Adaptation of the Polish legal system to European Union law: Selected aspects

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There are a couple of people whom I should particularly like to thank for their kindness, support and patience: Dr Aleks Szczerbiak of Sussex European Institute and Prof. E. Piontek, Director of Department of European Law at the Faculty of Law, University of Warsaw. I would also like to express my acknowledgements to Keith Vincent from the British Centre for English and European Legal Studies (University of Cambridge & University of Warsaw) and to two anonymous reviewers for their comments to this text.

Abstract

This paper analyses the process of the approximation of the Polish legal system to the requirements of the *acquis communautaire*. It covers both the theoretical and practical aspects of this process. It begins by considering the character and scope of what this encompasses, followed by a description of the approximation methods. The second part of the paper is devoted to considering practical aspects of the process. The analysis includes the organisation of approximation activities, their impact on the state administration and the very important issue of the enforcement of the new approximated legislation. The concluding section covers the judicial activism of Polish courts in the light of European law.

Adaptation of the Polish legal system to European Union law – selected aspects

Introductory remarks - making the Polish legal system *European*

It remains unquestionable that during last decade the Polish legal system has been subject to a variety of extensive reforms. Its present form is undoubtedly the direct result of two equally important factors. Firstly, the political, economic, and social reforms, which have been taking place in Central and Eastern Europe since 1989. Secondly, the implementation of new foreign policy objectives. In case of the latter, the most important include participation in a variety of political and economic international organisations, the most important of which is the European Union.[1] Both of these factors have played an important role in the adaptation of the legal system to the new environment created by a free market economy and, as I shall particularly emphasise, in the creation of previously unknown fields of law in many cases.[2]

This paper begins with an analysis of the process that is very often described as making the Polish legal system more "European." The legal reforms of the last decade have, as noted above, been to a large extent influenced by the development of Polish foreign policy. Participation in a number of important international organisations led to the introduction of several "European standards" into the Polish domestic legal system.[3] These standards include certain widely accepted rules, which are common to the countries of Western Europe. As Jaśkowska notes, this process relates particularly to the consequences of Polish membership of the Council of Europe and association with the European Communities.[4]

There is no doubt that this process is a very complex and time-consuming one. It affects different fields of the law and, as I shall particularly emphasise here, refers to both material and procedural rules. In fact, it is possible to distinguish three particular aspects of this: the reception of legal concepts from the other legal systems, the impact of international organisations together with the results of their legal activism and the influence of European Union law.[5]

The incorporation of certain rules from the other legal systems is a highly important issue, particularly at a time of extensive legal reforms. In the case of Central and Eastern European countries it is particularly relevant when it comes to the creation of previously unknown or undeveloped fields of law. The comparative approach provides the authors' of the legal reforms with an opportunity to develop a very good theoretical and practical analysis. While every legal system has its own special features, the incorporation of certain concepts into a different legal

[1] Poland is a member of the Council of Europe, OECD, WTO and NATO. See: S. Parzymies, I. Popiuk- Rysińska, *Polska w Organizacjach Międzynarodowych*, Institute of International Relations, Warsaw University, 1998.
[2] As Alan Mayhew has observed: "In associated countries each piece of legislation adopted does not mean a marginal change to existing legislation, but it is usually a major policy choice." (A. Mayhew, *Recreating Europe – The European's Union Policy towards Central and Eastern Europe,* Cambridge University Press, 1998).
[3] Because of the scale and scope of the reforms it seems quite proper to speak about the implications not only for Polish law but for the whole legal system.
[4] See: M. Jaśkowska, *Europeizacja Prawa Administracyjnego*, in: Państwo i Prawo, 11/1999, p. 18- 27.
[5] Here I follow Jaśkowska's classification in *Europeizacja..., op. cit.* p. 18

environment may be both useful and desirable. It might also be useful when domestic law is approximated with EU law (especially with EC directives). Comparative analysis plays an important role in the pre-accession phase but also prepares the state's administration for the process of implementation of EU law that is required by Member States.

The second distinguishing factor is particularly relevant when participation in the Council of Europe is taken into account.[6] In fact, during the last decade there were a number of important reforms introduced as a result of Polish accession to the European Convention of Human Rights and Fundamental Freedoms, as well as Charter of the Self Government. The jurisprudence of the European Court of Human Rights has also played an important role in the 'Europeanisation' of the Polish legal system. All of these have had a considerable influence on recent constitutional, administrative and criminal law reforms. [7]

Domestic political and economic reforms,[8] together with changes in the international environment led, to the signing of the Europe Agreement in 1991.[9] One of the most important legal consequences arising from this has been an obligation to approximate the Polish legal system to the law of the European Communities (European Union). [10]

Because of the importance and scope of the approximation process, the rest of this paper will focus solely on this aspect of the 'Europeanisation' of Polish legal system. The analysis will be limited to Polish activities and experiences in this field. However, some of the analysis and conclusions contained herein can be considered to be common for all Central and Eastern European countries applying for the EU membership. To emphasise the complexity of the issue, the analysis is divided into two major parts. The first section introduces the general concept of the adaptation. The second section presents a number of selected issues concerned with the implications of approximation for the state administration (including the highly important issue of the implementation and enforcement of the new legislation).

[6] One should also bear in mind the legal consequences arising from Poland's accession to the OECD.

[7] For example: the adoption of the new Constitution of the Republic of Poland; changes in the country's administrative structure and the introduction of local self government; the introduction of the new criminal code and criminal procedure. For more on this see: J. Łętowski, *Polski sędzia wobec prawa europejskiego*, in: *Stosowanie prawa Unii Europejskiej w wewnętrznym porządku prawnym państwa*, Biuletyn No 3-4/1998, p. 9-20, Centrum Europejskie Uniwersytetu Warszawskiego / Ośrodek Informacji i Dokumentacji Rady Europy, 1998.

[8] For more on Polish-EC bilateral relations during the last decade see: J. Menkes, *Problemy prawne przystąpienia Polski do UE*, in: Kontrola Państwowa, No 2/1998, p. 48 –69, Najwyższa Izba Kontroli, 1998.

[9] *Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part*. OJ L 348, 31.12.1993

[10] It became even more important when the prospect of EU enlargement became a realistic one, since the accession criteria as specified by the Copenhagen Summit include: a well functioning free market economy, democracy and rule of law together with adoption of the *acquis communautaire*.

1. The Approximation Process

I shall begin with a few introductory remarks on the source and the character of the approximation process. As Biernat notes, it is possible to identify two major sources for approximation: the legal obligations arising from Europe Agreement (EA) and the very important political factor, that flows from the fact that prospective EU membership is one of the major goals for Polish foreign policy.[11] This paper will leave aside the political aspects and focus on the Europe Agreement itself and the character of the legal obligation to approximate the legal system with the requirements of the *acquis communautaire*.

