

Marek Krzysztof Kolasiński*

INFLUENCE OF EUROPEAN LAW ON POLISH COMPETITION LAW

Abstract

Over a little more than the last twenty years Poland has undergone a fundamental socio-economic change. That period brought about a shift from a socialist economy to a free market model and Poland was eventually accepted as a member of the European Union. An important element of the reforms was the building of the competition law system, which was an unprecedented operation on a global scale. It should be underlined that the structure of the Polish economy was shaped by almost half a century of ideological monopolization and central planning, which made the introduction of competition law to the economical system a complicated task.

The first part of this paper contains a description of the evolution of Polish competition law. Such considerations are a starting point for an analysis concerning the place of competition law in the Polish legal system and its comparison with the European standards. Further points of this article present both an examination of the influence of the EU competition law on the Polish case law as well as an analysis of the areas in which there is a need for further approximation of the Polish competition law to the European Union standards. Finally, general conclusions concerning the influence of the EU competition law on the Polish legal system are formulated.

The author makes an attempt to identify the causes of the differences existing between these two legal systems.

Keywords

influence – European law – Polish law – competition

* Professor at Nicolaus Copernicus University in Torun, Faculty of Law and Administration, Chair of European Law.

I. AN OUTLINE OF THE EVOLUTION OF THE POLISH COMPETITION LAW

The beginnings of the Polish competition law date back to the interwar period¹. Its development was interrupted by the introduction of the system of a centrally planned socialist economy, whose basic principles remain in contradiction with the axiology of competition law.

In the 1970s and 1980s it became clear that socialist economy was inefficient. Some theorists underlined the fact that the monopolized areas of capitalistic economy revealed dangers very similar to those presented by a centrally planned socialist economy. They postulated the incorporation of some elements of competition law into the Polish socialist law. The titles of articles published in those days in the leading Polish law journals are characteristic of this phenomenon. S. Sołtysiński wrote “about the need for law against monopolistic practices and unfair competition”². J. Trojanek published an article “on the need and ways to break through monopolistic practices in a socialized economy”³.

European and United States patterns played an vital role in the development of the discussion on the building of Polish competition law. For example, I. Wiszniewska and A. Kawecki, in 1982, describing the basic principles of the drafted Polish competition law, strongly referred to the EC competition law⁴.

The conflict existing between the socialist economy and competition law was so intense that any attempt to combine them was doomed to be fruitless. Thus, it is hardly surprising that until the end of the socialist period, competition law in Poland existed only in a very fragmentary

¹ See Act of 28.03.1933 on cartels, Dz. U. [Journal of Laws] 1933, No. 31, item 270.

² S. Sołtysiński, *O potrzebie ustawodawstwa zwalczającego praktyki monopolistyczne i nieuczciwą konkurencji* [About the Necessity of the Law Against Monopolistic Practices and Unfair Competition], *Państwo i Prawo* [State and Law] 1982, no. 12, p. 16.

³ J. Trojanek, *O potrzebie i ekonomiczno-prawnych sposobach przelamywania monopolistycznych praktyk w gospodarce uspołecznionej* [About the Necessity and Economic-Legal Ways of Breaking Through Monopolistic Practices in a Socialised Economy], *Ruch Prawniczy Ekonomiczny i Społeczny* [Legal, Economic and Sociological Movement] 1973, no. 3, p. 49.

⁴ See I. Wiszniewska, A. Kawecki, *Problem legislacji antymonopolowej w systemie zreformowanej gospodarki* [Legislative Problems of Antitrust Law in the System of a Reformed Economy], *Przegląd Ustawodawstwa Gospodarczego* [Economic Law Review] 1982, no. 12, p. 262.

form⁵. Nonetheless, it should be underlined that the debate which took place in Poland mainly in the 1980s, inspired among other things by the EC competition law, was pivotal to the further development of Polish competition law.

The idea that the introduction of competition law should be an intrinsic element of Polish socio-economical transformation was widely accepted at the end of the 1980s. It was also obvious that Polish competition law should be similar to the EC competition law.

