

## THE CONSCIENCE CLAUSE OF SERVICE PROVIDERS FROM THE PERSPECTIVE OF LEGAL SECURITY

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**Abstract.** This paper discusses the issue of legal applicability of the conscience clause with respect to service providers. In the Polish legal order, at the statutory level, currently there are no provisions regarding the conscience clause of service providers. When assessing the issue from the perspective of legal security, the implementation of the abovementioned legal provisions into the Polish legal system appears to be a priority, since it would significantly improve the legal security of both service providers and service recipients.

**Keywords:** conscience clause; conscientious objection; provision of services; legal security of service providers; legal security of service recipients

### INTRODUCTION

The conscience clause in the Polish legal order is currently subject to numerous discussions and controversies [Bielecki 2019, 93-163]. While in principle it is not questioned with regard to the medical professions and the health service, the question is different with regard to other professions.

A recent subject of controversy in public discourse has been the issue of whether conscientious objection can be invoked by service providers [Dybowski 2019, 165-96]. In Poland, a lively public discussion on the subject arose with regard to the media-focused so-called ‘case of the printer of Łódź’ [Potrzezszcz 2019b, 13-55]. This case should be classified as a typical *hard case*, which is difficult to be conclusively resolved due to the conflict of values. It primarily involves the principle of equal treatment and non-discrimination on the one hand, and the principle of freedom of conscience and the principle of economic and contractual freedom on the other hand. Undoubtedly, the conflict of values reflected in the above principles cannot be resolved unequivocally *in abstracto*. In each particular case, its circumstances should be thoroughly analysed and subsequently, on this basis, the respective importance of various values must be determined.

In the author's view, however, it is indisputable that a kind of profession cannot prevent invoking conscientious objection [Skwarzyński 2016, 63-88], since every human being (including, of course, a person providing services), as a being endowed with an inherent and inalienable dignity of the person, has the natural right to be guided by the voice of his or her conscience in social relationships and the positive law should respect such a right. According to the doctrine, "the inalienable human rights cannot be protected effectively without the protection of his or her conscience. It is because freedom of conscience reflects human dignity. Its protection is vital to safeguard the essential content of certain fundamental rights, such as the freedom to express one's ethical, philosophical or religious convictions. [...] The right to invoke the conscience clause is recognised as a fundamental right, which may be only exceptionally limited" [Johann and Lewaszkiwicz-Petrykowska 1999, 21].

However, the question is whether and how it is possible to distinguish a real conflict between the voice of conscience and the obligation to act from a declared conflict, which in fact is not a real conflict, because its actual reason for refusal (e.g., to provide a service) is mere human malice, impoliteness, a tendency for prejudice or even laziness.

This paper discusses the issue of the conscience clause with respect to service providers from the perspective of legal security. In particular, it is appropriate to draw attention to the issue of the necessity and legal applicability of the conscience clause in respect to service providers. In the Polish legal order, at the statutory level, currently there are no provisions regarding the conscience clause of service providers. When assessing this state of affairs from the perspective of legal security, it is necessary to consider whether the implementation of provisions providing for invoking the conscience clause in respect of providing services will result in improving application of the concept of legal security of subjects involved in the relationships between service providers and service recipients. In other words, the research problem may be worded as follows: whether, and if the answer is positive, what impact may the implementation of the conscience clause of service providers into the Polish legal order have on the level of accomplishment of legal security of service providers as well as service recipients?

## 1. THE CONCEPT OF CONSCIENCE CLAUSE

The term "clause" (from the Latin *clausula* – termination, closure) when applied in legal and juristic language is understood as "a stipulation or provision in a contract, an arrangement or a legal act; an authorization for the consideration of special circumstances in the application of legal

norms, in the enforcement of judicial decisions and administrative acts” [Kość 2002a, 80-81].

The term “conscience clause” is understood as “the acceptance of the primacy of conscience, referring to natural law or ethical-religious convictions in important moral questions, by the legislator; it assumes the possibility of refusing to perform an obligation or rescinding a prohibition in the case of a conflict between positive (statutory) law and conscience” [Idem 2002b, 83].

The conscience clause is “a legal institution which safeguards freedom of conscience. The conscience clause means a provision or provisions of law (due to the system of legal sources adopted in the Constitution of the Republic of Poland of 2 April 1997,<sup>1</sup> the conscience clause must be provided for in the law), specifying a manner of exercising the right to conscientious objection, including procedural conditions and possible limitations in exercising it” [Olszówka 2019a, 58].

In the jurisprudence of the Polish Constitutional Tribunal (hereinafter: the Tribunal), the conscience clause is understood “as the capacity to refrain from performing an obligation in accordance with the law, yet contrary to the worldview (ideological or religious convictions) of a particular person. From the ethical point of view, this concept may prove the primacy of conscience over the obligations of statutory law, whereas from the juridical point of view, it safeguards freedom of conscience and prevents conflicts between the provisions of statutory law and ethical norms, thus enabling the individual to act in dignity – according to his or her own convictions.”<sup>2</sup>

The conscience clause, as a legal institution, aims to resolve the conflict between an individual’s moral convictions and a particular legal norm. However, it is necessary to distinguish between the conscience clause and conscientious objection, which means “the act of refusing to perform an obligation imposed by legal provisions, undertaken, however, not with the use of the provided legal measures (e.g., the conscientious clause), but under conditions of risk that it will not be recognized as falling within the limits of the constitutional freedom of conscience, and with the readiness to bear legal liability for committing this act. Furthermore, conscientious objection, so understood, may be a signal of a new important moral controversy, which has not yet been disclosed in a given community.”<sup>3</sup>

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<sup>1</sup> Journal of Laws No. 78, item 483 as amended [hereinafter: the Constitution].