Taking into account the purpose of association (as created by the Europe Agreement) and the advanced state of the accession negotiations, there are clearly two major aspects of this that need to be distinguished. First, the formal ones that relate to the process of adapting new legislation. Secondly, the material (real) ones that relate to the implementation phase.[12] While both are equally important and the problems of adapting Polish law to the Community acquis are considerable, *the problems of implementing the legislation are even more daunting.*[13]

The Europe Agreement

As noted above, the legal obligation to approximate the legal system with the law of the European Union arises from the Europe Agreement. According to art. 68 of the EA, "The Contracting Parties recognise that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with the Community legislation."[14]

It is commonly accepted that this in an obligation to act, not the obligation of the result.[15] As noted by Saganek (following the expertise of Schloh)[16] we are dealing here with the classical *best endeavours* clause. Consequently, a lack of *success* in approximation activities shall not be considered as breach of the international treaty (providing that approximation works take place),

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[11] See: S. Biernat, *Kilka uwag o harmonizacji polskiego prawa z prawem Wspólnoty Europejskiej*, in: Przegląd Legislacyjny, No 1-2/1998, p. 20-31, Kancelaria Prezesa Rady Ministrów, 1998.

[12] See: C. Mik, *Problemy dostosowania polskiego systemu prawnego do europejskiego prawa wspólnotowego (w kontekście przyszłego członkostwa w Polski w Unii Europejskiej),* in: Przegląd Legislacyjny, No 1-2/1998, p. 68–86, Kancelaria Prezesa Rady Ministrów, 1998.

[13] See: A. Mayhew, *Recreating Europe, op. cit.* p. 221

[14] An analysis of the legal sources of this obligation would not be complete without at least a few brief remarks on other provisions of the Europe Agreement, which refer to the adaptation of Polish legal system to the EU law in particular sectors. The exemplification of these *lex specialis* provisions can found in, for example, art. 56.5 (approximation in the field of the air and inland transport), art. 61.1 & 2 (referring to approximation in the field of free movement of capital), art. 65 (approximation in the field of state owned enterprises), art. 66 (approximation of Polish intellectual property legislation).

[15] See: S. Sołtysiński, *Dostosowanie prawa polskiego do wymagań Układu Europejskiego*, in: Państwo i Prawo, No 4-5/1996, p. 31 – 43, Polska Akademia Nauk, Komitet Nauk Prawnych, 1996.

[16] P. Saganek, T. Skoczny, *Selected Issues and Areas of Adaptation of Polish Law to the Law of the European Union*, p. 37, Warsaw University Centre for Europe, Warsaw 1999.

although it is important to bear in mind the political implications of this.[17] Taking into account recent developments in Poland-EU relations, together with the possible forthcoming accession to the EU, the provisions presented above, shall be, according to Piontek, subject to reinterpretation. The approximation task "should mean an obligation to incorporate [[18]] the respective Community rules into the legal order of the associated country to the fullest extent possible as an important condition of membership in the Union."[19]

The process of approximation has a voluntary character, which can be defined as the situation where "a third state adapts its national law to Community law rules which have no binding force in relation to that state and in the framing of which state may have had no real participation."[20] This may, in fact, have a negative influence on pending economic reforms.[21] In other words, approximation is the one-sided process in which a third state implements (which might be considered quite a technical activity) an external legal system (which it has had no opportunity to participate in the creation of) into its domestic legal system. A literal interpretation of article 68 of the Europe Agreement leads one to the conclusion that the highly important issues of the scope, timetable and methods of approximation activities remain the exclusive competence of the Polish authorities.[22] However, when one adopts a teleological approach to the whole process it becomes quite obvious that this argument should be treated with a high degree of prudence.

The scope of the approximation activities

The scope of approximation is defined by the regulatory extent of EU law. Since the major aim of bilateral relations between both parties is Poland's accession to the European Union the only factor relating to adaptation process which may be subject to negotiations is the timetable of

[17] In other words, the breach of obligation of international law will not be lack of approximation of the new Polish legal acts with the Community law, but failure to take best endeavours to achieve this aim. See: P. Saganek, T. Skoczny, *Selected Issues...., op. cit*. p. 37 - 38.

[18] It is interesting to note the different terminology that which occurs in the Polish literature. The process is in question is usually referred as "harmonisation" (which, considering the meaning of this term in relation to EC law, might be confusing), "adaptation" or "approximation." According to Piontek it might be also called "incorporation", which emphasises the formal and material aspect of the process. Biernat (cited above) refers to the legislative part (which I have qualified, following Mik, as the formal aspect of approximation) as "harmonisation", and the real part as "implementation." For the purposes of clarity, in most cases I use the terms "adaptation", "approximation" and "incorporation" interchangeably.

[19] See: E. Piontek, *Central and Eastern European Countries in Preparation for Membership in the European Union – a Polish Perspective*, in: Yearbook of Polish European Studies 1 (1997) 73, Warsaw University Centre for Europe, 1997.

[20] See: A. Evans, *Voluntary Harmonisation in Integration between the European Community and Eastern Europe*, ELRev 22(1997) 201.

[21] "The framework within which such harmonisation takes place may mean that this process is unable to take account of structural economic problems as severe as those faced by Central and East European countries. Therefore, while possibly improving their legal access tom the Community market, voluntary harmonisation may do less to assist such countries to develop their economic capacity to exploit the trading opportunities entailed." See: A. Evans, *Voluntary ..., op. cit*. p. 201

[22] See: J. A. Wojciechowski, *Dostosowanie prawa polskiego do prawa europejskiego – proces bez końca*, in: Przegląd Prawa Europejskiego, No 1/1996, p. 7-10, Fundacja Promocji Prawa Europejskiego & Dom Wydawniczy ABC, 1996.

approximation activities and possible transitional periods.[23] As a matter of fact, the Europe Agreement gives only a slight suggestion as to what fields of law shall fall under the process in question. According to article 69 of the EA "the approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animal and plants, consumer protection, indirect taxation, technical rules and standards, transport and environment." It should be noted that this enumeration does not have an exhaustive character but may rather be considered as a very specific type of guideline. The scope of approximation activities is, however, much wider than this and includes (in general) the whole *acquis communautaire*, that is: primary and secondary European Communities' legislation, legal instruments adopted within the second and third EU pillars, the jurisprudence of the European Court of Justice (and Court of First Instance) together with EC policies and the general rules of European law.[24] Taking into account continuing development of EU law we may conclude that the approximation process has a very dynamic character. Consequently, these activities can be compared to 'chasing the horizon', making approximation a seemingly endless process.[25] It must be emphasised that partial adaptation cannot be taken into account. As the European Commission has explicitly emphasised, "the Council has ruled out any idea of partial adoption of the acquis...[as] without solving the underlying problem...[it] could create new difficulties which would be even more considerable."[26]

However, it is important to note that it is possible to distinguish some limitations to the scope of these activities. Indeed, there are certain parts of EC legislation that should not be implemented into Polish legal system before certain criteria (that is, economic ones) are fulfilled or until accession takes place.[27] In practice, this refers to selected aspects of internal market legislation, institutional provisions together with company law, trade marks, transport, insurance sector etc. It also refers to international treaties concluded between Member States of the European Union.[28]

Timetable and order of the approximation activities

The speed and timetable of the approximation activities depends on a variety of internal and external factors. Only an analysis of both sets of factors gives one a complete picture of the process in consideration.