On the 24th February 1990 an Act against monopolistic practices was passed⁶. In his attempt to compare the law with the European standards, T. Skoczny concludes that it was in the mainstream of European antitrust laws⁷. Notwithstanding, the author stresses that the law of 1990 needed various corrections and adjustments⁸.

The passing of the Act of 15th December 2000 on competition and consumer protection⁹ is considered to be a turning point in the development of the Polish competition law¹⁰. In C. Banasiński's point of view, its main purpose was to adjust Polish law to EC standards¹¹. The law of 2000 was replaced by a new one, now in force, the Act of 16th February 2007 on competition and consumer protection¹². Its core is composed of Articles 6 and 9, which are very similar to Articles 101

⁵ Ustawa z dnia 28.01.1987 o przeciwdziałaniu praktykom monopolistycznym w gospodarce narodowej, Dz.U. Nr 3, poz. 18 ze zm. [Act of 28.01.1987 about counteracting monopolistic practices in national economy, Journal of Laws of 1987, No. 3, item 18 with amendments].

⁶ Ustawa z dnia 24.02.1990 o przeciwdziałaniu praktykom monopolistycznym i ochronie interesów konsumentów, Dz.U. 1990, Nr 14, poz. 88 ze zm. [Act of 24.02.1990 about counteracting monopolistic practices and protection of consumers, Journal of Laws of 1990, No. 14, item 88 with amendments].

⁷ See T. Skoczny, *Ustawy antymonopolowe krajów postsocjalistycznych* [Antitrust Laws of Former Communist Countries], *Przegląd Ustawodawstwa Gospodarczego* [Economic Law Review] 1992, no. 7-8, p. 132.

⁸ *Ibidem*, p. 132.

⁹ Consolidated text – Dz. U. [Journal of Laws] 2005, No. 244, item 2080 with amendments.

¹⁰ See C. Banasiński, *Ewolucja ustawodawstwa antymonopolowego w Polsce* [Evolution of Polish Antitrust Law], [in:] C. Banasiński (ed.), *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej* [Protection of Competition and Consumers in Poland and in the European Union], Warszawa: Urząd Ochrony Konkurencji i Konsumentów 2005, p. 17.

¹¹ *Ibidem*, p. 23.

¹² Ustawa z dnia 16.02.2007 o ochronie konkurencji i konsumentów, Dz. U. 2007, Nr 50, poz. 331 ze zm. [Act of 16.02.2007 on competition and consumer protection, Journal of Laws of 2007, No. 50, item 331 with amendments].

and 102 of the Treaty on the Functioning of the European Union (TFEU)¹³. According to Article 6(1) of the Polish Act on competition and consumer protection, agreements which have as their object or effect the elimination, restriction, or any other infringement of competition in the relevant market shall be prohibited, in particular those consisting in:

- fixing, directly or indirectly, prices and other trading conditions,
- limiting or controlling production or sale as well as 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 fulfilment 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 undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price.

This regulation almost literally repeats some parts of Article 101 of the TFEU, which provides that the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions,
- limit or control production, markets, technical development, or investment,

¹³ Consolidated version – OJ C 2012 326/47.

- share markets or sources of supply,
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Under Article 9(1) of the Polish Act on competition and consumer protection the abuse of a dominant position in the relevant market by one or more undertakings shall be prohibited. According to Article 9(2) the abuse of a dominant position may, in particular, consist in:

- 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 of contracting parties or consumers,
- application to equivalent transactions with third parties of 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 fulfilment 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,
- imposition by the undertaking of onerous agreement terms and conditions, yielding to this undertaking unjustified profits,
- market sharing according to territorial, product, or entity-related criteria.

This is a very similar to Article 102 of the TFEU, which provides that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
- limiting production, markets or technical development to the prejudice of consumers,
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The similarity between the national and the EU competition law is not only specific for the Polish legal system. K.J. Cseres, M.P. Schinkel, F.O. Vogelaar have noticed that “many EU Member States in fact abandoned their ineffective competition regulation (...) and adopted competition law system similar to the rules presently laid down”¹⁴ in Articles 101 and 102 of the TFEU and in the EU merger regulation.

