutions has been good, with several channels of communication open and frequently used[634]. The Office's President has played an active role in the overall economic policy, especially using his/her power to comment on draft legislation. In addition, as already mentioned[635], representatives of the Office have participated in the activities of an impressive number of committees and working groups, including those in charge of preparing industrial policy and privatisation strategies. This involvement has been to a large extent uni-directional i.e. without an analogous participation of representatives of other departments in the activities of the Antimonopoly Office/OCCP. However, some of these departments have been required by law to make known their standpoints on changes to competition legislation, and the President of the Polish competition authority has been involved in direct contacts with heads of other State offices on these matters. This has not represented a threat to the Office's independence, thanks to the "quality check" carried out by the fully independent Antimonopoly Court (later, CPCC) and, ultimately, by the Supreme Court.

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630 Cf. Chapter III.B.2.

631 Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 167.

632 Cf. Chapter III.A.3.

633 However, some critics argued that much more had still to be done in this respect, e.g. by means of issuing clear and understandable guidelines on the interpretation and application of the law in force. Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 171. Such guidelines have started being issued after the entry into force of the 2000 Act (cf. for example Chapter III.A.3.m.).

634 Cf. J. Fingleton, E. Fox, D. Neven and P. Seabright, *Competition Policy and the Transformation of Central Europe*, Centre for Economic Policy Research, London 1996, p. 169.

635 Cf. in particular Chapter III.A.3.b. and d.

In the second half of the 1990s, a number of regulatory bodies have been set up in formerly monopolised sectors of the economy, undergoing liberalisation. Among those bodies, one could especially quote the Telecommunications and Postal Services Regulatory Office, the Energy Sector Regulatory Office and the Rail Transport Office. As these bodies had among their tasks issues closely related with the OCCP's mandate, it has gradually become clear that there was a need to ensure better and more structured co-operation between the Office and the bodies in question. This was reflected *inter alia* in the, already mentioned, Report on Competition Policy for the Years 2004 - 2005[636], which enumerated this issue among the OCCP's priorities.

The Report stressed that, to a certain extent, the responsibilities of the OCCP and of the respective regulatory offices overlapped and thus it was necessary to co-ordinate their activities - by means of detailed agreements - in order to avoid contradictory action, too high intervention or lack of intervention (negative conflicts of competence). Such agreements were to define the organisational and procedural basis for co-operation in general and in particular cases, as well as clarify the rules on information exchange. The OCCP considered that this was required not only because of the necessity to avoid conflicting action, but also due to the need to present a "unified front" in contacts with the European Commission, other EU Institutions and Member States[637].

B. Relationship between the Polish and the Community anti-trust rules and institutions - mechanisms of prevention of conflict of laws and jurisprudence

Ensuring a coherent application of the EC competition law throughout the EU – as well as contributing to the creation of a harmonious system for the protection of competition, in which the legislation and the activity of authorities and courts of the Member States would complete and reinforce the protection against anticompetitive practices offered by the Community rules – has been a major concern for the European Commission for a number of years now. These efforts, clearly visible at least since the 1983 Annual Report on Competition Policy, found their first express and structured expression in the Commission Notice of 1997 on Co-operation between National Competition Authorities and the Commission in Handling Cases Falling within the Scope of Articles 85 or 86 of the EC Treaty[638]. This document marked the beginning of an active Commission's policy on decentralisation of enforcement of the Community competition law, thus switching from passive conflict avoidance to active co-operation[639].

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[636] Cf. Chapter III.A.4.

[637] This ambitious and necessary objective has not been met until the end of 2005. It has been again placed in the draft Report on Competition Policy for the Years 2006 – 2007, cf. http://bip.uokik.gov.pl/gfx/uokik/files/Zestawienie_uwag_do_projektu_Polityka_konkurencji_2006-2007_1.pdf. Despite repeated efforts by the OCCP President (cf. *inter alia* C. Banasiński, "Równoległe stosowanie prawa konkurencji i instrumentów regulacyjnych w Polsce (na przykładzie telekomunikacji i energetyki)", in: C. Banasiński (ed.), *Prawo konkurencji – stan obecny oraz przewidywane kierunki zmian*, UOKiK, Warszawa 2006), such agreements have not been concluded by the end of 2006, obliging the OCCP to rely on the – sometimes not very clear and coherent – jurisprudence of the Polish courts on this mater.

[638] O.J. C 313/1997.

[639] Cf. E. Piontek, "A Coherent Application of EC Competition Law in a System of Parallel Competences - Adequacy of the Proposed Measures", Paper presented at the Conference on the Reform of European Competition Law, Freiburg, November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg.

The main principle of the above-mentioned 1997 Notice was shared responsibility for the enforcement of the EC competition rules. Consequently, national competition authorities were encouraged to apply Community law and/or their national competition legislation in a spirit compatible with the objectives of the EC policy. Cases were to be allocated according to the following criteria:

a/ national authorities were to handle cases having mainly national effects;

b/ if, following a preliminary examination by the national authority, it appeared that the case could qualify for an exemption under the EC rules, the national authority was to refer the case to the European Commission, as the only authority empowered to grant exemptions under the EC rules;

c/ in each case, the authority concerned was to carefully consider the issue of the forum applicable to the case, taking into account the objective of obtaining a maximum of efficiency of protection against anticompetitive practices.

However, in practice, the risk of divergent decisions of national competition authorities applying their national rather than Community law remained, not the least because only some 50% of the national competition authorities of the "old" EU Member States were at that time empowered by their respective laws to apply the Community law directly[640]. Furthermore, as the things stood at that time, it was clear that national competition authorities could not decide about exemptions[641].

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[640]Cf. E. Piontek, "A Coherent Application of EC Competition Law in a System of Parallel Competences - Adequacy of the Proposed Measures", Paper presented at the Conference on the Reform of European Competition Law, Freiburg, November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg.

[641]Or at least it was clear to the Commission. E. Piontek stressed that Article 9 (1) of Regulation No. 17/62 was precise and unconditional only with respect to the authority having the sole power to declare Article 85 (1) EC inapplicable pursuant to Article 85 (3) EC. However, it was less clear as to whether this exclusive power should be understood as prohibiting national competition authorities of the Member States to refuse an exemption if their national laws so required. This was particularly problematic in the light of the so-called "double barrier" theory, according to which an agreement, decision or concerted practice could only be considered lawful if it passed the tests laid down by both the national and the Community law (which implied that the same practice could be allowed in one Member State but forbidden in another). Advocates of this theory referred *inter alia* to point 45 of the Commission's 4th Report on Competition Policy, where it stated that "The Court's judgement [...] leaves open the question whether the primacy of Community exemptions constitutes a strict rule, or whether it should be regarded rather as a flexible principle in the application of which it is permissible to take account of the respective interests of the Community and of the Member States". C. S. Kerse in the 4th Edition of his book on EC Antitrust Procedure, published in 1998, stated (on p. 453) that "Indeed, in the absence of a Community provision which requires the performance of an exempted agreement, it may, at least at first sight, be surprising that a Member State could be considered to be under an obligation to relax its national law to permit such performance". However, the Commission has remained consequently opposed to such an interpretation, as illustrated *inter alia* by its reply to the Written Question No. 1508/81 (O. J. C 85/1981), in which it described block exemption regulations and formal exemption decisions as: "the only Commission measures which prevent the application of domestic competition law where this would have the effect of prohibiting or annulling an agreement exempted under Article 85 (3)". This point of view was clearly shared by Advocate-General Tesauro in the *Volkswagen* Case (Case C-266/93, *Bundeskartellamt v. Volkswagen and VAG Leasing*, at 51), where he stated that "the exemption granted [...] cannot but prevent the national authorities from ignoring the positive assessment put on them by the Community authorities. Otherwise, not only would a given agreement be treated differently depending on the law of each Member State, thus detracting from the uniform application of Community law, but the full effectiveness of the Community measure – which an exemption under Article 85 (3) undoubtedly is – would be disregarded". Cf. E. Piontek, "A Coherent Application of EC Competition Law in a System of Parallel Competences - Adequacy of the Proposed Measures", Paper presented at the Conference on the Reform of European Competition Law, Freiburg, November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg.

Moreover, in particular cases, it was often difficult for national authorities to establish whether there was a *prima facie* likelihood that a case would qualify for an exemption. Against this backdrop, the European Commission reached the conclusion that a thorough reform of the system of enforcement of the EC competition law was required. This was the reason behind the issue of the Commission's White Paper of 28 April 1999 on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty[642], which offered a comprehensive set of guidelines for a decentralised application of the EC competition rules.

The White Paper subsequently provided the basis for a draft Council Regulation on implementation of Articles 81 and 82 of the Treaty[643], which was well received by competition authorities of the candidate countries from Central Europe[644].

The main elements of the new system for decentralised enforcement of EC competition law were:

a/ extension of direct applicability of Community competition law to Article 81 (3) EC, combined with a switch from the exemption mechanism based on prior evaluation to *ex-post* supervision of restrictive practices covered by directly applicable exceptions. This implied that the Commission and national competition authorities and courts were to apply Article 81 (3) EC in all proceedings in which they were to apply the prohibition rule of Article 81 (1) EC. Thus, agreements, decisions and concerted practices satisfying the requirements of Article 81 (3) EC were to be valid and enforceable *ab initio*, without the need to apply for a prior administrative decision and, consequently, without the obligation to notify them;

b/ introduction of a procedure ensuring that restrictive practices capable of affecting trade between Member States are assessed pursuant to a single set of Community rules to the exclusion of domestic competition laws; this was to guarantee the consistency of approach and remove the additional burden of parallel application of Community law and national laws, both for competition authorities and for companies;

c/ setting up a new enforcement system, based on close co-operation between national competition authorities and between those authorities and the Commission, as well as with the Community Courts. This mechanism was to ensure that each case would be handled by a single authority (national or the Community one) so as to ensure the consistent application of the Community competition law throughout the internal market.

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[642]Commission Programme No. 99/027.

[643]Issued in Brussels on 27 September 2000, COM (2000) 582 Final. Following a period of public consultation, the Council adopted this draft on 16 December 2002 as Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (O. J. L 1/2003). It entered into force on 1 May 2004 (cf. also Chapters II.B.6. and III.A.1.).

[644]Cf. E. Piontek, "A Coherent Application of EC Competition Law in a System of Parallel Competences - Adequacy of the Proposed Measures", Paper presented at the Conference on the Reform of European Competition Law, Freiburg, November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg.

The new system appeared to be fault-less at first. However, the Polish authority (i.e. the OCCP) submitted some critical remarks on the draft[645]. Further reservations were communicated by some independent experts[646]. These reservations *inter alia* related to the above-mentioned idea of changing the existing exemption system to a directly applicable exception system.

In order to facilitate the task of coherent and consistent application of exceptions under Article 81 (3) EC, which lay ahead of national competition authorities and courts of Member States, the Commission planned to adopt a new type of block exemptions. Such block exemptions were to consist of a general exemption for all agreements and all clauses in a given category, subject only to a list of prohibited ("black") clauses. Further, they would include specific conditions of application and a market share threshold. In individual cases, not covered by block exemption, the Commission envisaged to clarify the conditions governing the application of Article 85 EC by means of notices.