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[23] For more on this see: C. Mik, *Problemy dostosowania..., op. cit*. p. 71

[24] One should also remember that approximation also has much wider constitutional context. Accession to the European Union requires that Member States' legal systems accept the highly important doctrines of supremacy, direct applicability and direct effect. Consequently, in order to secure the proper enforcement of EU law after the accession, certain constitutional matters also need to be resolved in advance. For example, this includes revision of powers of Parliament, government, the courts and the Constitutional Tribunal. For more on this see: C. Mik, *Zasady ustrojowe europejskiego prawa wspólnotowego a polski porządek prawny*, in: Państwo i Prawo, No 1/1998, p. 12-39, Polska Akademia Nauk, Komitet Nauk Prawnych, 1998.

[25] See: J. A. Wojciechowski, *Dostosowanie prawa ..., op. cit.* p. 10.

[26] See: *Agenda 2000 For a stronger and wider Union*, European Commission, Bulletin of the European Union, Supplement 5/97, 1997, p. 44 – 45.

[27] One should bear in mind that there is number of regulations and directives which require well-developed co-operation between institutions of the Member States for their enforcement.

[28] See: P. Saganek, & T. Skoczny, *Selected Issues...., op. cit.* p. 78-80.

Although the Europe Agreement establishes certain time limits for approximation in selected fields of law, this cannot be considered as the proper timetable *per se*. One should also have in mind the powers of the Association Council in this respect. The whole problem of the timetable and the order of approximation activities should be considered from a much broader perspective and not just from the point of view of the Europe Agreement.

As mentioned in the introduction, unlike the case of the recent 1995 enlargement, the adaptation of the *acquis* by the Central and East European applicant states is part of the pending process of democratic reforms. Consequently, when discussing the internal aspects of the timetable and the order of the approximation activities, one must distinguish between legal, economic and social aspects.

In legal terms one needs to bear in mind that since the beginning of the 1990s the Polish legal system has been subject to extensive reforms. In many cases an immense amount of legislative activity has had to take place. As in the case of other countries in the region, several brand new and unknown fields of law (such as consumer protection, competition law, environmental law) have been created. It should be emphasised that the process under consideration has, in fact, a dual character. At the same time as adaptation to the new economic and political environment has been taking place, the Polish legal system has been subject to approximation with European Communities' law. Since the legal system of every country is a system of many constituent parts, the order and timetable of approximation activities is, therefore, dependent on a variety of legal factors.

The innovatory character of these reforms involves, in many cases, immense budgetary expense. This is the reason why we may also speak about economic aspect of the approximation of Polish legal system to EU law. The timetable and order of approximation activities is, of course, strictly connected with the financial abilities of the state, as implementation of the new legislation may, in many cases, require institutional changes in state and local administration.

Another aspect that needs to be taken into account is the social factor. Most of both the pending reforms and the approximation activities affect the nation in a number of ways and may cause a great deal of controversy. A clear example of this is the rapidly decreasing support for Polish EU accession, which has decreased from 77 % to 59 % during the period from June 1994 to November 1999.[29]

Consequently, it seems obvious that the final timetable and the order of the approximation works must be the result of a deep interdisciplinary analysis. The above factors prove the complexity of the process under consideration. The whole approximation effort must have its basis in a regularly updated timetable and definitely cannot be enforced on an *ad hoc* basis.

In fact, in the last few years there were several programme documents published by the Polish Government relating to this topic. The most important of these include the *National Strategy for Integration* (*Narodowa Strategia Integracji*)(1997)[30] and *National Programme for the Adoption*

[29] See: *Poparcie dla Integracji Polski z Unią Europejską, Komunikat z badań*, Warsaw, XI 1999.
[30] See: *National Strategy for Integration*, in: Monitor of European Integration, special edition, Committee for European Integration, 1997.

of the Acquis (Narodowy Program Przygotowania do Członkostwa) (1998, amended in 1999 and 2000)[31]. The first of these has a rather declaratory character and simply sets out the economic, legal and social priorities of Polish authorities in relation to EU enlargement.[32] The second document (which was a response to the European Commission's *Accession Partnership*) has a much more relevant practical aspect, as it provides the schedule for the country's pre-accession actions. It sets out, in particular, the timetable for adaptation activities as well as the potential economic and administrative impact. The programme covers both the legislative aspects of the approximation activities and also the implementation implications, including possible administrative changes and necessary financial expenses concerned. The particular tasks are presented sectorally. It should be noted that responsibility for the proper implementation of the programme lies not only in hands of the government and parliament but also extends to the whole state administration, local administration and courts system. In many cases the co-operation of representatives of the private sector was also considered to be highly relevant. Since the pre-accession preparatory activities are of a very dynamic character the *National Programme for the Adoption of the Acquis* was amended in 1999 and 2000. New priorities have been defined while the timetable and cohesion of certain action priorities with the Accession Partnership have been affirmed.[33]

The external aspect is also of much relevance here. The European Commission, by means of different political documents presents its views and guidelines on approximation for each applicant country. The timetable and order of the approximation activities is also subject to detailed scrutiny from the European Commission. The Commission quite regularly presents applicant states with variety of documents assessing their progress on the road to accession (although they are political in nature and do not, therefore, create any legal obligations in addition to the Europe Agreement).[34] First, a highly important document was undoubtedly the White Paper of 1995 [35]/[36], which defined the scope of the approximation activities in the field of the internal market.[37] This was followed by the *Avis*: the European Commission Opinion on Poland's membership application[38] that clarified the state of approximation of the Polish legal system to the law of the European Union. Since the accession negotiations (preceded by screening) have been in progress new documents have been more detailed and undoubtedly posses a specific

[31] See: *National Programme for Implementation of the Acquis*, Warsaw 1998 (http://www.ukie.gov.pl)
[32] See:: D. Hübner, *On "National Strategy for Integration"* in: Yearbook of Polish European Studies 1 (1997) 177, Warsaw University Centre for Europe, 1997.
[33] See: E. Synowiec, *Modyfikacja Narodowego Programu Przygotowania do Członkostwa w Unii Europejskiej*, in: Wspólnoty Europejskie, p. 31 – 44, No.7-8 /1999, IKCHZ, 1999.
[34] It should be noted that these documents are only of a political nature and cannot, therefore, be considered as international treaties creating rights and obligations for both parties. The only legally binding document for both parties is the Europe Agreement, as specified above.
[35] See: The European Commission, *White Paper: Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union*, COM (95) 163 final, 03.05.1995 and COM (95) 163 final / 2, 10.05.1995.
[36] One should also bear in mind the European Council's Conclusions of the Presidency from Copenhagen (June 1993), Essen (December 1994) and Cannes (June 1995).
[37] There is more on impact of the White Paper on approximation activities in: M. Górka, *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.
[38] See: *Agenda 2000, Opinia Komisji Europejskiej o wniosku Polski o członkostwo w Unii Europejskiej*, in: Monitor Integracji Europejskiej, wydanie specjalne, KIE, 1997

political importance. The Accession Partnerships [39] created a pre-accession strategy for applicant countries. As noted in the Polish version of the document: "The purpose of the Accession Partnership is to set out in a single framework the priority areas for further work identified in the Commission's Opinion on Poland's application for membership of the European Union, the financial means available to help Poland implement these priorities and the conditions which will apply to that assistance." The Regular Reports published annually by the European Commission are, to some extent, a continuation of the 1997 Commission's Opinion on the membership application. Presented in the same structure as the latter, the reports identify (amongst other things) the state of approximation of the Polish legal system to the law of the European Union.