II. THE PLACE OF THE POLISH COMPETITION LAW IN THE SYSTEM OF CONSTITUTIONAL VALUES IN THE LIGHT OF EUROPEAN STANDARDS

After the communist years, the Polish legislator and courts faced the task of creating a coherent system for the protection of fundamental rights. One part of the effort was the establishment of the place of competition law in the general legal system. There was also a need for defining the relationship between competition rules and the rules of property protection, contractual freedom, and the freedom of economic activity.

European standards have been strongly influential upon the Polish constitutional rules concerning fundamental rights. The Polish constitutional rules connected with the problem of protection

¹⁴ K.J. Cseres, M.P. Schinkel, F.O. Vogelaar, *Law and Economics of Criminal Antitrust Enforcement: An Introduction*, [in:] K.J. Cseres, M.P. Schinkel, F.O. Vogelaar (eds), *Criminalization of Competition Law Enforcement*, Northampton: Edward Elgar Publishing 2006, p. 13.

of fundamental rights were mainly affected by the standards of the Council of Europe. Nonetheless, it should be kept in mind that according to Article 6(3) of the Treaty on European Union¹⁵, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The framework of antitrust intervention can be found in Article 20 of the Polish Constitution. It provides that a social market economy, based on the freedom of economic activity, private ownership as well as solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland. It is worth emphasizing that the idea of a social market economy comes from the ordoliberal school. The presumption that competition law should occupy a crucial place in the modern legal system was a vital element of this ideological movement. It was justified by the statement "that a competitive economic system was necessary for a prosperous, free and equitable society"¹⁶. Moreover, as R. O'Donoghue, and A.J. Padilla point out, "many of key figures involved in the foundation of the European Community were associated with the ordoliberal school of thought. Some commentators have therefore argued that the abuse concept contained in Article 82 EC originates from a distinctly German doctrine of economic philosophy that had developed separately from the American notion of economic efficiency that underpinned the Sherman Act 1890"¹⁷. The idea of social market economy is still present in the discussions concerning the axiology of the EU competition law¹⁸.

¹⁵ Consolidated version - OJ C 2012 326/13.

¹⁶ R. O'Donoghue, A.J. Padilla, *The Law and Economics of article 82 EC*, Oxford, Portland: Hart Publishing 2006, p. 9.

¹⁷ Ibidem, p. 9. See also W. Wells, *Antitrust and the Formation of the Postwar World*, New York 2002, pp.172-174; M.M. Furse, *Competition Law of the EC and UK*, Oxford 2004, p. 6.

¹⁸ See speech by Commissioner M. Monti, *Competition in a Social Market Economy* at the Conference of the European Parliament and the European Commission on *Reform of European Competition Law* in Freiburg on 9-10.11.2000, available online: <http://www.docstoc.com/docs/3556972/Competition-in-a-Social-Market-economy-Speech-by-Commissioner-Monti>.

In the judgment of 9th September 2006 the Polish Supreme Court¹⁹ expressed the idea that competition law limits the freedom to conduct a business. From that statement it can be inferred that the constitutional rules regulating acceptable limitations of fundamental rights are not irrelevant to the competition law point of view. Polish constitutional rules connected with such problems are strongly affected by European standards. It is clearly noticeable as regards the protection of property. Under Article 64(1) of the Polish Constitution everyone shall have the right to ownership, other property rights, and the right of succession. Article 64(2) provides that everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights, and the right of succession. According to the Article 64(3) the right of ownership may be limited only by means of a statute and only to an extent that does not violate the substance of such right. Those regulations are in full accordance with Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, under which every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. Similarly, Article 17(1) of the Charter of Fundamental Rights of the European Union provides that everyone has the right to own, use, dispose of, and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

¹⁹ III SK 6/06, Orzecznictwo Sądu Najwyższego [Supreme Court Case Law] 2007, item 25. See also the judgment of 8.04.1998 of the Polish Constitutional Tribunal, Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy [Constitutional Court Case Law - Official Record] 1998, no. 3, item 29.

The problem of the interference of constitutional rights with the scope of freedom to conduct a business frequently emerges in the Polish case law. For example, it was the subject of the analysis of the Polish Constitutional Tribunal in the sentences of 18th June 2003²⁰.