The Commission's new approach was generally followed by the Polish legislator in the 2000 Act[647]. First of all, the very concept of prohibition of restrictive practices applied in the Act (Articles 9 to 26) closely reflected the jurisprudence of the European Commission and of the Community Courts[648].

According to the 2000 Act, two categories of restrictive practices were excluded from prohibition:

a/ agreements of minor importance (the *de minimis* rule);

b/ agreements covered by block exemptions, introduced by means of executory Council of Ministers Regulations and drafted in a manner following closely the group exemptions issued by the Community Institutions[649].

Further, the 2000 Act contained provisions on inspections of premises, including the homes of managers and of other members of the staff of undertakings and associations of undertakings (Article 97, read in conjunction with Article 63), drafted in an almost identical manner as Article 20 of the Regulation No. 1/2003.

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[645]Such critical comments were also sent by competition authorities of other candidate countries, e.g. of the Czech Republic, Estonia and Hungary.

[646]*Inter alia* by E. Piontek. Cf. "A Coherent Application of EC Competition Law in a System of Parallel Competences - Adequacy of the Proposed Measures", Paper presented at the Conference on the Reform of European Competition Law, Freiburg, November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg.

[647]Cf. also Chapter II.B.5. and following.

[648]Cf. E. Piontek, "A Coherent Application of EC Competition Law in a System of Parallel Competences - Adequacy of the Proposed Measures", Paper presented at the Conference on the Reform of European Competition Law, Freiburg, November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg.

[649]That said, the Polish authorities chose to continue issuing "old style" bloc exemptions, enumerating "white" and (sometimes) "grey" clauses. Cf. especially Chapter II.B.7. to 11.

Naturally, the question that remained was the *de facto* capacity of the Polish competition authority and judiciary to implement and enforce the EC competition law in a manner coherent with the policy of the Community Institutions. In this context, the level of knowledge of the Community competition law and of the experience in its application varied greatly[650].

There was a near-ignorance of the EC competition law among the general public administration officials and ordinary judges of the courts of general competence while, on the other hand, the level of expertise among the staff of the OCCP and judges of the CPCC could be considered as very high. The latter could be explained by a long and well-established practice of referring to and relying on the EC competition law and jurisprudence in the application of Polish competition law[651]. In particular, as already mentioned, the Antimonopoly Court (and, subsequently, the CPCC) has frequently referred directly to the Community's competition law as a guideline for the interpretation of corresponding Polish provisions[652]. This is why some experts[653] suggested that, in order to limit the risks of inconsistent or even wrong implementation of the EC competition rules, the right and duty to apply them on the national level should be restricted to the national authorities, whether administrative or judicial, specifically set up and competent to protect competition and/or related areas. Unfortunately, this suggestion was not followed by the European Commission and the Council, and the final wording of Regulation No. 1/2003 speaks simply of "national courts" having the power to apply Articles 81 and 82 EC (cf. Article 6 of the Regulation).

The Polish Government responded to the new rules on the implementation of the EC competition law in its June 2004 Report on Competition Policy for the Years 2004 - 2005[654]. Regarding restrictive practices, it was pointed out that the OCCP President would retain his exclusive competence in cases without an impact on trade between the EU Member States. Likewise, merger control would remain in the exclusive remit of the President of the Office in cases without a Community dimension. In these cases, the Polish competition authority would simply continue applying the Polish competition law.

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[650]Cf. E. Piontek, "A Coherent Application of EC Competition Law in a System of Parallel Competences - Adequacy of the Proposed Measures", Paper presented at the Conference on the Reform of European Competition Law, Freiburg, November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg. M. Sendrowicz (in: "Reforma prawa konkurencji", "Gazeta Prawna" No. 116 (972), 16 June 2003) also pointed at the poor knowledge of the EU competition law, and especially of the new rules implying close co-operation between the Commission and the national competition authorities, among representatives of the Polish business community. She suggested that lawyers (especially those from international law firms) should pay particular attention to making their clients aware of these rules, and especially of the additional "risk" for potential violators due to the increased co-operation and information exchange between respective national competition authorities of the EU Member States. Cf. also E. Derkacz, A. Jurkiewicz, B. Pęczalska, *Reforma wspólnotowego prawa konkurencji*, Zakamycze, Kraków 2005.

[651]Cf. also Chapter III.A.2. and B.1.

[652]Cf. Chapter III.B.2.

[653]E.g. E. Piontek in "A Coherent Application of EC Competition Law in a System of Parallel Competences - Adequacy of the Proposed Measures", Paper presented at the Conference on the Reform of European Competition Law, Freiburg, November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg. He referred to the practice (under national rules) of France and Germany, where only national competition authorities had the right to decide on exemptions.

[654]Already mentioned in Chapter III.A.3. Cf. "Polityka konkurencji na lata 2004 - 2005", Warszawa 2004, available on the OCCP's website (www.uokik.gov.pl). On the issue of the new relationship between the OCCP and the European Commission after the entry into force of Regulation No. 1/2003, cf. also S. Dudzik, "Wpływ członkostwa Polski w Unii Europejskiej na administrację rządową na przykładzie kooperacyjnego modelu stosowania wspólnotowego prawa konkurencji", in: S. Biernat, S. Dudzik, M. Niedźwiedź (ed.), *Przystąpienie Polski do Unii Europejskiej. Traktat Akcesyjny i jego skutki*, Zakamycze, Kraków 2003, pp. 231 – 259.

The situation was different with respect to practices having a potential impact on intra-Community trade, where the OCCP would only have a limited competence (the Report also used the term "parallel competences"). In such cases, the European Commission and the President of the OCCP could apply respectively and independently of each other the Community or the Polish competition law. However, the OCCP (which was in fact the author of the Government's document on competition policy for the years 2004 - 2005) stressed that, if the Commission chose not to apply the Community law in respect of a given practice, it would be the duty of the President of the OCCP to apply the EC competition law next to/in parallel with the Polish law. The potential conflict of laws was to be solved by the principle that the application of the Polish rules could not bring about results contrary to the Community law. This implied *inter alia* the prohibition of applying more restrictive provisions of the Polish law. The only exception to this rule was the abuse of dominant position, where the Office President would be entitled to apply more severe norms of the Polish law. On the other hand, if the Commission chose to act in a given case, the OCCP would lose its competence to apply Community law in that particular case.

The Report underlined the possibility, foreseen by the Regulation No. 1/2003, for the President of the OCCP to terminate the proceedings without deciding on the merits if he considered that a competition authority of another EU Member State had better possibilities to clear the case in an efficient manner. In addition, attention was drawn to the Commission Notice on co-operation in the framework of the European Competition Network[655], where the Commission expressed the view that it should be competent to consider cases where the agreement or practice has an impact on competition in more than three EU Member States.

As already mentioned earlier in this text, one of the new duties of the OCCP stemming from the Regulation No. 1/2003 was carrying out, on the territory of Poland, inspections of premises in cases investigated by the European Commission. These inspections were to be effectuated jointly with the Commission officials, and the OCCP staff would have an auxiliary function. Further, the Commission could request the OCCP to carry out independently inspections of premises located on the Polish territory. The Office would also collect information in co-operation with and upon request of competition authorities of other EU Member States. The OCCP stressed that fulfilling these new tasks would be impossible without an appropriate increase in staff and financial resources.

Concerning merger control[656], the OCCP's report recalled that concentrations with a "Community dimension" would fall under the exclusive competence of the Commission. However, the new Merger Regulation left open certain possibilities for the latter to transfer cases with the Community dimension to national competition authorities in the Member States. In such cases, the OCCP would have the competence to consider a case under the Polish law. An opposite procedure was also foreseen, i.e. the Commission would have the possibility to initiate a transfer of a *prima facie* national (e.g. Polish) case to it by the national competition authority, in order for it to be investigated under the Community law provisions.

[655]Commission Notice on cooperation within the Network of Competition Authorities, O. J. C 101, 27 April 2004, pages 43-53.

[656]These matters were regulated on the Community level by the new Merger Regulation: Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O. J. L 24/ 2004, 29 January 2004, pages 1-22. It entered into force on 1 May 2004.

Such a transfer could take place upon request of the interested undertakings (Article 4 (4) and (5) of the Merger Regulation) or upon the motion of the national competition authority; however, the Commission would only have the possibility to refer to the OCCP with a suggestion to make such a request - it would not have the right to formally initiate such a transfer itself (although one could imagine that such a "suggestion" would normally be followed in practice).

The Report stressed that the introduction of the case transfer system would entail additional duties for the OCCP, such as the monitoring of notifications submitted to the European Commission (in order to assess whether they qualify for a potential transfer: check whether there exists a market on the territory of Poland possessing all features of a separate market; check whether this relevant market represents a part of the EC internal market; and assess whether the concentration in question has an impact on this market or risks to bear a significant influence of it). As regards concentrations without a Community dimension, the OCCP President would have the possibility to request a transfer of the case to the Commission if the concentration had an impact on intra-Community trade and created the danger of a significant impact on competition on the territory of Poland. In this respect, the OCCP stressed that proving an "impact on trade" was much more difficult and resource-consuming than finding the evidence of a "potential impact on trade".

In addition to the analysis under the criteria set out by the Community Regulation, the OCCP highlighted the need to proceed each time with an assessment of the advisability of the transfer of the case to the Commission, and (in case of transfers pursuant to Article 4 (4) and (9) of the Merger Regulation) the possibility for the President of the Office to consider the case within the time-limits imposed by the law. Furthermore, the OCCP President would have to take a stand with respect to possible motions by other national competition authorities and motivated submissions by undertakings, transmitted by the Commission pursuant to Article 4 (4) and (5) as well as Article 22 of the Merger Regulation. In this context, the Report stressed a relatively short time-limit (15 days) for these actions. At the same time, the OCCP pointed out that in order to function efficiently, the new system of allocation of cases would require not only thorough legal, economic and policy analyses but also intense contacts with the European Commission, and especially with all other national competition authorities in the EU Member States.

This was an important challenge for the Office, which was aware of the fact that its relative position within the network of Community and national competition authorities would to a large extent depend on its performance under the new rules. The Office considered important to avoid situations in which cases of "strategic" importance for competition in Poland would systematically be dealt with by the European Commission, while the OCCP would waste its time and resources on examining transnational mergers which could be handled far better by the Commission. In order to fulfil its new tasks, the OCCP considered that it required a substantial increase in qualified staff and financial resources, needed to cover the cost of expert advice and international co-operation.

The Polish competition authority became a member of the European Competition Network (ECN) as from the entry into force of the Regulation No. 1/2003[657]; the OCCP President issued a statement to this effect on 30 March 2004[658]. As a consequence of this, starting from the moment of Poland's entry to the EU and (at the same time) the entry into force of the above-mentioned Regulation, i.e. as of 1 May 2004, the OCCP has been obliged to check, each time it became interested in a given case, whether a competition authority of another EU Member State had not already initiated proceedings in the same case, or whether it did not consider initiating such proceedings. Were it to be the case, the President of the OCCP had to assess whether the Polish authority's intervention was suitable. If he concluded, for whichever reason, that the competition authority of another Member State would handle the case more efficiently, he was to inform the other authorities belonging to the ECN of his conclusion. It could also happen that several competition authorities would wish to take up the case simultaneously, sometimes appointing one of them as a leading authority.