The accession negotiations, which began in 1998, also have an influence on the approximation process. Apart from defining the areas of law where legislative effort is needed (this was the crucial task of screening, the first phase of the negotiations) they definitely have an additional political impact and mobilise the relevant Polish authorities. As noted in the Opinion of Legislative Council it is very important that Polish negotiation positions are harmonised with th government's legislative programme.[40]

Approximation methods

Another important factor that needs to be considered at this point is the method of approximation. The various concepts relating to the methodology of approximation have been presented in Polish literature.[41] However, adopting a more general approach these can all be reduced to a common denominator according to which we may distinguish between legislative and other methods (including, in the first place, interpretative ones – the so called pro-European interpretation of law).

It should be emphasised that because of the character, scope and the present form of approximation activities in Poland, the most basic method is the legislative one. The others are also of much importance but only have a subsidiary character. The legislative method, providing that it is organised in a reasonable way, is already well developed and provides the most certain approximation tool. Based on a written, official programme (as specified above) it creates a large amount of legal certainty for both the state administration involved in the activities and the subjects applying the law. Legislative approximation is achieved by the amendment or repeal of the legislation currently in force or, when required, by the adoption of completely new acts of legislation. As previously noted, in many cases it causes the evolution of undeveloped fields of law and sometimes may even lead to creation of new, previously unknown fields of law. The novel introduction in 2000 of so called "European Law Acts" is a direct result of the pressures inherent in this process. In order to speed up the legislative work various legislative proposals concerned with approximation of the Polish legal system are put into one single act. The first

[39] Decision of the Council of the European Union. See: *Partnerstwo dla członkostwa w Unii Europejskiej, Studium porównawcze*, Collège d'Europe, Natolin, 1999

[40] See: *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, Kancelaria Prezesa Rady Ministrów, 1999.

[41] A summary of most distinguished concepts had been presented by P. Saganek in: P. Saganek, T. Skoczny, *Selected Issues op. cit.* p. 82.

experiences of this Act show that it might be a very useful tool, providing that the topics covered by such an act are within similar fields of law.

It shall be emphasised that the legislative method does only not cover the legislative process of the adoption of the legal acts (which may be called the 'formal' aspect of approximation). It also extends to their proper implementation and enforcement (the 'real' dimension).[42]

The other approximation method that this paper considers is the so-called pro-European interpretation of Polish law. This leads us on to the more general aspects concerned with the accession process and the role of the domestic courts in the pre-accession period both of which are considered in the second part of the paper.

[42] It is very interesting to analyse this method in direct reference to the diversified sources of EC law. The legislative method applies in general to both primary and secondary legislation. However the character of these activities may differ when we take into account particular acts of EC law. In case of approximation of Polish law to matters regulated by primary legislation arguments on the limitations of the scope of the approximation are particularly applicable. For example, the basic rules on free movement of persons and services provided in the Europe Agreement differ, to large extent, from the rules for Member States as specified in the EC Treaty. They cannot, therefore, be subject to approximation activities in this phase of association. The fact that the ECSC Treaty will terminate soon should be also taken into account. The subject issue becomes quite complex when secondary sources of the EC law are taken into consideration. According to article 249 of the EC Treaty "a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." From the moment of the accession, therefore, the part of the *acquis* that takes the form of a regulation will be directly applicable in the new Member States. Consequently, the relevant domestic legislation will have to be repealed, although this will take place only within the scope of the EC law. Less problematic is the approximation of the Polish legal system to directives, as the present legislation after accession will be implicitly transformed into national implementation measures within the meaning of article 249 of the EC Treaty. However, because of the character of directives, Polish legislators should also take into account the implementation measures as applied in the Member States. As far as decisions are concerned, Poland is allowed to come to a general conclusion that they are not subject to approximation, except for those that require certain financial and logistic actions, such as research and development programmes (C. Mik, *Problemy dostosowania..., op. cit.* p. 80.). Since international treaties which the European Community have concluded with third states and international organisations also form part of the *acquis communautaire*, the scope of the approximation shall be respectively extended. As a result, all future international treaties concluded by Poland must be in conformity with EU law. The agreements that are already in force will have to become the subject of renegotiations and, in extreme cases, will have to be terminated. Apart from the primary and secondary sources of the EC law the *acquis communautaire* also consists of the jurisprudence of European Court of Justice as well as a variety of non-binding acts (recommendations, guidelines, communications etc.). It might be quite difficult and unreasonable to imagine the Polish legislature implementing all of the results of European Court of Justice's judicial legislation or the non-binding acts of the European Commission into domestic law. Some Court conclusions specifying provisions of EC law might be used in the implementation measures (for example, in case of the directives) but, in general, this should not be the case. The conclusion that arises is that all of those documents shall be used particularly in the enforcement part of the approximation process as very useful interpretation tools. For more on this see: C. Mik, *Problemy dostosowania…, op. cit.* p. 79 – 80; S. Biernat, *Kilka uwag…, op. cit.* p. 26 – 30.

2. The Implications of the approximation process for the state administration

Introductory remarks

Having discussed the most important theoretical issues relating to the approximation process, consideration will now be given to more practical factors. It is no exaggeration to say that, in practice, approximation affects all three elements of *Montesquieu*'s concept of the division of powers: the legislature, executive and judiciary. Since the most effective approximation method is the legislative one, the major role is played by the parliament. However, the dual role and impact of the executive shall be also taken into account. On one hand, the executive determines the programme of approximation activities works and prepares legislative proposals. On the other hand, it is the main body responsible for the enforcement of the new legislation. One should also mention the judiciary. Its role is quite limited in the pre-accession phase, but we should not forget about the pro-European interpretation of laws, which can also be considered as an approximation method *per se*.

This part of the paper examines various aspects of the approximation process. The starting point shall be the important issue of the organisation of approximation activities. This is followed by considerations on the enforcement of the new legislation and its consequences for the state administration. Finally, the role of the courts in the process is considered.

Organisation of approximation activities

As noted above, the most effective and widely used approximation method is the legislative one. The practice of the Polish legislature and recent developments in the legislative procedure will be discussed in detail in the due course. However, we shall begin with a brief overview of the legislative procedure, together with the sources of Polish law.