The Polish case law seems to place more emphasis on the role of fundamental rights in competition law than the EU case law. The difference is mainly of rhetoric nature and is caused by historic factors.

After the communist years, the Polish legal system tended to focus upon the role of fundamental rights. It was essential for Polish courts to recognize the relationships between constitutional values and competition law in the emerging free market economy. It is worth noticing that similar tendencies were present in the US case law and theoretic discussions in the period of creating the basis of antitrust law²¹.

The situation looks different in the EU case law. For many years the integration in the EU system was mainly of an economic nature, so - naturally - the Court of Justice avoided analyses of the problem of the relations between fundamental rights and the EC competition law. After the Maastricht Treaty and the acceptance of the Charter of Fundamental Rights of the European Union, it became clear that fundamental rights are protected in the European Union system on a very similar level to that in the national constitutions and in the Council of Europe system²².

III. ABUSE OF A DOMINANT POSITION IN THE POLISH CASE LAW AGAINST THE BACKGROUND OF THE EU STANDARDS

According to Article 3(2) of the Regulation 1/2003, the application of national competition law may not lead to the prohibition of agreements,

²⁰ K 2/02.

²¹ See R.J. Peritz, *Competition Policy in America*, New York: Oxford University Press 2000, pp. 3, 9 et seq.

²² See A. Szafranski, *Wolność działalności gospodarczej w perspektywie prawa Unii Europejskiej* [*Freedom of Economic Activities from the European Union Law Point of View*], [in:] W. Szwajdler, H. Nowicki (eds), *Konstytucyjna zasada wolności gospodarczej* [*Constitutional Rule of Freedom of Economic Activities*], Toruń: TNOiK 2009, pp. 423, 424.

decisions by associations of undertakings, or concerted practices which may affect trade between Member States, but which do not restrict competition within the meaning of Article 101(1) of the Treaty, or which fulfil the conditions of Article 101(3) of the Treaty or which are covered by a Regulation for the application of Article 101(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

From the Article 3(2) it can be inferred that the Member States “are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings”²³. The Polish legislator has not taken that opportunity. Polish courts try to follow the Court of Justice way of thinking and avoid giving judgments contradictory to the European standards. It is especially well established that Polish law, including the Polish constitution, should be interpreted in accordance with the spirit of the EU law. Among others, that rule was recognized by the Polish Constitutional Tribunal in the sentences of 12th June 2003²⁴, 21st April 2004²⁵, 11th May 2005²⁶ and 17th July 2007²⁷. Nonetheless, Polish courts sometimes seem to be stricter in their examination of the prohibition of abusing a dominant position than is the EU case law. As an example, it is worth pointing out the problem of the duty to deal, which is sometimes associated with the essential facilities doctrine.

In the EU case law it is established that the duty to deal does not exist unless the cooperation is not essential from the weaker undertaker’s point of view and that there is no essentiality if the undertaker is able to fulfil their needs in another way.

Polish courts understand the notion of essentiality in a very broad way. In the judgment of 22nd June 1994 the Polish Antimonopoly Court²⁸ decided that the duty to deal does not arise only when the alternative

²³ O’Donoghue, Padilla, *supra* note 16, p. 49.

²⁴ K 2/02.

²⁵ K 33/03.

²⁶ K 18/04.

²⁷ P 16/06.

²⁸ XVII Ama 3/94, *Wokanda* 1995, no. 2.

possibility of fulfilling the key economic need is within one's close reach. In the sentence of 12th June 2000 the Antimonopoly Court²⁹ expressed the opinion that the notion of an alternative way of fulfilling supply needs does not include the possibility of fulfilling it by oneself for example by self-investment.