In the Report on competition policy in 2004 and 2005, the OCCP President stressed that he had undertaken (in the aforementioned statement of 30 March 2004) that he would respect the rules set out in the Regulation No. 1/2003 and in the related Commission Notice[659] in his work i.e. that, even though he was not obliged by the Regulation to abandon the case for the benefit of another ECN member, he would do it in practice when required by the need to ensure efficient and coherent implementation of the EC competition law.

Further, the President of the OCCP stressed that certain cases might be so complex and/or concern such a large number of countries, that the European Commission would be the only suitable body to investigate them. In this respect, the OCCP's position was that the Commission had the right to decide to take over the case at any stage, even if the investigation had already been initiated and was well underway in Poland. Moreover, if the Commission considered that a decision by the President of the Polish competition authority could threaten the coherence and uniform application of the Community law, it could take over the case immediately prior to the issue and publication of that decision - that is why the President of the OCCP was required to communicate all draft final decisions to the Commission.

The OCCP fully approved the new Commission's institutional and procedural make-up for implementation of the Community competition law (e.g. the "modernisation package"). However, the Office's President insisted that the OCCP's functioning in this new context required, on the one hand, some legislative and regulatory amendments and, on the other, developing new procedures for decision-making and for information exchange between the authorities concerned. In this respect, the Office intended to follow entirely the mechanisms elaborated by the European Commission and set out in its (already mentioned before) Notice on cooperation within the ECN.

The main actions to be undertaken at the stage of joining the ECN included:

a/ adapting the OCCP's internal structure by selecting teams or persons responsible for particular areas of co-operation;

b/ devising internal procedures for co-operating with other members of the ECN;

[657]Cf. also the Commission Notice on cooperation within the Network of Competition Authorities, O. J. C 101, 27 April 2004.
[658]Cf. "Polityka konkurencji na lata 2004 - 2005", Warszawa 2004, on the OCCP's website (www.uokik.gov.pl).
[659]Cf. above.

c/ training of the Office's staff in the new procedures;

d/ preparing the necessary technology and infrastructure (including computers with access to the Circa network, in which the ECN was to operate).

It is noteworthy that, according to the OCCP's own declaration, the tasks under a/ and b/ above were to a large extent accomplished before 1 May 2004.

The joining of the ECN (and, more generally, the entry into force of Regulation No. 1/2003) created an entirely new situation for the Polish competition authority, of which the OCCP was fully aware[660]. The "europeanisation" of Polish competition law was another – connected – aspect of this new situation, which meant *inter alia* that Poland had lost a part of its sovereign powers in legislating in the field of competition policy. Further, the OCCP's rights and duties as a member of the ECN resulted *de facto* in weakening the links of the Office with other parts of the State administration, to the benefit of close co-operation with competition authorities of other Member States and, first of all, with the European Commission.

Seen in the context of the functioning of the Polish system of protection of competition, the new situation was likely to have as its consequence that the manner in which the OCCP would apply the Polish competition law (both on the merits and as regards the procedure) would become closely aligned with the manner in which the European Commission – as well as the OCCP itself (in certain situations) – applied analogous provisions of the EC competition law. In a way, this phenomenon was even more interesting as it could be seen as the first example of the manner in which the Polish legal system as a whole would gradually become "europeanised"[661].

It should be stressed that this issue has in the meantime gained practical significance, as the OCCP has started its first proceedings in which Articles 81 and 82 were directly applied. Two such proceedings were initiated in 2004[662], one concerning an agreement between Polish and foreign banks (members of the Visa and Mastercard systems) on interchange tariffs, the other involving the Polish telecom (TP) which allegedly prevented competing companies from providing internet services of decent quality via foreign transit; in the latter case, the OCCP considered that the incriminated practice could have impact on trade between EU Member States in so far as it forced Polish operators to decline the services of foreign providers.

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[660] As expressed in analytic papers published by senior OCCP staff on its website, cf. e.g. M. Krasnodębska-Tomkiel, "Wpływ reformy wspónotowego prawa konkurencji (rozporządzenia Nr 1/2003/WE) na system prawa wewnętrznego państw UE, w tym Polski".

[661] Cf. M. Krasnodębska-Tomkiel, above.

[662] Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2004 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2004], the OCCP's website (http://www.uokik.gov.pl).

The number of proceedings in which Articles 81 and 82 EC were directly applied rose to eight in 2005[663], including two inquiries into various forms of abuse of dominant position by TP (restricting access to its network for other operators; applying exclusivity clauses for certain services in relation with fixed-line telephony, etc) and an investigation into the suspected abuse of dominant position by Poland's largest life insurance company (PZU Życie) on the market of employees' group insurance, *inter alia* through requiring that all employees agree to a cancellation of the agreement (despite the fact that employees were not parties to such agreements) and obliging the employers to bear financial consequences in case when employees stepped out of the scheme. All those proceedings were still ongoing at the end of 2005[664].

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Regarding the relationship between the activity, in the field of competition law, of the Community Institutions and the Polish Court for the Protection of Competition and Consumers (CPCC), the situation has changed (and, in a certain way, became more structured and clear) with the accession of Poland to the EU and, especially, with the entry into force of the new EC competition policy (the "modernisation package", already referred to earlier in this text)[665]. The Community's point of view on this relationship was clarified in the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC[666]. As mentioned before, the Notice referred to all national courts and not only to those specialised in competition law issues - an option regretted by certain experts[667].

The Commission stressed that national courts play a particular role in the enforcement of the Community competition law as they have the power to find a particular contract void and to award damages to the injured party[668]. It also stressed that the national courts must apply the Community law when assessing agreements, decisions of undertakings or concerted practices which may affect trade between Member States, irrespective or whether they apply the national competition rules in parallel or not[669]. In this context, it was of utmost importance that such a parallel application of national law does not lead to a different outcome from that of the EC competition law.

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663 Cf. *Sprawozdanie z działalności Urzędu Ochrony Konkurencji i Konsumentów w 2005 r.* [Report on the Activity of the Office for Competition and Consumer Protection in 2005], the OCCP's website (http://www.uokik.gov.pl).

664 Cf. above.

665 On this issue, cf. also A. Wentkowska, "Sądownictwo polskie w przeddzień przystąpienia do Unii Europejskiej – spostrzeżenia *de lege ferenda*", in: S. Biernat, S. Dudzik, M. Niedźwiedź (ed.), *Przystąpienie Polski do Unii Europejskiej. Traktat Akcesyjny i jego skutki*, Zakamycze, Kraków 2003, pp. 303 – 312. The author *inter alia* points out that many Polish judges will likely have problems accepting the application of norms not stemming from the Polish legislature, as well as the principles of primacy and direct effect of the Community law. Further, it will not be easy for them to understand and to accept the way of reasoning of the Community Courts, with its quasi "common law" character, their tendency to apply a widely teleological interpretation and the judges' reluctance to accept foreign organs' somewhat "superior" position in this context.

666 O. J. C 101, 27 April 2004, pages 54-64.

667 Such as E. Piontek, cf. above.

668 Cf. recital 4 of the Notice.

669 Cf. recital 5.

The Commission recalled that Article 3 (2) of the Regulation No. 1/2003 provided that agreements, decisions or concerted practices which did not infringe Article 81 (1) EC or which fulfilled the conditions of Article 81 (3) EC could not be prohibited under the national competition law. Further, referring to the well-established case-law of the ECJ[670], it stressed that, on the other hand, agreements, decisions or concerted practices violating Article 81 (1) EC and not qualifying for the exemption under Article 81 (3) EC could not be upheld under the national law.

As regards the parallel application of national competition law and Article 82 EC to the unilateral conduct of companies abusing their dominant position, the situation was different in that the Regulation No. 1/2003 did not contain provisions analogous to those concerning agreements, decisions and concerted practices. However, the Commission expressed the view that the general principle of the primacy of Community law required, in case of conflicting national and EC competition provisions, the national courts to ignore the national provision, irrespective of whether the latter provision was adopted prior to or after the adoption of the Community one[671].

The Commission pointed out that, apart from the application of Articles 81 and 82 EC, the national courts might also be required to apply Community acts, provided these acts had direct effect. Thus, courts in the EU Member States could, for example, be brought in the position to enforce individual Commission decisions or group exemption regulations. The Commission stressed that, when doing so, national courts acted within the framework of the Community law and were consequently bound to observe the general principles of Community law[672]. Further, the Commission considered that, in such cases, the national courts would be bound by the case-law of the Community courts as well as by the group exemption regulations. Moreover, the Commission took a brave and somewhat risky position (from the standpoint of the principle of separation of powers and independence of the judiciary), stating that national courts should feel bound by the jurisprudence of the Commission when applying the EC competition provision in the same case in parallel with or subsequent to the Commission[673].

Even more controversial was the statement that, without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts might "find guidance" in the Commission regulations and decisions "which present elements of analogy" with the case they were considering, as well as in the Commission notices and guidelines relating to the application of the EC competition rules, and in the Commission's annual reports on competition policy[674].

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[670]Case 14/68, *Walt Wilhelm* [1969] ECR 1, and joined cases 253/78 and 1 to 3/79, *Giry and Guerlain* [1980] ECR 2327.

[671]Cf. recital 6. The Commission referred to Case 106/77, *Simmenthal* [1978] ECR 629, and Case C-198/01, *Consorzio Industrie Fiammiferi (CIF)* [2003] 49.

[672]The Commission based this view *inter alia* on the position of the ECJ in Case 5/88, *Wachauf* [1989] ECR 2609.

[673]Cf. recital 8 of the Notice.

[674]The Commission found support for its position in the following jurisprudence of the ECJ: Case 66/86, *Ahmed Saeed Flugreisen* [1989] ECR 803; Case C-234/89, *Delimitis* [1991] ECR I-935, and the Joined Cases C-319/93, C-40/94 and C-224/94, *Dijkstra* [1995] ECR I-4471. A list of Commission guidelines, notices and regulations in the field of competition policy, and in particular the group exemption regulations, was annexed to the Commission's Notice.

Regarding the procedure for the application of the EC competition law by national courts, the Commission acknowledged the general principle according to which the procedure and the sanctions for possible infringements were the matter for the Member States' national laws. However, the Commission stressed that, to some extent, the Community law also determined the conditions in which the EC competition rules were enforced. As examples of such situations, the Commission quoted the Community provisions giving the national courts the right to ask for the Commission's opinion on questions concerning the application of the EC competition rules, or those allowing the Commission and national competition authorities to submit written observations. The Commission stressed that such Community law provisions prevailed over national rules; therefore, the national courts had to set aside national rules which, if applied, would conflict with these Community law provisions. The Commission also recalled that, where such Community law provisions were directly applicable, they were a direct source of rights and duties for all those affected, and had to be fully and uniformly applied in all the Member States from the date of their entry into force[675].

The Commission went on to say that, in the application of the national procedural rules and sanctions in respect to violations of the EC competition provisions, the national courts must respect the primacy and the general principles of the Community law. In this regard, the Commission recalled the case-law of the ECJ, according to which:

a/ where there is an infringement of the Community law, the national law must provide for sanctions which are effective, proportionate and dissuasive[676];

b/ where the infringement of the Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages[677];

c/ the rules on procedure and sanctions which the national courts apply to enforce the Community law must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness)[678], and

d/ must not be less favourable than the rules applicable to the enforcement of the equivalent national provisions (the principle of equivalence)[679].