One of the major achievements of the Constitution of Republic of Poland of 2nd April 1997[43] was introduction of a new section on sources of law that clarified the existing, very complicated, structure.[44] According to article 87 of the Constitution, the sources of Polish law include the Constitution itself (as a supreme legal act), statutes, ratified international treaties, regulations and the legal acts of the local authorities (state or local self-government).[45] It should be emphasised that the Polish legal system is a statutory one. In other words, the principle of *stare decisis*, well known in common law countries, does not apply.

[43] See: Konstytucja Rzeczpospolitej Polskiej z dnia 2 kwietnia 1997r, Dziennik Ustaw No 78/1997, item. 483

[44] The legal situation in this respect, together with the constitutional practice (as created by previous constitution of 1952 and the Constitutional Act of 1992), were unclear and therefore unacceptable for a country committed to respecting the rule of law. The open system of sources of law, with large number of governmental acts, has been subject to criticism. As a result of these controversies the new Constitution of 1997 have introduced the closed catalogue of universally binding sources of law.

[45] It should be noted that Constitution has also introduced the category of internal sources of law, which regulate internal aspects of the state administration activities. These include, for example, prime ministerial. orders or resolutions of the Council of Ministers establishing the statutes of ministries (article 93).

For the purposes of this paper it is very important to analyse in detail statutes and regulations as, in practice. these are the main instruments of the legislative activism of the relevant state organs and the main approximation tool. The legal acts of local authorities have a limited application and their relevance to approximation process is, therefore, marginal.

Statute is (apart from the Constitution) undoubtedly the most important source of law in Poland. It is the act of parliament, adopted on the initiative of members of the Sejm (the lower house of Polish Parliament), Senate (the upper house), the President of the Republic and Council of Ministers. The novelty introduced by the new Constitution was the right of legislative initiative of 100,000 citizens (article 118 of the Constitution as specified by the Act on Citizens Legislative Initiative). This multiplicity of bodies possessing legal initiative has wide ranging consequences for the process of approximation. As far as the legal character of the statute is concerned, we should point out that it takes the highest position in the catalogue of sources of law [46] and it possesses a normative character. Its subjective scope is unlimited and on certain, important matters it is the only legislative tool which may be used.[47]

Another source of law that is worth mentioning are regulations that, according to the hierarchy of legal acts in Poland, are subordinate to statutes. Regulations are legal acts of an executive character, introduced by the President of the Republic, Council of Ministers, prime minister, government ministers as well as the National Council of Radio Broadcasting and Television. Its essence is that regulations may be adopted only on the basis of explicit statutory delegation and for the purposes of the enforcement of a statute.

Because of the structure of the legislative procedure and different state institutions that are involved in the law making process, it was necessary to create two different scrutiny procedures. Governmental procedure deals with the analysis of regulations and bills (which are to be introduced to the Parliament by the Council of Ministers) for their conformity with EU law. However, as noted above, the initiative to present bills to the Parliament also lies in the hands of bodies other than just the government. It was, therefore, necessary to create a separate scrutiny procedure in parliament. Both procedures will be separately analysed in detail in the next section of this paper.

Scrutiny procedure within Council of Ministers

The scrutiny procedure for legal acts adopted within the Council of Ministers was introduced long before the Europe Agreement came into force. “Already in September 1990, the Economic Committee of the Council of Ministers (KERM) officially recommended that new legislation be harmonised to meet the Community’s requirements”.[48] This was formally followed by the decision of Council of Ministers (No 16/94 of 29th March 1994)[49] on additional requirements for the procedure of adoption of Council of Ministers legislative acts arising from the obligation to approximate the legal system to European Union law. Currently, these issues are regulated by the

[46] With the exception of the Constitution and ratified (with the permission of parliament) international treaties, which (in case of inconsistency with statute) take precedence.
[47] See: L. Garlicki, *Polskie prawo konstytucyjne zarys wykładu*, p. 194, 2nd ed., Liber 1998
[48] E. Piontek, *Central and Eastern.. op. cit.* p. 77
[49] See: Monitor Polski, No 23 / 1994, item 188

Council of Ministers Rules of Procedure (CMRP)[50] and also the Act on Committee for European Integration (CEI).[51]

According to § 14.1 of the CMRP the drafts of normative acts and other legal acts shall be scrutinised for their conformity with European Union law during the co-ordination part of the legislative procedure. As noted by Saganek [52] while the subjective scope of the procedure *prima facie* seems to be undefined, in practice it extends to all legislative acts adopted within the Council of Ministers. This primarily refers to bills, regulations and certain internal sources of law (that is, resolutions of the Council of Ministers).

The legislative procedure starts with the initiative of the entitled authority. The draft of the legal act shall 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 EU law. If the legal act is the draft of a bill it shall also have the drafts of the regulations enclosed. Co-ordination is the next party of the procedure. The draft of the legal act with all appeneded documents shall be sent to relevant institutions of the state administration as well as to the Committee for European Integration. The Committee is "the national administration's principal authority for planning and co-ordinating policies regarding Poland's integration with the European Union and the planning and co-ordination of Poland's adjustment to European standards as well as the co-ordination of the national administration's disbursement of incoming foreign aid."[53] Its tasks includes assessing government legal acts for their conformity with EU law. This opinion shall be then annexed to the legal act in consideration for the purposes of the remainder of the legislative procedure. It shall be emphasised that according to § 16 of the CMRP the drafts of the legal acts shall not be subject to examination by the Council of Ministers until the opinion on conformity with the EU law has been delivered to the Secretary of the Council of Ministers. The last part of the procedure is adoption of the legal act by the Council of Ministers. If the legal act is a bill,it is then passed to the parliament with the Committee's opinion attached. If it is a regulation, it is published in the relevant Official Journal and enters into force at a specified time.

The scrutiny procedure (as created by the decision of Council of Ministers № 16/94 and later by the CMRP) has been extensively used for approximately five years. Experience leads one to various conclusions that now will be critically analysed in detail. Firstly, until March 1999 this was the only scrutiny procedure for all legislation being adopted in the country. Because of its limited scope (applying only to legal acts adopted by the Government) the bills introduced by other entitled state authorities (as well as other executive legal acts)[54] where not subject to any audit as to their conformity with EU law. According to Parliamentary statistics in the period of 1993-1997 there were 819 bills submitted to the Marshal of the Sejm [55] and only 314 originated

[50] See: Monitor Polski No 15 / 1994, item 144
[51] See: Dziennik Ustaw No 106/ 1996, item 494
[52] See: P. Saganek, T. Skoczny, *Selected Issues op. cit.* p. 42.
[53] See: *Act of August 8, 1996 on the Committee for European Integration*, in: Yearbook of Polish European Studies 1 (1997) 234, Warsaw University Centre for Europe, 1997
[54] Which, before the new Constitution came into force, also consisted of other categories of sources of law such as. executive orders.
[55] According to article 31.1 of the Standing Orders of the Sejm of Republic of Poland all bills shall be submitted to the Marshal of the Sejm (unified text of the document in Monitor Polski No 44/ 1998, item 618)

from the government. In other words, almost 58 % of all the bills submitted were not subject to any formal audit as to their conformity with EU law. Consequently, the number of non-scrutinised acts adopted by the Parliament in this period of time amounted to 265 (244 acts on the initiative of groups of MPs, 57 on the initiative of Parliamentary Commissions, 7 acts originating from Senate and 12 from President). [56] It was only at the beginning of 1999 that parliament finally amended its Standing Orders in order to provide a legal basis for the scrutiny procedure of all bills being subject to legislative procedure. This will be discussed in the next part of the paper. Another conclusion that emerges from the practice of the governmental procedure is that it appears to be relatively weak tool. First of all, the opinion is not binding. As a consequence it does not have to be taken into account and may lead to the adoption of the legal act which is not in conformity with EU law. Secondly, before the parliamentary procedure was established there was no permanent scrutiny of bills. Even when a bill was in conformity with EU law at the governmental stages of the legislative procedure, it could still be amended by the Sejm or Senate and, as a result, become contrary to the provisions of EU law.[57]