Those Polish judgments are not in line with the EU case law. Advocate General Jacobs, in an opinion delivered on 28th May 1998 in *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others*³⁰, expressed the opinion that in the EU legal system "intervention of that kind, whether understood as an application of the essential facilities doctrine or, more traditionally, as a response to a refusal to supply goods or services, can be justified in terms of competition policy only in cases in which the dominant undertaking has a genuine stranglehold on the related market. That might be the case for example where duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy. It is not sufficient that the undertaking's control over a facility should give it a competitive advantage. I do not rule out the possibility that the cost of duplicating a facility might alone constitute an insuperable barrier to entry. That might be so particularly in cases in which the creation of the facility took place under non-competitive conditions, for example, partly through public funding. However, the test in my view must be an objective one: in other words, in order for refusal of access to amount to an abuse, it must be extremely difficult not merely for the undertaking demanding access, but for any other undertaking to compete. Thus, if the cost of duplicating the facility alone is the barrier to entry, it must be such as to deter any prudent undertaking from entering the market"³¹.

Generally speaking, the duty to deal in the Polish case law has a broader scope than it does in the EU case law. This is in line with the tendency of the courts of ex-socialist countries to be very strict

²⁹ XVII Ama 93/99.

³⁰ Case C-7/97 [1999] ECR I-7791 (paragraph 65-66).

³¹ Available at http://curia.europa.eu/juris/document/document_print.jsf?jsessionid=9ea7d2dc30dbc300b201e73b4b86873db2199df1720c.e34KaxiLc3qMb40Rch0SaxuMa3z0?doclang=EN&text&pageIndex=0&part=1&mode=DOC&docid=43901&occ=first&dir&cid=27225.

in applying the prohibition of abusing a dominant position³². In that place it is worth stressing the specific character of the economy of ex-socialist countries, in which the dominant position is frequently occupied by former socialist monopolists. Their strong economic position is a consequence of the decisions of communist authorities and not the result of their efficiency and as such justifies a stricter attitude to it. That line of reasoning is not contradictory to the EU competition law standards. Nonetheless, it seems that the Polish case law concerning the duty to deal is even stricter than is justified by the specific character of the Polish economy.

IV. THE NEED FOR FURTHER APPROXIMATION OF THE POLISH COMPETITION LAW TO THE EUROPEAN STANDARDS

Generally speaking, Polish competition law fulfils requirements coming from EU law. Nonetheless, one can still find areas in which there is a tension between the two legal systems. It is especially worthwhile to mention the problem of damages for damage coming from the violation of the EU competition law.

The Member States are obliged to assure the possibility of getting damages for damage resulting from the violation of the EU competition law. The Court of Justice in *Manfredi* pointed out that “it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (*Courage and Crehan*, cited above, paragraph 26). It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC. In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing

³² See R. Janusz, T. Skoczny, *Wprowadzenie [Introduction]*, [in:] *Ustawy antymonopolowe krajów postsocjalistycznych [Antitrust Laws of Former Communist Countries]*, Warszawa: Urząd Antymonopolowy, Dom Wydawniczy Elipsa 2005, p. 13.

actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)".

The Polish legislator has given up introducing any precise regulations concerning the problem of damages for the damage coming from the violation of Polish and EU competition law. Nonetheless, such claims may be pursued on general rules of tort liability. It leads to the situation in which there are no clear answers to fundamental questions connected with the rules of private enforcement of EU competition law. The problems of passing-of defence, access to evidence, and the standing of claimants in the Polish legal system are particularly unclear. There is also no established line of reasoning of the Polish courts in this area and as a consequence private enforcement of the EU competition law hardly plays any role in the Polish legal system, which does not seem to be in line with the EU standards. There are serious doubts as to whether Polish law does not "render practically impossible or excessively difficult the exercise of rights conferred by"³³ European Union law.

V. FINAL REMARKS

The influence of the European standards upon Polish competition law has been very strong and has occurred in four areas:

- theoretical approach,
- content of legal regulations,
- establishment of the place of competition law in the system of constitutional values,
- case law.

Despite the somewhat specific character of Polish case law, the opinion that there are essential contradictions between it and the EU law

³³ See Case C-261/95 *Palmisani* [1997] ECR I-4025 paragraph 27; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29.

is not justified. The sources of existing differences are of a historic and economic nature.

Nonetheless, the negligence of the Polish legislator leads to the generation of some tension between the EU and the Polish competition law. It is also hard to find any essential justification for not facilitating the possibility of claiming damages for the damage resulting from the violation of the EU competition law. Such legislative actions would improve the quality of the Polish competition law and remove the tension between it and the EU competition law.