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[675] Cf. recital 9 of the Notice, in which the Commission referred to Case 106/77, *Simmenthal* [1978] ECR 629.

[676] Cf. Case 68/88, *Commission v. Greece* [1989] ECR 2965.

[677] In this context, the Commission referred to the following cases: a/ as regards damages in case of an infringement by an undertaking - Case C-453/99, *Courage and Crehan* [2001] ECR 6297; b/ as regards damages in case of an infringement by a Member State or by an authority which is an emanation of the State, and the conditions of such liability - Joined Cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357; Case C-271/91, *Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367; Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029; Case C-392/93, *British Telecommunications* [1996] ECR I-1631; and Joined Cases C-178/94, C-179/94 and C-188/94 to 190/94, *Dillenkofer* [1996] ECR I-4845.

[678] To illustrate this principle, the Commission recalled, as examples, Case 33/76, *Rewe* [1976] ECR 1989; and Case 45/76, *Comet* [1976] ECR 2043, as well as Case 79/83, *Harz* [1984] ECR 1921.

[679] Here, the Commission again quoted the *Rewe* case (cf. above), as well as Case 199/82, *San Giorgio* [1983] ECR 3595 and Case C-231/96, *Edis* [1998] ECR I-4951.

Further, the Commission outlined some obligations which, in its opinion, the national courts had to respect in case of parallel or consecutive (i.e. subsequently to the Commission) application of the EC competition provisions[680]. First of all, the Commission stressed that, when issuing a decision on a case prior to the Commission (considering the same case), the national courts should avoid the risk of an outcome conflicting with the future Commission's decision. In order to prevent such a conflict, the Commission proposed a system under which the national courts would request it to inform them whether it had initiated proceedings in the same case and, if so, what would be the likely final outcome of these proceedings[681]. In the interest of legal certainty, the Commission suggested that the national courts stay the proceedings in such cases pending the receipt of the Commission's response (i.e., in fact, a procedure quite similar to the preliminary reference system set in place by the EC Treaty in respect of the Community Courts).

For its part, the Commission promised that it would give priority to cases in which the national courts had stayed their proceedings. On the other hand, the Commission advised the national courts to look at the precedents in the Commission's case-law and to go ahead with taking their decisions in similar cases without staying the proceedings and requesting help from the Commission; the same would apply to the cases where the national courts "could not reasonably doubt" about the contents of the Commission's contemplated decision.

The Commission expressed the view[682] that, if it was faster than the national court in reaching a decision on a particular case, the latter could not take a decision contradicting the Commission's one. However, if the national court disagreed with the Commission's stance, it could (as the only option at its disposal) make a preliminary reference to the ECJ[683]. On the other hand, the Commission stressed that if its decision was challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depended on the validity of the Commission's decision, the national court had no choice but to stay its proceedings pending the final judgment in the action for annulment by the Community courts, unless it considered that, in the circumstances of the case, it would be better to have recourse to the preliminary reference procedure[684]. In both cases, it was - in the Commission's view - up to the national court to decide whether interim measures were required to safeguard the interests of the parties[685].

The Commission, while acknowledging that (unlike in the case of the national and the Community Courts), the EC Treaty did not contain provisions explicitly obliging the national courts to co-operate with it in handling cases with a Community element, stressed nevertheless that such a general obligation could be read from the jurisprudence of the Community Courts based on Article 10 EC[686], requiring the EU Member States to facilitate the achievement of the Community's tasks. This provision had been interpreted as imposing on the European Institutions and the Member States (as well as all the emanations of the State, including the judicial powers) mutual duties of loyal co-operation with a view to attaining the objectives of the EC Treaty[687].

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[680] Cf. recitals 11 to 14 of the Notice.

[681] In this respect, the Commission recalled the opinion of the ECJ from Case 48/72, *Brasserie de Haecht* [1973] ECR 77, according to which the initiation of proceedings implies an authoritative act of the Commission, evidencing its intention of taking a decision.

[682] Cf. recital 13 of the Notice.

[683] The Commission referred to Case 314/85, *Foto-Frost* [1987] ECR 4199.

[684] Cf. Case C-344/98, *Masterfoods* [2000] ECR I-11369.

[685] Cf. recital 14 of the Notice, as well as Case C-344/98, *Masterfoods* [2000] ECR, I-11369.

[686] Cf. recital 15 of the Notice.

[687] Cf. Case C-94/00, *Roquette Frères* [2002] ECR 9011.

For its part, the Commission declared its readiness to assist (as *amicus curiae*[688]) the national courts in the application of the EC competition rules. Such assistance (in the form of transmission of information, provision of opinions upon request of the national courts and the submission of observations) was already set out in Article 15 of the Regulation No. 1/2003, and the Commission stressed that the national procedural rules could not create obstacles to these forms of assistance (as they were expressly foreseen by the Community secondary legislation); furthermore, the Commission expressed the view that the Member States were under the obligation to adopt procedural rules necessary for the correct implementation of this assistance system.

Naturally, the Commission stressed that it would, in any event, respect the independence of the national courts and that the assistance offered would not be of a binding nature[689]. Further, the Commission would ensure that its co-operation with the national courts does not violate its obligation to respect professional secrecy, and that it does not bring in danger its own functioning and independence. Moreover, the Commission stressed that its possible involvement in cases before national courts would only limit itself to the defence of the public (Community) interest; thus, it would never intervene in the private interest of one of the parties (and such requests from companies would be rejected, with information about it provided to the competent national court).

The Commission undertook to transmit relevant information to the national courts[690]. In particular, the national courts could ask the Commission for documents in its possession or for information of a procedural nature (whether a certain case was pending before the Commission; whether the Commission had initiated a procedure or whether it had already taken a position; when a decision was likely to be taken, etc), and the Commission endeavoured to respond to such requests within one month, with limitations due to its obligation to respect professional secrecy (business secrets and other confidential information)[691]. However, it qualified this last undertaking by recalling that the combined reading of Articles 10 and 287 EC did not lead to an absolute prohibition for the Commission to transmit such confidential information to the national courts.

To justify this position, the Commission referred to the case-law of the Community courts[692], according to which the duty of loyal co-operation required it to provide the national courts with whatever information they asked for, even information covered by professional secrecy. However, in doing so, the Commission could not undermine the guarantees laid down in Article 287 EC. Consequently, before transmitting such information, the Commission intended to remind the national courts of their obligation under the EC law to respect the latter provision, and was going to ask them whether they could and would guarantee the protection of confidential information and business secrets. The information in question would only be transmitted provided the national courts offered such a guarantee.

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[688] Cf. recitals 17 to 35.

[689] Cf. recital 19 of the Notice.

[690] Cf. recital 21 of the Notice.

[691] Cf. Article 287 EC and Case C-234/89, *Delimitis* [1991] I-935.

[692] Cases C-2/88, *Zwartveld* [1990] ECR I-4405 and T-353/94, *Postbank* [1996] ECR II-921.

Furthermore, the Commission would refrain from transmitting information to national courts for "overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence"[693]. This included information voluntarily submitted to the Commission under the "leniency procedure" (unless the company concerned agreed to such a transmission).

The Commission suggested that, when called upon to apply the EC competition rules to a case pending before them, the national courts could first look for clarification of any doubts in the case-law of the Community courts or in the Commission's secondary legislation, notices and guidelines on the application of Articles 81 and 82 EC[694]. Were this not to be sufficient to clarify the legal situation, the national courts could ask the Commission for its opinion (not binding on the courts, of course) on these issues, including the economic, factual and legal matters[695].

The Commission stated that it would normally provide the requested opinion within 4 months from the date of receipt of the request, unless additional information was needed from the national courts (in which case this deadline would start to run from the moment when the additional information was received by the Commission). The Commission would refrain from considering the merits of the case (although it might be hard to avoid its strong impact on these considerations in practice – note by author).

According to Article 15 (3) of the Regulation No. 1/2003, the national competition authorities and the Commission could submit observations on issues relating to the application of Articles 81 or 82 EC to a national court which was called upon to apply those provisions. The regulation distinguished between written observations, which the national competition authorities and the Commission could submit on their own initiative, and oral observations, which could only be submitted with the permission of the national court. In this context, the Commission stressed[696] that it would limit its observations to an economic and legal analysis of the facts underlying the cases pending before national courts. Further, the Commission "warned" the courts that it might well have to request them to transmit copies of all documents necessary to make a useful assessment of the case; however, in line with Article 15 (3) (2) of the Regulation, it promised that it would not use those documents for any other purpose than for the preparation of its observations (and it would fully respect the business and other secrets).

As regards the procedure for the submission of such observations, the Regulation No. 1/2003 did not contain any provisions in this respect. Consequently, the rules applicable were those in force in each EU Member State. In this context, the Commission noticed[697] that the national courts would be in a difficult situation of having to decide which procedure to follow in cases when the Member States had not yet established the relevant procedural framework.

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[693]Cf. recital 26 of the Notice, as well as Cases C-2/88, *Zwartveld* [1990] ECR I-4405; C-275/00, *First and Franex* [2002] ECR I-10943, and T-353/94, *Postbank* [1996] ECR II-921.

[694]Cf. recital 27 of the Notice.

[695]The Commission relied on Case C-234/89, *Delimitis* [1991] ECR I-935, and on Joined Cases C-319/93, C-40/94 and C-224/94, *Dijkstra* [1995] ECR I-4471.

[696]Cf. recital 32 of the Notice.

[697]Cf. recital 34.

In any event, the Commission stressed that the rules applied would have to follow the general principles of the Community law (especially the fundamental rights of the parties involved in the case); could not make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness)[698]; or make it more difficult than the submission of observations in court proceedings where equivalent national law was applied (the principle of equivalence).

The Commission once again recalled[699] that the duty of co-operation also implied that the Member States' authorities had to assist the European Institutions with a view to attaining the objectives of the EC Treaty[700]. The Regulation No. 1/2003 foresaw such assistance in three cases:

a/ the transmission of documents necessary for the assessment of a case in which the Commission would like to submit observations (cf. above);

b/ the transmission of judgments applying Articles 81 or 82 EC; and

c/ the role of the national courts in the context of a Commission inspection.

With regards to point b/, Article 15 (2) of the Regulation required the Member States to send to the Commission a copy of any written judgement of the national courts applying Articles 81 or 82 EC without delay after the full written judgement was notified to the parties. The objective of this provision was to inform the Commission in due time of cases for which it could consider appropriate to submit observations at the (possible) appeal stage. Turning to point c/, the Commission noted that the national legislation might require authorisation from a national court to allow a national enforcement authority to assist the Commission in case of opposition of the undertaking concerned; such authorisation might also be sought as a precautionary measure.

The Commission recognised a national court's power to control the authenticity of the Commission's inspection decision, and to assess whether the coercive measures envisaged were not arbitrary or excessive. In the context of this assessment, the national court could ask the Commission, directly or through the national competition authority, for detailed explanations (in particular on the grounds the Commission had for suspecting infringement of Articles 81 and 82 EC, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned[701]).