The scrutiny procedure in parliament

There was much criticism that there was no parliamentary scrutiny procedure until early 1999. The first attempts to devise one were in 1997 when the Standing Orders of the Sejm were slightly amended (a new provision was added to article 31). The authors of legal acts (bills and other non-binding internal documents such as draft Sejm resolutions) were required to submit an opinion on conformity with EU law as an annex to the legal act under consideration. Due to the lack of a relevant procedure this provision proved unenforceable. [58] Consequently on 19th March 1999 [59] the Sejm Standing Orders were once more amended and a more complex scrutiny procedure was introduced.[60]

According to article 31 of the Standing Orders, bills and draft resolutions must be first submitted to the Marshal of Sejm and shall have an explanatory note attached. Among other important information (such as an explanation of the need for and purpose of the bill) this shall contain a statement on its conformity with EU law. If it does not then the document shall define the scope and reasons for it not doing so. If the subject matter of the bill is not covered by the regulatory extent of EU law, then such information shall be included in the explanatory note.[61] In the case of a bill originating in the Council of Ministers the subject opinion on conformity is the document mentioned above (an opinion given by the Committee for European Integration). According to art. 31. 3b of the Standing Orders of Sejm, a bill that is declared by the author as approximation bill shall have a translation of the relevant EU law instrument (regulation, directive etc.) attached

[56] C. Mik, *Problemy dostosowania....op. cit.* p. 73-74
[57] For more on this see: J. A. Wojciechowski, *Dostosowanie prawa....op. cit.* p. 8
[58] A critical analysis of this can be found in C. Mik, *Problemy dostosowania....op. cit.* p. 74
[59] See: Monitor Polski No 11/ 1999, item 150
[60] For more on different proposals for reform of the procedure see: J. Jaskiernia, *Badanie zgodności projektów ustaw z prawem Unii Europejskiej w sejmowym postępowaniu ustawodawczym*, in: Państwo i Prawo No 7/1999, p. 19-33, Polska Akademia Nauk, Komitet Nauk Prawnych, 1999.
[61] If the explanatory note does not fulfil the requirements of article 31.2 and article 31.3 (as well as the requirement of attaching the opinion on conformity with EU law) the Marshal of Sejm is allowed to return the bill or the draft resolution to the author.

to it. Statements on conformity (with the exception of governmental bills) have only a preliminary character, since the Marshall of Sejm shall also secure an opinion on a bill's conformity with EU law before its first reading of the bill. This opinion is prepared and submitted by parliamentary experts.[62] In the case of the non-conformity the Marshal of Sejm shall refer the bill to the Parliamentary Committee for European Integration for an opinion.[63] This opinion (whether it states conformity or not) shall then be submitted to the author of the draft.

According to the Standing Orders of the Sejm the legislative procedure requires three readings of any bill. During all stages of the procedure, if there are any doubts as to the conformity of the amended bill with EU law, a request for an opinion may be submitted to the Committee for European Integration. This might be the case during the readings of the bill in the Sejm as well as during the Sejm debates on amendments introduced by the Senate, the second chamber of the Polish Parliament. It should be noted that according to the article 39.3a of the Standing Orders while a piece of legislation must be referred to the Committee for an opinion, that opinion is not necessarily binding.

During the committee part of the legislative procedure, when its conformity with EU law is considered, representatives of the Committee for European Integration shall take part in the proceedings together with a representative from the parliamentary legal service. This facilitates the scrutiny of the legislation during the parliamentary process. In practice, this may lead to avoidance of amendments that are inconsistent with EU law.

The reform introduced in July 2000 has changed the face of the parliamentary legislative procedure. Its two major achievements are: the creation of the specialised European Law Commission and new, tight time limits for particular parts of the procedure. According to article 56 w of the Standing Orders of Sejm, a governmental bill declared as an "approximation bill" during the commission part of the legislative procedure shall be subject to the proceedings of the above mentioned European Law Commission. Only in exceptional circumstances, and at the request of the Marshall of Sejm, will such a bill be analysed by a sectoral parliamentary commission. However, one should remember the additional role of the Parliamentary Commission for European Integration.

The experience of the parliamentary scrutiny procedure is relatively limited, since it was only introduced in 1999. However the legal framework and also the first experiences may lead us to certain conclusions. Firstly, the creation of such procedure has finally ended the highly critical situation where a large amount of legislation was not subject to analysis as to its conformity with EU law. that had been causing unacceptable problems in the pre-accession process. Secondly, the legal framework, as briefly described above, provides the legislature with a wide range of tools to secure the conformity of new legislation with EU law during the legislative procedure. Its structure and the range of institutions involved allow permanent scrutiny during all of the phases of the adoption of a bill. Apart from its practical and political meaning, it also has an awareness

[62] The natural question that arises is the *ratio legis* for such a procedure. *Prima facie* it may lead to the conclusion that the statement of conformity is irrelevant, since another opinion is required anyway. However, as noted by Jaskiernia such a requirement forces the authors of bills to take into account EU law when drafting their proposals. (See: J. Jaskiernia, *Badanie zgodności...., op. cit*. p. 28)

[63] As in the case of other parliaments the committees play an important part in the legislative process.

rising aspect. The statement on conformity requires from the authors of the bill obtain certain knowledge of the approximation issues and sensitises their future legislative activism. Finally, the creation of the European Law Commission may, in fact, lead to acceleration of the legislature's work.

Apart from the procedure itself there are also a few more general remarks which should be made at this stage. The practice of the recent decade proved that there is a lot of political blockage in relation to legislation being subject to parliamentary proceedings. This had led, in some situations, to the adoption of legislation that is inconsistent with EU law. Taking into account delays in approximation (as emphasised in the 1998 Progress Report) this important issue has recently been subject to intense political discussions between representatives of the Council of Ministers and parliament. The current accession negotiations require a smooth legislative procedure in order to accelerate approximation activities. From the formal point of view, a so-called 'fast-track' legislative procedure is provided for bills introduced by the Council of Ministers.[64] In addition, recent political discussions show that there is a growing need for political agreement on the priorities of foreign policy (where EU integration is a key point) in order to secure progress in pre-accession activities. If the new procedure functions properly, it may be expected that it will facilitate the swift adoption of the acts approximating the Polish legal system with EU law.