As to inspections of non-business premises, the Regulation No. 1/2003 required the authorisation from a national court before a Commission decision, ordering such an inspection, could be executed. In that case, the national court's assessment could, in addition to the elements mentioned above, also concern the reasonable likelihood that business books and records relating to the subject matter of the inspection were kept in the premises for which the authorisation is requested.

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[698] Cf. recital 35 of the Notice, where the Commission referred to Joined Cases 46/87 and 227/88, *Hoechst* [1989] ECR 2859.

[699] In recital 36 of the Notice.

[700] The Commission referred here to Case C-69/90, *Commission v Italy* [1991] ECR 6011.

[701] Cf. also Case C-94/00, *Roquette Frères* [2002] ECR 9011.

The reaction of the Polish judiciary and, more generally, representatives of the legal profession and the academia to the Commission Notice and to the new co-operation system was generally positive. However, several voices were raised (for example, during the workshops organised in September 2004 by the Polish Competition Law Association in co-operation with the Linklaters law firm)[702], expressing concern about the degree of preparation of Polish courts for operating in the new system, as well as the efficiency of communication between the Polish courts and the Commission[703].

The scarcity of information available about the actual implementation of the system introduced by the Regulation No. 1/2003 by the Polish courts made it difficult to assess the situation shortly after accession. However, it appeared from the Commission's first annual review of the application of the new system[704] that – at least in the period until the end of 2005 – the Polish courts did not make use of the possibilities offered by Article 15 of the Regulation[705]; in fact, very few courts in the EU's 25 Member States had done so, although it was interesting to note that – from among the new 10 Member States – a court in Lithuania was quicker in applying the new procedure than any court in Poland[706].

[702] Cf. B.G., "Competition Meeting", "Warsaw Voice", 15 September 2004.

[703] Cf. also K. Kohutek, "Stosowanie reguł wspólnotowego prawa konkurencji przez sądy krajowe", Europejski Przegląd Sądowy No. 8/2006.

[704] Set out (as a separate chapter concerning the implementation of Article 15 of the above-mentioned Regulation) in the Commission's 2005 Annual Report on Competition Policy, issued in Brussels on 15 June 2006 (SEC(2006)761 final).

[705] I.e. to ask the Commission for information in its possession or for an opinion on questions concerning the application of the EU competition rules, pursuant to Article 15 (1) of Regulation No. 1/2003. The same could be said in respect of 2006 (cf. the Commission's 2006 Annual Report on Competition Policy, issued in Brussels on 29 June 2007, COM (2007) 358 final).

[706] In 2005, the Commission provided information in reply to three requests from national judges and issued six opinions: three in reply to requests from Belgian courts, one to a Lithuanian court and two to Spanish courts. Cf. the Commission's 2005 Annual Report on Competition Policy, paragraph 219. The Lithuanian case is, in fact, very interesting also for the Polish circumstances, as it deals with the abuse of dominant position by a local community (an issue of high relevance for the Polish competition authority and courts, as could be seen in Chapter III). The Vilnius District Court asked whether it was compatible with Article 86 (1) EC, in conjunction with Article 82 EC, for a municipality to carry out a tender procedure for the award of an exclusive right to collect waste for 15 years. The applicant in the legal action pending before the court had argued that such long-term exclusivity would grant the concession-holder the opportunity to charge excessive prices to certain clients. In its opinion, the Commission referred to the case law of the ECJ on the issue of the existence of a dominant position in the waste management sector (Case C-209/98, *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [2000] ECR I-3743 ; and Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075) and to the Notice on the definition of relevant market for the purposes of Community competition law (O.J. No C 372, 9 December 1997, p. 1). The opinion also outlined the conditions to be fulfilled for a finding of a violation of Article 86 (1), in conjunction with Article 82 EC, namely that an abuse by the successful concession-holder would have to be the inevitable or at least the likely result of the tender conditions. Finally, the opinion indicated that a violation of the competition rules could be justified under Article 86 (2) EC, with reference to the *Københavns* judgment.

Further, it is noteworthy that, in the course of 2005[707], the Commission did not receive any copy of a judgment issued by a Polish court deciding on the application of Articles 81 or 82 EC, as is foreseen by Article 15 (2) of Regulation No. 1/2003. This did not necessarily mean that none of the Polish courts has had to deal with such questions during this period – the "fault" could as well lie with the Polish Government, whose duty it was to transmit such judgments to the Commission[708]. Whatever the actual reason behind this, it was clear that the implementation of the mechanism of co-operation between the Commission and the Polish courts on issues relative to competition law remained still at a very early stage.

[707] As well as in 2006 (cf. the Commission's 2006 Annual Report on Competition Policy, issued in Brussels on 29 June 2007, COM (2007) 358 final).

[708] As a "consolation", one should note that the relatively small number of judgments communicated to the Commission from all the 25 Member States during the period in question (i.e. the total of 54 judgments) could give rise to doubts as to whether all the national authorities were sufficiently vigilant in implementing Article 15 (2) of Regulation No. 1/2003.

CHAPTER V: BRIEF OVERVIEW OF THE MAIN DEVELOPMENTS SINCE POLAND'S ENTRY INTO THE EU (UNTIL THE END OF 2009)

A. Legislative developments

The 2000 Act was replaced by a new Act on Competition and Consumers Protection on 16 February 2007 (hereafter the 2007 Act)[709]. In order to improve the effectiveness of the OCCP's operations, the 2007 Act eliminated the institution of proceedings launched upon a motion with regard to practices restricting competition. Antitrust proceedings were thus only initiated *ex officio*. However, it was also possible to submit a written notification concerning the suspicion of an anti-competitive practice. Such notification was not binding for the President of the Office, which meant that he was not obliged to initiate proceedings on its basis. This allowed the OCCP to focus on the most serious violations of the 2007 Act.

In the main, the 2007 Act took over the provisions of the 2000 Act regarding restrictive agreements and abuse of dominant position. This applied in particular to the catalogue of prohibited restrictive practices[710] and to the *de minimis* rule which was defined in the same way as previously[711]. As for merger control, the essential elements of the 2000 Act had likewise been taken over in the 2007 Act. The OCCP's main responsibility in this respect remained the control over transactions between companies (e.g. mergers, takeovers, acquisitions and joint ventures) which influenced or could influence the Polish market. That said, the threshold for companies required to obtain a prior clearance from the OCCP President was significantly raised: under the 2007 Act a notification was obligatory when the companies' turnover in the year preceding the application exceeded one billion EUR in the world or 50 million EUR in Poland[712].

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[709] Dz. U. 2007, Nr 50; poz. 331. Cf. also the OCCP's website (www.uokik.gov.pl) and Gazeta Podatkowa, "Nowa ustawa o ochronie konkurencji i konsumentów", 21 April 2007.

[710] Prohibited restrictive agreements included in particular: direct or indirect price fixing; limiting or controlling production or sale and technical development or investments; sharing markets of sale or purchase; applying to equivalent transactions with third parties onerous or not homogenous agreement terms and conditions, thus creating for these parties diversified conditions of competition; making conclusion of an agreement subject to acceptance or fulfillment by the other party of another performance, having neither substantial nor customary relation with the subject of such agreement; limiting access to the market or eliminating from the market undertakings which are not parties to the agreement; collusion between tender participants or between the participants and the organizer of the tender, of the terms and conditions of the bids to be proposed, particularly as regards the scope of works or the price. Examples of the abuse of a dominant market position expressly mentioned in the 2007 Act included: direct or indirect imposition of unfair prices, including predatory prices or prices glaringly low; delayed payment terms or other trading conditions; limiting production, sale or technological progress to the prejudice to contractors or consumers; application to equivalent transactions with third parties onerous or not homogenous agreement terms and conditions, thus creating for these parties diversified conditions of competition; making conclusion of the agreement subject to acceptance or fulfillment by the other party of another performance having neither substantial nor customary relation with the subject of agreement; counteracting formation of conditions necessary for the emergence or development of competition; application of burdensome contractual terms and conditions of contracts, yielding to this undertaking unjustifiable benefits; and market sharing according to territorial, product, or entity-related criteria.

[711] I.e. agreements between non-competing companies if the market share of any of these companies on the relevant market did not exceed 10%; as well as agreements between competitors if their joint market share did not exceed 5%.

[712] For a reminder, under the 2000 Act the woldwide turnover threshold was EUR 50 million. This low threshold resulted *inter alia* in many financial investors, with the bulk of turnover outside Poland, being required to notify intended mergers between two companies doing business exclusively abroad.

This obligation was waived if the turnover of the target company had not exceeded the equivalent of 10 million EUR in Poland in any of the two financial years preceding the notification, or if the merger involved entities belonging to one capital group[713].

The OCCP cleared transactions which did not lead to a significant restriction of competition. Otherwise, it prohibited the consolidation. It was also possible that a merger or acquisition was cleared subject to certain terms and conditions, for example resale of a part of assets. Moreover, the 2007 Act exceptionally allowed to clear a transaction leading to a significant restriction of competition if it simultaneously contributed to economic development or technical progress or had a favourable impact on the economy.

The OCCP President could impose a fine of up to 10 % of previous year's revenue, if a company, even unintentionally, carried out a merger or acquisition without obtaining the President's prior consent. Furthermore, if this merger proved to have been anticompetitive, structural sanctions could be applied. In general, the 2007 Act increased the fines that could be issued by the OCCP President: for example even if a company had no profit in the preceding two years, the Office's President could punish it with a fine equivalent to up to 200 average monthly salaries (in the 2000 Act it was up to 100 average salaries). Further, the penalty payments for the failure to timely execute the President's order were increased too: up to 10.000 EUR per day. To balance this, the rules on calculating fines had been rendered more precise and transparent, including the set of criteria which the OCCP's President had to follow (e.g. the length of violation, degree and precise circumstances, as well as any prior violations and fines imposed on the company concerned).

The 2007 Act abolished the requirement of notification of an intended merger consisting of acquisition of shares or securities of another company, allowing to obtain at least 25% of votes at the shareholder's general meeting, as well as in case when the same person became a member of the board or control body of two competing companies.

As for the provisions on inspections of companies, the OCCP's powers were reinforced, inter alia making clear that the Office could carry out such "dawn raids" at the stage of preliminary proceedings before a given company was expressly identified as a "suspect" (and hence without the company's prior knowledge of an investigation having been initiated). It was also clarified that such inspections could be carried out even in the absence of representatives of the company's management – it was sufficient that any employee of the company concerned was present. Further, the OCCP's inspectors were expressly given the right to interview any staff members of the company and to use audio and video equipment in the course of an inspection.

The 2007 Act also consolidated the legal status of the "leniency programme", pursuant to which the OCCP could grant immunity from fines or their reduction to a company which had undertaken co-operation with the Office and provided evidence of an existence of an unlawful competition-restricting agreement.

[713] Cf. the Regulation of the Council of Ministers of 17 July 2007 concerning the notification of the intention of concentration of undertakings (Dz. U. of 2007, Nr. 134, poz. 936 and 937); and Regulation of the Council of Ministers of 17 July 2007 concerning the method of calculation of the turnover of undertakings participating in the concentration (Dz. U. of 2007, Nr. 134, poz. 934 and 935).