Taking into account the 2001 parliamentary elections we should not forget about the traditional rule of discontinuation of legislative works,[65] which, in theory, leads to the disruption of outstanding legislation at the end of the term of Parliament. In other words, a new parliament does not complete the unfinished legislation of the previous assembly. A strict application of this rule may lead to serious distortion of approximation activities in 2001 if bills concerned with the pre accession process are not adopted in time. However, it should be pointed out that recently preliminary steps were taken in order to exclude all the bills that are submitted in accordance with the *National Programme for the Adoption of the Acquis* from the discontinuation rule.

Enforcement of the new legislation

We now turn to consider another very important aspect of the approximation process: the enforcement of newly adopted legislation. As noted above by the European Commission, this part of the process is of even greater importance than the mere incorporation of Community legislation into the domestic legal system.[66] According to Mik this may be described as the 'real' aspect of the approximation[67] and includes the creation of the proper organisational, technical, financial environment for the application of the relevant legislation.[68]

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[64] See: article 123 of the Constitution of the Republic of Poland

[65] As noted by Garlicki, it is very difficult to say whether this rule has a normative or just a traditional character, it is not subject to any legal provisions. For more on this see: L. Garlicki, *Polskie prawo ...., op. cit.* p. 168

[66] *Agenda 2000 underlined the importance of incorporating Community legislation into national legislation effectively, but even greater importance of implementing it properly in the field, via appropriate administrative and judicial structures*. in: Enlargement, Commission Progress Report 1998, p. 41

[67] Biernat refers to this problem as "implementation" (in contrast to harmonisation, which he uses as an alternative expression for approximation), see: S. Biernat, *Kilka uwag o harmonizacji..., op. cit*. p. 23

[68] See: C. Mik, *Problemy dosotosowania....op. cit*. p. 69

In practice, in a lot of cases enforcement requires certain administrative activism and changes in the structure of the state administration. One should remember that it also has an impact on the work of the judicial system. The implications of the enforcement part of the approximation process may be divided into three broad categories:

- legal
- technical
- social.

As far as the first category is concerned, one should point out that because of the specific character of EC/EU law its implementation (especially in the associated countries of Central and Eastern Europe) may have a widespread legal consequences. In order to have a coherent legal system both Member States and applicant countries are sometimes forced to amend a variety of existing legal acts as the direct or indirect result of the implementation (approximation) of EC/EU law. As Wojciechowski notes, the legal system is the system of combined parts so that reforms in one field may imply changes in others.[69]

The second factor is of an administrative character. The legal reforms may require changes in the structure of the state and local administration. Since 1989 there were several new institutions established in Poland. The main reasons for their establishment were the democratic reforms and introduction of a free market economy. However the approximation process has also played an important role in their creation. The Office for Competition and Consumer Protection (OCCP), the Office of Public Procurement and the Data Protection Inspector General are particularly good examples of this. The on-going approximation process undoubtedly plays an important role in the creation of powers of certain institutions. Very recent developments show that newly adopted legislation on consumer protection or on state aid will lead to a reform of the structure of the Office for Competition and Consumer Protection. It will require "an increase in the controlling functions of the OCCP in order to execute the observance of those provisions and to protect the consumers' interests properly. It will be necessary to strengthen the competence and potential of the OCCP by legislative changes and by increasing the budget resources."[70]

An essential aspect of the implementation phase which shall be distinguished are relations and co-operation between different ministries and institutions of the state administration. Relations with non-governmental organisations might also be relevant here. As noted by the European Commission undeveloped links between institutions may, in practice, lead to very weak enforcement of legislation. In relation to phytosanitary and veterinary issues, for example, the 1999 Progress Report states as follows: "To facilitate implementation, it may be useful to strengthen the consultation mechanisms between the administration, the seed industry, plant protection companies, farmer's organisations and other concerned bodies."[71]

One of the indirect results of the approximation process are changes in the structure of the staff (the social aspect). The main problem is inexperienced and very low paid young staff, who usually move on to more profitable work in the private sector after a short experience in the state

[69] See: J. A. Wojciechowski, *Dostosowanie prawa polskiego..., op. cit.* p. 8
[70] See: Enlargement, Commission Progress Report 1999, p. 50
[71] See: Enlargement, Commission Progress Report 1999, p. 46

administration. Analysis of the 1999 Progress Report leads to the conclusion that this sort of problems is quite common for the Polish administration. For example, in the Ministry of Agriculture there is a "very severe shortage of qualified staff" [72]; in the energy sector "the administration is weak an ineffective, [...] the departments [...] are inadequately staffed and have very limited knowledge of the requirements."[73] Those are just a few examples but illustrate the scale of the problem under consideration. They also show how complex the process of approximation and, more broadly, the preparations for EU accession are.

Approximation and Polish courts

Undoubtedly the judiciary plays an important role in the process of approximating the Polish legal system to the requirements of the *acquis communautaire*. In the pre-accession phase the courts' activities in the field of the EU law are limited due to the fact that it does not constitute part of the domestic legal system. The rules of supremacy, direct applicability and direct effect are not binding on Polish courts. Moreover, the preliminary ruling rules of article 234 of the EC Treaty only apply to Member States' courts and are, therefore, not applicable to associated countries.

As it was mentioned in the introductory remarks, the role of the courts in this process is very different than in the case of the legislature and executive. Because the most effective approximation method (which is being used in Poland) is the legislative, Polish courts are *prima facie* not involved in adaptation activities. However, one should remember that there are also other approximation methods being used. As a subsidiary tool, we shall particularly distinguish the so-called 'pro-European' interpretation of laws, sometimes classified as the 'soft' adaptation of law to European standards.[74] In this case the role of the domestic courts seems to be predominant. It should be emphasised that "interpretation of Polish law in accordance with the EC law is the cheapest and the fastest instrument of approximation of the [domestic] legal system to Western European standards."[75] However, one should also be aware that this method can only have a subsidiary character and should not be used to avoid legislative difficulties. On the other hand, it can also be considered as introduction to the application of the rule of indirect effect that is well-established in EC law.[76]

The question that naturally arises here, is to what extent the courts should have discretion in using this tool of interpretation? There are no official guidelines as to the application of this rule. However, as suggested by various authors (see footnote no. 74 & 75) the situation seems to be quite clear and straightforward when the provisions of Polish law as approximated with EC law are clear and unambiguous. It will be appreciable if the domestic court, while preparing the judgement, will take into account the relevant provisions of EC law as well as the jurisprudence

[72] See: Enlargement, Commission Progress Report 1999, p. 46
[73] See: Enlargement, Commission Progress Report 1999, p. 47
[74] See; M. Safjan, *Prawo Wspólnot Europejskich a prawo polskie – prawo spółek, wprowadzenie*, p. 9-28, Instytut Wymiaru Sprawiedliwości, 1996.
[75] See: S. Sołtysiński, *Dostosowanie prawa ..., op. cit.* p. 39
[76] See: case 14/83, *Von Colson and Kamann v. Land Nordrhein – Westfalen* [1984] ECR 1891, [1986] 2 CMLR 430 and case C-106/89 *Marleasing S A v. La Comercial Internacional de Alimantación S A* [1990] ECR I-4135, 4159, see also P. Craig & G. de Burca, *EU law, text, cases and materials*, p. 198 – 206, second edition, Oxford University Press, 1998; S. Weatherhill & P. Beaumont, *EU law*, p. 409 – 413, third edition, Penguin Books, 1999.

of the European Court of Justice. The particular problem may arise if the legal act that is taken into account does not conformity with the EC law. The dilemma that the court may face is whether it should apply the domestic law in accordance or contrary to the requirements of the *acquis communautaire*? According to Sołtysiński the rules of the 'pro-European' interpretation of law shall apply if there is some ambiguity or lack of clarity and there are no socio-economic obstacles for such an interpretation.[77] This encompasses the possibility of there being situations where, during the pre-accession period, non-conformity with EU law is deliberately permitted for certain economic and legal reasons. It seems that if it is the case, the court will only take into account Polish law.

Practice shows that there are a number of courts, including the Supreme Court and the Constitutional Tribunal, that are willing to apply these rules. However it shall be emphasised that this does not occur very often. There are several reasons for this. The first is quite negative attitude towards the application of external legal systems and especially public international law. Before the entry into force of the 1997 Constitution there was no general rule defining the relations between Polish legal system and public international law. Also the practice of the domestic courts proved relatively little important this problem. The developments of the 1990s led the drafters of the Constitution to propose the introduction of adequate provisions into the text of the Constitution of the Republic of Poland.[78] According to the article 9 of the Constitution, Poland respects the rules of international law. Moreover, as explicitly stated in article 91.1 a ratified international treaty, after publication in *Dziennik Ustaw* (the Official Journal) is part of the domestic legal system and shall be directly applicable. If it was ratified with the permission of the parliament[79] (in the form of statute) it shall have precedence over the domestic statutes. This has, in theory at least, solved this problem. However, among many examples of the application of public international law in courts there are still examples proving that many judges are reluctant to apply those rules in their legal practice.[80]

As previously mentioned, the 'pro-European' interpretation of the law has been accepted by several Polish courts. In case III CZP 22/9, the Supreme Court[81] explicitly referred to provisions of the directive 94/19/EC of 30.05.1994. The jurisprudence of the Constitutional Tribunal has also been influenced by EU law. In judgement K 15/97, the Tribunal referred to article 141 of the EC Treaty as well as the jurisprudence of the European Court of Justice in this respect.[82] It should be particularly emphasised that even lower courts are beginning to include provisions of the law of the European Communities in their considerations. The Katowice District Court in a judgement of 16.07.1996 explicitly analysed provisions of Polish Commercial Code and German

[77] See: S. Sołtysiński, *Dostosowanie prawa , op. cit.* p. 40

[78] It should be noted that the practice of Polish courts before the new constitution came into force was to repeadetly accept the possibility of the application of international law in the Polish legal system. For more on this see: A. Preisner, *Prawo międzynarodowe w orzecznictwie sądów polskich*, in: *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym*, 1997, p. 127 – 144, Wydawnictwa Sejmowe, 1997

[79] It is the case when the treaty is dealing with the selected issues as specified in article 89 of the Constitution.

[80] For example, in the highly criticised judgement of Court of Appeal in Kracow (judgement of 10 October 1996, No 429/96) the court refused to apply the European Convention for Human Rights and Fundamental Freedoms. What is particularly striking is the fact that the court confused the ECHR with the law of the European Union. For more on this see: W. Czapliński, *Z praktyki stosowania prawa międzynarodowego w polskim systemie prawnym*, in: Państwo i Prawo, No 2/1998, p. 82-85, Polska Akademia Nauk, Komitet Nauk Prawnych, 1998.

[81] See: P. Saganek, T. Skoczny, *Selected Issues op. cit.* p. 87

[82] See: OTK 1997/3-4/37

Act on Limited Liability Company in the light of the directive 89/667/EEC of 21 December 1989.[83]

These few examples show that Polish courts are slowly accepting both the concept of approximation and the 'pro-European' interpretation of the law. The most important aspect here is growing interest of the courts in the law of the European Union. Undoubtedly, in the coming years the role of this sector of the *Montesquieu* division of powers doctrine will rapidly grow, as has been seen in many existing Member States, following the lead given by the ECJ. It is extremely important that the system of courts is prepared by the time of accession for the challenges of application of EU law. Looking at the experiences of current Member States this may, in practice, still constitute a problem for a long time after the accession takes place.

Conclusions

The Progress Report of 1999 underlined the particular problems that Poland was facing in the process of approximation. Huge delays in legislative procedure together with a variety of problematic issues concerned with the enforcement were putting Poland in an increasingly uncomfortable position in the accession negotiations. The situation in this respect has moved in the right direction (as emphasised in The Progress Report published in 2000), although much of the necessary legislative work in still required in the coming years.

The issue of approximation (as emphasised in this paper) is characterised by a high degree of complexity. In practice, it affects the whole of state administration. So far, the major role has been played by parliament and the government (the later is to a large extent responsible for implementation of *National Programme for the Adoption of the Acquis*). The role of the courts, although limited in the pre-accession phase, will grow in coming years.

The organisation of approximation activities has been weakened by the lack of a proper scrutiny procedure in parliament. The developments of 1999 and 2000 have undoubtedly changed this situation. However, the lack of procedure was not the only reason for such delays in adoption of the *acquis*. It ought to be emphasised that, in practice, the state administration is sometimes suffering from a lack of co-ordination in these activities. The structure of the administration and inexperienced staff are additional major problems (as underlined in the recent Progress Report) and political and social aspects also need to be taken into account.

When we examine at this process in detail it seems quite obvious that approximation is not simply the implementation of the EU law. In many cases it leads to the creation of brand new fields of law or changes previous legal concepts and doctrinal foundations. This is the reason why both the programming of these activities and final enforcement of the approximated provisions are causing so many problems. There is no doubt that the current accession negotiations will accelerate the process of the approximation of Polish legal system with EU law. Taking into account the improved legal framework for these activities, much depends now on the ability of the state administration to face the important legal reforms still to come. In various fields such as

[83] Details taken from judgement of the Supreme Court No II CKN 133/97 of 28.04.1997 as published in: Przegląd Prawa Handlowego, Feb. 1998, KiK, 1997

environmental protection, the introduction of the *acquis communautaire* into the domestic legal system will require extensive financial input. In many fields of law, therefore, the transitional periods will be subject to negotiations (although this should not lead to the slowing down of the approximation process).

Undoubtedly, the coming years will demonstrate Poland's abilities as a future Member State of the European Union. The long and complex process of adaptation of the legal system to the requirements of the *acquis* is expected to become even more important at the moment of accession. Then, it will have to be changed and become a part of the process of harmonisation and unification of laws of the Member States. Therefore we may conclude that the sooner the Polish administration (the executive, legislature and judicidary) is prepared for this, the less difficult will be the consequences of the accession.

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