Leniency applications (also shortened and simplified ones) could be submitted personally at the OCCP's Central Office in Warsaw, to an Office's official for the record, via mail, fax or e-mail. Information for companies interested in applying for leniency was set out in the Guidelines of the OCCP's President on the leniency programme[714].

The leniency rules were further amended in 2009 so as to allow interested companies to submit even incomplete applications (provided the missing information was delivered at a later specifed date). This was an important change because only the first company to report to the competition authority and to provide evidence of a cartel could expect to be granted a full immunity from fines. The second, third and subsequent applicants could only expect to have their sanctions reduced by, respectively, up to 50%, 30%, and 20% of the fine which would have been imposed if they had not filed a leniency application. This amendment was introduced in order to harmonise the Polish leniency programme with the model leniency programme developed by the European Competition Network (ECN[715]).

B. Competition authority

As of the end of 2009, the OCCP was led by Ms Małgorzata Krasnodębska-Tomkiel[716]. The organisation of the Office was set out in its revised Statute issued in the form of an Order of the Prime Minister No. 146 of 23 December 2008[717]. The OCCP was composed of its Central Office and 9 Branch Offices: in Bydgoszcz, Gdańsk, Katowice, Kraków, Lublin, Łòdź, Poznań, Wrocław and Warsaw. As for the subject-matter subdivisions, the OCCP had the following Departments: State Aid Monitoring; Consumer Policy; Protection against Concentrations; Trade Inspection; Market Analyses; Budget and Administration; Competition Protection; Market Surveillance; International Relations and Communication, and Legal Affairs. On 1 January 2009, the Office employed 460 staff including 164 taken over from the previously closed down Main Trade Inspectorate. The OCCP's total annual budget was nearly 50 million PLN (some 13 million EUR).

After Poland's entry into the EU, the OCCP has continued intense activities as regards law drafting and issuing opinions on compatibility of various draft legal acts with the competition rules. For example, in the course of 2009, the President of the Office issued opinions on a total of 2.300 thousand draft pieces of legislation and other Government documents submitted to the OCCP for consultation. When issuing its opinions, the OCCP mainly took into account a particular draft's impact on competition, consumers and its compliance with the rules of granting state aid to enterprises. Further, the OCCP continued the practice of carrying out sector inquiries in order to assess the degree of concentration of certain markets, the market situation of particular companies and the behaviour of key players. In 2009, the OCCP conducted 48 such inquiries, including 34 concerning the national market and 14 concerning local markets[718].

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714 Cf. the OCCP's website, above. More detailed provisions are set out in the Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from fines or their reduction. Dz.U. Nr. 20 of 2009, item 109.

715 Cf. below.

716 Cf. the OCCP's 2009 Annual Report, http://www.uokik.gov.pl/download.php?plik=8476.

717 Monitor Polski No. 97, item 846.

718 Cf. the OCCP's 2009 Annual Report.

C. Jurisprudence

1. OCCP

The jurisprudence of the OCCP in the period preceding the entry of Poland into the EU was described in detail earlier in this thesis[719]. A detailed description of such activity in the subsequent period would go far beyond the scope of this text. Thus, the case-law of the OCCP in 2009 has been chosen as illustration of the continuous efforts by the Polish competition authority in this respect, in the new context created by Poland's status as Member State of the EU.

As already mentioned, antitrust proceedings in Poland were – pursuant to the 2007 Act – instituted only *ex officio*. However, it was possible to provide the OCCP President with a written notification about suspected practices prohibited by the 2007 Act. In the course of 2009, the OCCP received 413 such notifications and consequently launched 193 explanatory (preliminary) proceedings and 27 antitrust proceedings. In cases where the suspected prohibited practice could have had an impact on trade between the EU Member States, the Office carried out its proceedings also on the basis of the EU law, i.e. Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)[720].

In total, the OCCP carried out 176 antitrust proceedings in 2009, out of which 107 were terminated. This included 15 proceedings concerning horizontal agreements (8 closed), 4 of which conducted pursuant to Article 101 TFEU; 22 proceedings concerning vertical agreements (10 closed), none of them conducted pursuant to Article 101 TFEU; and 139 proceedings concerning abuse of a dominant position (89 closed), 3 of them pursuant to Article 102 TFEU. Further, the OCCP carried out 492 explanatory proceedings and closed 350 of them by the year's end. Thus, the Polish competition authority maintained a high pace of jurisprudential activity.

A few decisions issued in 2009 by the OCCP's President, concerning restrictive agreements and other practices, have been highlighted in the Office's Annual Report:

- the "Concrete decision"[721]

Antitrust proceedings in this case were initiated in December 2006. The OCCP was checking whether producers of grey concrete Lafarge Cement, Górażdże Cement, Grupa Ożarów, Cemex Polska, Dyckerhoff Polska and concrete plants Warta and Odra had concluded an illegal agreement. The Office launched the proceedings having received information about irregularities occurring on the construction market and based on findings from its comprehensive inquiry of the conduct of companies operating on this market carried out in the years 2003 to 2006. In the course of the proceedings and the biggest "dawn raid" in the OCCP's up-till-then history, the Office gathered extensive evidence. Moreover, the producers themselves furnished the OCCP with further information in the course of the proceedings.

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719 Cf. Chapter III.A.2

720 Cf. the OCCP's 2009 Annual Report. On 1 December 2009, when the Treaty of Lisbon entered into force, the TFEU replaced the Treaty establishing the European Community (the EC Treaty). As a result, Articles 81 and 82 of the EC Treaty became Articles 101 and 102 of the TFEU.

721 8 December 2009, No. DOK-7/2009.

Based on the collected materials, the OCCP's President concluded that at least since 1998 the largest concrete producers in Poland had been dividing the market, by fixing market shares of particular parties, establishing minimum prices of concrete, coordinating price rises, their dates and the order of introducing them.

The Office's President decided not to punish Lafarge Cement and to significantly reduce the fine for Górażdże Cement – the company was ordered to pay a fine of 5% of its year's revenue. Both companies had co-operated with the OCCP under the leniency programme. The remaining five cartel participants received the highest possible fines – 10% of their respective annual revenue. In total, the six companies were ordered to pay over 411 million PLN (some 105 million EUR) i.e. the highest fine in the Office's 20 years of operation. It is noteworthy that the proceedings were also carried out under the EU law and the Office's final decision was consulted with the European Commission.

- the "Telecommunications" decision[722]

Antitrust proceedings against two mobile telecommunications operators – P4 and Polkomtel – were initiated in January 2009. The inquiry focussed on the terms and conditions of providing national roaming services. At the end of 2008, four mobile operators were present on the Polish market. Three of them – Polkomtel, Polska Telefonia Cyfrowa and Polska Telefonia Komórkowa Centertel – possessed full infrastructure of a nationwide mobile network, while P4, which had entered the market only in 2007 and thus had not managed to build its own infrastructure yet, had a limited geographical coverage. Consequently, P4 had to use the network of another operator and signed a national roaming agreement with Polkomtel for this purpose.

In the course of the antitrust proceedings the OCCP found that the terms and conditions of the agreement between the two operators were contrary to the 2007 Act. In particular, the agreement stipulated that P4 would purchase the access to the network infrastructure exclusively from Polkomtel. Moreover, the agreement guaranteed Polkomtel priority over other operators as regards providing this service. As a result of the OCCP's proceedings, the companies undertook to change the contract terms and delete the clauses in question.

- the "Anti-theft doors" decision[723]

Proceedings in this case were initiated in June 2008, based on information obtained in the course of a nationwide inquiry of the Polish market of locks and hinges (carried out by the Office in 2005 and 2006). The OCCP wanted to find out whether Gerda and 45 distributors of its products had concluded a price fixing agreement. In the course of the proceedings, the President of the Office found that at least in the period 2000-2007 Gerda had put its distributors under a contractual obligation to strictly follow the prices of particular types of anti-theft doors that Gerda had itself fixed. If a distributor did not apply the fixed prices, Gerda reserved the right to terminate the agreement with immediate effect. The OCCP's President punished the parties to the agreement with fines totalling over 1.3 million PLN (some 335 thousand EUR).

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722 13 November 2009, No. DOK-6/2009.

723 30 December 2009, No. RKT-44/2009.

Below are a few decisions issued in 2009 by the OCCP's President concerning abuse of a dominant position[724]:

- "Freight rail transport" decision[725]

In December 2006 the OCCP initiated antitrust proceedings against PKP Cargo (cargo department of the State Railways) upon a complaint by its competitor, CTL Logistics. Evidence gathered in the course of the proceedings demonstrated that PKP Cargo had abused its dominant position and discriminated against some of its contractors by offering them worse contract terms. PKP Cargo provided freight services under its general terms (standard freight agreements) and under special terms (including attractive price discounts). As was established, companies perceived by PKP Cargo as potential or actual competitors were only offered contracts under the general terms, without discounts. As a result, two companies ordering a shipment of analogous goods on the same route and with trains of the same type, could still have been treated differently. If one company used exclusively PKP Cargo's services while another also transported some part of the goods on its own, the first could obtain more favourable terms than the latter.

According to the OCCP, such a pricing system restricted PKP Cargo's competitors' possibility of carrying out business and prevented new players from entering the relevant market. More advantageous contract terms were also not available to companies which were not PKP Cargo's competitors, but belonged to the same group as a company considered by PKP Cargo as its rival. Thus, the dominant company limited the economic freedom of companies having no agreement with PKP Cargo and infringed their right to choose freely the sphere of their activity. The OCCP's President's decision was made immediately enforceable. According to the Office, a further application of the agreement in question could have had an irreversible impact on the market. PKP Cargo was ordered to stop the abusive practice and pay a fine of 60 million PLN (some 15 million EUR).

- "Sewage collection and disposal" decision[726]

The decision concerned the abuse of a dominant position by the Municipal Waterwork and Sewage Company (MPWiK) in the town of Rzeszów. The practices in question included, for example, imposing unfair, excessively high prices for the collection of sewage from urban areas located within the area of Boguchwała. The prices covered additional costs which were not connected with the actual provision of sewage collection services. Moreover, MPWiK would not sign sewage collection agreements with customers who did not agree to contribute financially to the development of the sewerage facilities located in the area where MPWiK operated. The OCCP's President found that the company had abused its dominant position and punished it with a fine of over 430 thousand PLN (some 110 thousand EUR). This case provides an illustration to the continuous high attention being paid by the Office to restrictive practices by municipal companies and authorities.

724 Cf. the OCCP's 2009 Annual Report.

725 7 July 2009, No. DOK-3/2009.

726 14 May 2009, No. RKR-5/2009.

As regards mergers, the OCCP handled 144 merger control cases in the course of 2009, 123 of which were closed[727]. In the majority of these cases (97), the OCCP issued a positive decision pursuant to Section 20 (2) of the 2007 Act (i.e. mergers which did not substantially restrict competition). There was also one conditional consent, 3 negative decisions (prohibitions), 3 decisions to discontinue proceedings, 10 decisions to close the case due to withdrawal of the merger notification and 2 decisions to impose a fine for the failure to notify a merger. Here are a few examples of merger decisions issued by the OCCP's President in 2009[728]:

- Consent to the takeover of British Sugar Overseas Polska by Pfeifer & Langen Polska[729]

Pfeifer & Langen Polska belonged to the Pfeifer & Langen capital group, which operated on the European markets mainly as sugar producer and distributor. In Poland, it produced, sold and imported sugar extracted from sugar beet under the brand name Diamant. The target company belonged to the capital group Associated British Food Group and operated in the field of production and sale of such products as sugar (under the brand name Srebrna Łyżeczka), animal fodder and sugar production by-products. Having carried out the antitrust proceedings, the OCCP's President decided that the transaction in question would not significantly restrict competition on the relevant market. Consequently, she cleared the transaction, allowing Pfeifer & Langen Polska to purchase 100% of British Sugar Overseas Polska's share capital.

- Conditional consent to the takeover of Kotlin by Agros Nova[730]

Agros Nova produced juices, soft drinks, jams, sauces, soups, ready-to-eat dishes and ketchups under such brands as Fortuna, Dr Witt, Pysio, Garden and Łowicz. Kotlin was a producer and seller of fruit and vegetable preserves, especially ketchups, tomato concentrates, vegetable preserves and jams. The company was also the owner of Sorella and Guiseppe brands. Agros Nova and Kotlin products were among the most frequently purchased goods of this type in Poland. The analysis of the transaction's effects showed that it might result in a substantial restriction of competition on the domestic jams retail market.

Consequently, the OCCP's President issued a conditional consent decision. Firstly, Agros Nova had to sell Kotlin's jam production line and Sorella trademarks by 31 August 2010. The assets could be sold only to an investor independent of Agros Nova's capital group and approved by the Office's President. By the time the above conditions were fulfilled, the acquirer was under the obligation to maintain the sales volume of Sorella jams in Poland at least at 70% of the brand's average sales volume, and to maintain the expenses for promotion and advertising of these products at the 2007 and 2008 average.

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727 Cf. the OCCP's 2009 Annual Report. The cases concerned in particular the following sectors: trade (33 cases); food industry (18 cases); financial services (12 cases); fuel, gas and electricity (10 cases); chemical and cosmetic industry (7 cases); transport (6 cases); metallurgy and steel industry (6 cases); insurance activity, banking and IT (5 cases); media (5 cases); developer activity and services of real property management (4 cases); telecommunications (4 cases); production of construction materials (4 cases); mining industry (3 cases); production, repair and maintenance of machinery and devices (3 cases); waste management (2 cases); shipbuilding (2 cases); and one case in respectively the defence industry; tobacco; pharmaceutical; publishing; automotive and aviation industries.

728 As selected by the OCCP itself in its 2009 Activity Report.

729 Decision of 16 November 2009, No. DKK-80/2009.

730 Decision of 25 February 2009, No. DKK-9/2009.

Moreover, Agros Nova had to cease selling Kotlin jams within 3 years from the transaction. The OCCP also obliged Agros Nova to provide it with information on the fulfilment of these conditions.

- Prohibited acquisition in the food market[731]

The decision concerned a planned takeover of FoodCare (producing under the Gellwe brand) by Reiber Foods Polska. Both companies were active in the same sector of the economy (food industry). The prospective acquirer belonged to the Norwegian capital group Rieber&Son and operated in Poland under the brand name Delecta. As for FoodCare, it produced various food products under brands such as Gellwe, Tiger and Fitella.

Having analysed the planned merger, the OCCP's President decided that clearing it would have lead to a substantial restriction of competition on the domestic markets of different food products. As a result of the takeover, Rieber would gain a dominant position on these markets. While prohibiting the intended takeover, the Office's President took also into account the significant barriers to entry existing on the relevant markets.

2. Courts

In the period following Poland's entry into the EU, the Polish courts (especially the CPCC and the Supreme Court) have continued their approach developed prior to the accession, namely interpreting the Polish competition law in accordance with the spirit of the EU law[732]. This could be seen in particular in the manner in which the courts defined terms such as the relevant market, dominant position, substitute products, agreements and practices, etc[733].

Under the 2007 Act (which in this respect maintained the overall system set up by the 2000 Act), companies could appeal against the decisions of the OCCP's President to the Court for the Protection of Competition and Consumers (CPCC). Further appeals against judgements of the CPCC could be filed to the Court of Appeals in Warsaw. Finally, cassation complaints could be introduced before the Supreme Court. By means of an illustration, in the course of 2009 the CPCC overruled 3 decisions by the OCCP's President, changed 6 of them and dismissed 31 appeals[734]. Below are two examples of higher instance court decisions, one by the Court of Appeals and one by the Supreme Court:

731 Decision of 8 October 2009, No. DKK-68/2009.

732 By means of an illustration of this approach, the Antimonopoly Court (predecessor of the CPCC) in its decision of 8 October 1997 expressly stated that the competition authority had the right to demand additional information from companies notfying intended mergers (as foreseen in Regulation No. 4046/89), despite the fact that such a possibility was at the time not yet expressly set out in the relevant Polish act.

733 Cf. Chapter III.B.2.

734 Cf. the OCCP's 2009 Annual Report.

- Judgement of the Court of Appeals of 29 January 2009 on the appeal of Telekomunikacja Polska against the OCCP's President[735]

In 2006, the OCCP's President decided that Telekomunikacja Polska (TP SA) had restricted competition by requiring customers willing to sign agreements for broadband access (Neostrada TP) to sign up for TP's fixed-line telephone services. The Office's President ordered TP SA to abandon these practices. The fact that TP SA was making it difficult for consumers to use telecommunication services from other operators by offering only tariff plans already including a telephone fee was also considered an anticompetitive practice. The OCCP's President took into account that the practice in question had ceased on 1 March 2006, and fined TP SA with 11 million PLN (some 2.8 million EUR).

In February 2008, the CPCC dismissed TP SA's appeal against the decision of the OCCP's President. Subsequently, Telekomunikacja Polska appealed against the judgment of the CPCC to the Court of Appeal, which in turn dismissed the appeal in its entirety.

- Judgement of the Supreme Court of 19 May 2009 on the appeal of the Chamber of Architects in Warsaw against the OCCP's President[736]

In 2006 the OCCP's President ruled that the Chamber of Architects in Warsaw had entered into an illegal agreement by introducing into the Rules of Architects' Professional Conduct a provision forbidding its members from participating in tenders in which the only criterion was the price offered. The Office's President acknowledged the fact that the practice had ceased on 18 December 2005, and imposed a fine of 215 thousand PLN (some 55 thousand EUR).

The Supreme Court dismissed the cassation appeal filed by the Chamber of Architects. Previously, the CPCC had dismissed the Chamber's appeal in its judgement of 18 September 2007, whilst the Court of Appeals had decided on 10 July 2008 that the appeal was justified only with relation to the amount of fine, decreasing it to 50 thousand PLN (some 12.8 thousand EUR).

735 No. VI ACa 1202/08.

736 No. III SK 1/09.

D. Co-operation with the EU Commission and Courts

As already briefly described earlier in this thesis[737], co-operation between the Polish competition authority and the EU Delegation, especially in the period following the entry of Poland into the EU, has primarily taken place in the framework of the European Competition Network (ECN), established as a forum for discussion and co-operation of European competition authorities in cases where Articles 101 and 102 of the TFEU are applied[738]. The main forms of this co-operation included:

- informing each other of new cases and envisaged enforcement decisions;
- coordinating investigations, where necessary;
- helping each other with investigations;
- exchanging evidence and other information; and
- discussing various issues of common interest.

Within the ECN, groups of experts in specific sectors (including banking, securities, energy, insurance, food, pharmaceuticals, healthcare, environment, motor vehicles, telecommunications, media, IT&information, telecommunications, railways, etc) discussed competition problems and promote a common approach. In 2009, the OCCP's activity in the framework of the ECN was mainly focused on the working groups dealing with telecommunications, the pharmaceutical sector, insurance and food industry[739].

Contacts within the ECN were frequent at all levels of the respective administrations. Depending on the nature of the contact, it could be established at a case-handler level or between dedicated contact points. As regards the mechanism for case allocation between the respective competition authorities, the general rule was that the competition authority that started the investigation after receiving a complaint or launching proceedings *ex officio* retained the responsibility for the case.

The issue of a possible re-allocation arose, for instance, if a single practice affecting trade between EU Member States was subject to multiple procedures carried out at the same time by several ECN members who would be interested to deal with the case. In these situations these authorities discussed the possible re-allocation with a view to a quick and efficient sharing of work within the network. There had to be a close connection between the infraction and the territory of a Member State, in order for the competition authority of that Member State to consider itself "well placed" to handle the case. The Network Notice explained in more detail the conditions for being a "well placed" authority.

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737 Cf. Chapter IV.B.

738 Cf. http://ec.europa.eu/competition/ecn/ecn_convergencequest_April2008.pdf. Detailed ECN rules are set out in the "Commission Notice on cooperation within the Network of Competition Authorities" (the "Network Notice"), to which all competition authorities in the network adhered by a special statement.

739 Cf. the OCCP's 2009 Annual Report.

If a case needed to be re-allocated to protect competition and the Community interest effectively, members of the Network strove to ensure that it was handed to one, well placed authority wherever possible. The duty to inform the other ECN members either before or immediately after the first formal investigative measure, while acting under Articles 101 or 102 TFEU, allowed the detection of multiple proceedings (for instance parallel complaints) and an efficient and rapid re-allocation if appropriate[740].

In this context, it is worth mentioning that the Polish competition authority was duly following these rules in its enforcement activity. This was for example the case in the year 2009, in the course of which the OCCP conducted 7 cases applying both the Polish and the EU law simultaneously; 4 of them concerned prohibited agreements and 3 – abuses of a dominant position[741].

The European Commission published on its website the ECN Brief, a newsletter containing articles coming from the competition authorities of the Member States, as well as the European Commission. The Brief, published five times a year, was meant to raise transparency of the ECN. It was addressed to members of the legal and business community, the judiciary, consumer associations and academics as well as any persons interested in EU competition law developments. It is noteworthy that the OCCP was actively involved in the initiative of the creation of the newsletter and supported it from the very beginning.

In order to avoid undue interference with the independence of the judiciary, a network such as the ECN could not be established with national courts. However, many Polish judges sought contacts with their peers in other EU Member States in order to exchange experience and to establish "best practices" for the application of the EU competition rules. The Association of European Competition Law Judges (AECLJ[742]) was the first and most known network in that respect (and it provided several trainings on the EU competition law to Polish judges too). However, it should be stressed that there were no links between the ECN and the AECLJ. That said, in order to gather information on the enforcement by national courts, the European Commission built a database of national courts' judgements applying the EU competition rules, accessible on the DG Competition website[743].

740 Cf. http://ec.europa.eu/competition/ecn/ecn_convergencequest_April2008.pdf.

741 Cf. the OCCP's 2009 Annual Report.

742 http://aeclj.com/

743 http://ec.europa.eu/competition/court/overview_en.html

CONCLUSION

Since 1 May 2004, Poland has been (despite a number of transitional arrangements applicable to certain areas, such as the movement of workers) a fully-fledged Member State of the European Union. This implies that Poland enjoys (basically) the same rights and has the same obligations as the "old" EU Member States. Seen from this perspective, the history of approximation and subsequently integration of the Community's competition policy in Poland – in particular if one focuses on its anti-trust aspect – can be considered a success.

As has been mentioned in this thesis, the beginnings were quite modest and "shy", at least on the Community's side. The early measures taken in Brussels in the aftermath of the fall of Communism in Central and Eastern Europe were characterised by conservatism and the tendency to "limit the damage", rather than to open up to the newly (re)created democracies from the other side of the former "iron curtain", Poland included.

Even later, after the mechanism of the Europe Agreements was devised as a means to offer new prospects to the former Socialist countries, there was a clear tendency to avoid any express allusion to these countries' possible future membership in the Brussels-based Organisation, and certain attempts were made to present the Europe Agreements as an alternative to EC/EU membership. These attempts were quickly noticed and efficiently "torpedoed" by the countries concerned, mainly the Visegrad four (Poland, Hungary and Czechoslovakia, later the Czech and the Slovak Republics). Nevertheless, there is no doubt that the Europe Agreements have played an important and positive role, which could well be demonstrated in this text on the example of the approximation of competition law in Poland.

That said, and precisely with the example of competition provisions in mind, it was clear that the Europe Agreement and its mechanism had its limitations. It could, namely, not replace full integration – and not even the less ambitious (than full membership) but however more "integrationist" approach of the European Economic Area Agreement; this was *inter alia* illustrated with the debate on possible direct effect of the EA's competition provisions.

The importance of political events has soon overtaken the modesty of the Europe Agreement mechanism, and there was no longer any talk of "alternatives". It became clear, especially after the Copenhagen European Summit, that the only acceptable objective was, for the associated countries and (to a lesser extent) for the Brussels Institutions, a full membership of these countries in the Community (EU). The result of this realisation was a radical policy reorientation in Brussels, with the Europe Agreement and its mechanisms and institutions becoming a part of the overall pre-accession (subsequently, "enhanced" pre-accession) strategy, coupled with an intensified assistance (*inter alia* through PHARE) and clear commitments on the Polish side.

The new approach has proved immensely useful for the associated countries (Poland among them), thanks to the structuring and clarifying nature of the White Paper and subsequent regular monitoring in the framework of the Commission's Opinion and Regular Reports. The success of approximation efforts would not be possible without these mechanisms, as well as without the clear and verifiable (and verified) tasks and commitments undertaken in the context of the Accession Partnership.

The approximation/adaptation process found its culmination with the signature and, subsequently, ratification of the Accession Treaty which – as far as Poland and anti-trust was concerned – confirmed the full transposition of the *acquis* by Poland. The situation was to a significant degree more complex as regards State aid, where resistance to a complete and timely transposition had been much stronger on the Polish side, due to the high political and economic stakes involved. Consequently, a full integration of this aspect of the Community competition policy in Poland has proved to be more difficult; as a matter of fact, it is not yet completed at the time of writing these words and will become so only once all the transitional arrangements are terminated (in particular, as regards the Special Economic Zones and various restructuring aids to ailing sectors of the Polish economy).

On the Polish side, various – sometimes somewhat chaotic and disorganised – approximation/integration efforts had begun unilaterally, even before the signing of the Europe Agreement and long before any concrete commitments were made by the Community as regards the prospective enlargement. This was possible thanks to an almost unanimous consensus among the political class in Poland that upgrading the Polish law and economy to the EC standards was indispensable for the modernisation of the country, even without the prospect of future EU membership. Obviously, these efforts received huge support, boost and – importantly – streamlining with the subsequent intensification and reorientation of the Community's approach to the candidate countries, including Poland.

The pre-accession strategy, the technical assistance, the White Paper, the Opinion and the Regular Reports, and – last but not least – the Accession Partnership and the accession negotiations have helped "get many issues straight", better prioritise the tasks and bring some more stability to the Polish approximation procedures and structures, prone (for internal political reasons and, perhaps, for cultural and historical reasons too) to frequent reorganisations, conceptual and model changes, staff fluctuation, etc. Thanks to the steady support from Brussels, there was ongoing progress on all issues, sometimes slower and even plagued by some temporary setbacks, sometimes faster and more clearly visible (as with the anti-trust). Arguably, the progress was easier to achieve as regards legal transposition than with regard to creating the necessary administrative capacity (in the case of Poland, due to a large extent to financial reasons and to the shortage of qualified staff).

Despite these difficulties, one could probably say that the Polish anti-trust authorities (both administrative and judicial) have developed a quite impressive activity record as from the early years of their existence, and certainly as from the entry into force of the new competition law in 2000. Overall, both the Antimonopoly Office (replaced in later years by the Office for Competition and Consumer Protection) and the Antimonopoly Court (subsequently, the Court for the Protection of Competition and Consumers) have deliberately opted for the "pro-European" interpretation of the relevant Polish law, attaching importance to the fidelity to the jurisprudential lines of the European Commission and the Community Courts, demonstrated in the context of the application of analogous EC rules.

This approach was somewhat less evident, and in any case more belated, with respect to other jurisdictions, and especially the general courts. Nevertheless, one will most likely not risk an error of judgment by stating that the dominant stream of the Polish jurisprudence has remained remarkably conform with the spirit of the Community competition law and policy (at least with respect to anti-trust), and that any differences/discrepancies were of a minor and temporary character.

It is clear that achieving this "harmony" has been easier with respect to the "traditional" anti-trust than, for example (and as already mentioned earlier), State aid, regarding which the Polish authorities of all sorts and levels have demonstrated more reluctance to align/integrate. Even in the anti-trust area, the Polish competition authority has sometimes shown a difference of focus as compared with its Community counterpart, e.g. when providing a proof of a surprising leniency in assessing certain large, transnational mergers. This, as explained in this text, could be understood in the context of transformation of the Polish economy and the perceived need to support the creation of "strong players" on the Polish market, capable of competing on the future internal market of the European Union. No doubt, these were industrial policy considerations, which stood – to a certain extent – in contradiction with the competition authority's role as a "competition watchdog".

On the other hand, the AMO/OCCP has been capable of developing a very strong position (arguably, even stronger than that of the European Commission) in certain areas where the EC law departed from the general rules on free competition (such as agriculture or the position of public authorities on the market). Furthermore, in a manner which – in the author's view – was clearly very positive for a country with the historical situation and the degree of development of Poland, the Polish competition authorities (especially the administrative branch) have demonstrated their resolve to "push through" structural change, demonopolisation and transformation of the economy from the Socialist-type to the market-based one. This was most visible when observing the AMO's/OCCP's "merciless" treatment of former State monopolies or various kinds.

Naturally, there were some obvious pressures on the OCCP from the Government and/or particular line Ministries to show some "flexibility" and "understanding" in respect of the anti-competitive behaviour of companies (or even of the State itself) in sectors such as steel, mining or shipbuilding. Despite the generally positive balance of the Office's activity, one could not say that it has always resisted these pressures efficiently.

In the context of Poland being a Member State of the EU, the issue of potential conflicts of law and jurisprudence between the Polish and the Community competition authorities (both administrative and judicial) has – at last – found a relatively clear solution in the form of the relevant Community legislation (especially the Regulation No. 1/2003), Commission Notices (discussed earlier in this text) and the corresponding amendments and new legal developments on the Polish side.

There is, in the author's opinion, no doubt that the OCCP (as well as, in a more wide sense, the Polish executive powers) has demonstrated its willingness to participate constructively and in good faith in the new institutional and procedural set-up for the implementation of the EC competition law (and for the harmonious delimitation of the boundaries between national and Community competition laws), as imagined by the European Commission. This constructive approach is also visible in the activity of the Polish Court for the Protection of Competition and Consumers.

The trend is perhaps less clear with respect to the general courts, where the first less-than-enthusiastic reaction was partly due to certain psychological difficulties in accepting an external (and supreme) legal and jurisprudential order, and – to an even larger extent – to the initially considerable ignorance of the EC law (including the Community competition law) among Polish judges. This required a period of learning and adaptation, during which the Polish courts *inter alia* learned how to use the tools available to them under the Community legal order, especially the preliminary reference procedure[744].

In any event, the current situation is, from the point of view of legal certainty, much clearer and better than the previous one – prior to Poland's entry to the EU and subject to the Europe Agreement regime – which had left many questions open (to begin with, the one about the legal nature and the power of the EA provisions). It must be said though that these questions have finally proved to be of a theoretical nature: the Polish administrative and judicial bodies did generally (and unilaterally) follow the legal and jurisprudential developments on the Community's side, even if not always strictly speaking required to do so by the existing legal framework in Poland, and occasionally venturing into the dangerous area of "creative" interpretation of the Polish norms, where these were not entirely conform with the corresponding EC provisions. On the Community's side, the practice appeared to be to resort to the EC law (and to the relatively wide interpretation of its territorial scope) in cases involving Community companies, rather than applying the cumbersome procedures envisaged in the Europe Agreement's implementing rules to the competition provisions.

Time has demonstrated that the Polish competition authority – the OCCP – had sufficient human, organisational and financial resources to function efficiently in the framework of the European Competition Network, and to fulfil the role which the Commission envisaged for the national competition authorities of the EU Member States as regards the decentralised application of the EC competition law.

It is relatively more difficult to clearly establish the extent to which the Polish judges (other than those of the CPCC and the competent chamber of the Supreme Court, already "accustomed" to the matter) have integrated effectively the new concepts, standards and procedures of the EC competition law and policy in their daily practice. Clearly, a lot remains to be done in this area, and ongoing training seems to be indispensable, as well as the dissemination of information to lawyers, companies and the public at large. Such activities are, by the way, already ongoing since several years, through the OCCP and the academia (among others).

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744 The available statistical data seems to indicate that at least some of the Polish courts have learned how to use the preliminary reference procedure. For example, 21 such instances have been recorded with respect to administrative courts in the period 2005 – 2010. Cf. http://www.nsa.gov.pl/index.php/pol/NSA/Prawo-Europejskie/Pytania-prejudycjalne-WSA-i-NSA. However, other courts of general jurisdiction have so far been more reluctant to apply this procedure: from the moment of accession to the EU until the end of 2009 only 24 preliminary reference questions have been sent by all types of Polish courts (including 4 from the Supreme Court and 14 from courts other than the Supreme and administrative courts). One possible explanation was the tendency of Polish judges to refer to the Polish Supreme Court rather than to the ECJ. This situation should radically change after the Polish Supreme Court's decision of 28 June 2010, in which the Supreme Court clearly stated that it was not competent to decide on the intepretation of the EU law in situations of a possible conflict with the Polish law. Cf. Sygn. Akt III CZP 3/10 and K. Szychowska, "Wykładnia prawa Unii należy do Trybunału Sprawiedliwości", http://portalprocesowy.pl/opinie-i-komentarze/art113,wykladnia-prawa-unii-nalezy-do-trybunalu-sprawiedliwosci.html.

Having in mind all the outstanding tasks and challenges, one can nevertheless say that the integration of one of the most important Community policies i.e. the competition policy in a new EU Member State – Poland – has been successful, at least as regards the anti-trust chapter. One could even risk a further statement, namely that this success has probably been more evident than with respect to several other Community policies, in the areas such as agriculture, environment, transport, research, etc. A task of a formidable and unprecedented scale has been accomplished.

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