<sup>2</sup> Judgment of the Constitutional Tribunal of 7 October 2015, ref. no. K 12/14, OTK ZU 9/A/2015, item 143.

<sup>3</sup> Dissenting opinion of the Constitutional Tribunal Judge Sławomira Wronkowska-Jaskiewicz to the judgment of the Tribunal of 7 October 2015, ref. no. K 12/14.

The distinction between the concept of conscience clause and the concept of conscientious objection has been explicitly made in the doctrine and it is worth accepting. The conscience clause is understood as a legal means of “expressing the right to conscientious objection, which constitutes part of the right to freedom of thought, conscience and religion. [...] The conscience clause should be understood within a sufficiently narrow and precise scope [...] it should be the exception and not the rule of law. [...] is the execution of this right [i.e. the right to freedom of thought, conscience and religion – author’s note] in a circumstance where its statutory limitations are necessary” [Orzeszyna 2017, 17-28]. By contrast, “conscientious objection” (in French: *l’objection de conscience*), refers to an individual’s objection to a formally binding legal norm, rather than to a questioning of the validity of the entire legal system of the state. The idea of acting in the name of conscientious objection is to improve a particular community through correcting an existing, in the opinion of the person exercising conscientious objection, faulty and unjust law. A conscientious objection arises when a citizen, because of his convictions, cannot respect the law in force. A wise legislator aims to avoid such a problem and to provide the law in such a manner that it respects the differences in worldviews which may amount to a conflict of conscience” [Orzeszyna 2017, 18-19].<sup>4</sup>

From the point of view of legal security, understanding the conscience clause as a legal institution is very important due to its inclusion in the legal order, thus in the normative sphere, whereas conscientious objection is placed in the factual sphere.

## 2. PROVISION OF SERVICES AND THE CONSCIENCE CLAUSE

The concepts such as service and provision of services encompass a large catalogue of social phenomena, the comprehensive presentation of which is beyond the scope of this study. The “service” is defined as “any activity or benefit of a non-material nature that one party can offer to another, which does not necessarily involve the sale of goods or services in comparison to a product that can be purchased on its own.”<sup>5</sup> According to the definition in the *Dictionary of Polish Language (Słownik języka polskiego)* “services”: “economic activity which does not consist in the production of material goods, it takes the form of services provided by natural and legal persons (entities) for the benefit of others; the third, apart from agriculture and industry, sector of the national economy; includes

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<sup>4</sup> See also Szostek 2013, 7-8.

<sup>5</sup> *Service* – *Encyklopedia Zarządzania*, <https://mfiles.pl/pl/index.php/Us%C5%82uga> [accessed: 15.09.2021].

the following sections: transport, communications, trade, municipal economy, health care, education, administration, justice, financial and insurance institutions, and others, e.g. hairdressing [...].”<sup>6</sup>

Alternatively, a selection of normative acts providing definitions of such concepts may also be indicated. According to point 4.1 of the Annex to the Regulation of the Council of Ministers of 4 September 2015 on the Polish Classification of Goods and Services,<sup>7</sup> services include: “all activities provided to economic entities conducting productive activities, i.e. services for production purposes that not directly produce new material goods, [...] all activities which are provided for the benefit of units of the national economy and for the benefit of the population, intended for the purposes of individual, collective and general public consumption. The concept of services does not encompass activities related to manufacturing of products (including semi-manufactured products, components, parts, machining of parts) from the enterprise’s own materials, at the order of other units of the national economy, intended for production purposes or for further resale, and, as a rule, does not include manufacturing of products on individual order, from the contractor’s own materials”.

According to point 7.6.1 of the PCGS 2015 “services are divided into: [...] production services – activities that cooperate in the production process, but do not directly produce new goods, performed by one economic unit on the order of another economic unit, [...] consumption services – all activities related directly or indirectly to satisfying the population’s demands, [...] general social services – activities satisfying the order and organisational demands of the national economy and the society as a whole”.

Pursuant to Article 8 of the Act on Goods and Services Tax of 11 March 2004,<sup>8</sup> “by providing services, as specified in Article 5(1)(1), shall be understood as any service provided to a natural person, legal person or organizational unit without legal personality, which does not constitute a supply of goods within the meaning of Article 7 [...]”. However, Article 7 of the AGST defines the concept of supply of goods as “transfer of the right to dispose of goods as owner [...]”.

In the context of the issue of the potential application of the conscience clause concerning persons providing services, the question of the obligation to provide services should be raised. The doctrine holds that “the refusal to perform as well as the consent to perform are fundamental attributes of economic freedom and the principle of freedom of contract. [...]

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<sup>6</sup> *Services – Słownik języka polskiego*, <https://encyklopedia.pwn.pl/haslo/uslugi;3991813.html> [accessed: 15.09.2021].

<sup>7</sup> Journal of Laws, item 1676 as amended [hereinafter: the PCGS 2015].

<sup>8</sup> Journal of Laws of 2021, item 685 [hereinafter: the AGST].

Just as a consumer cannot be forced to choose a particular entrepreneur, an entrepreneur cannot be required to enter into contractual relationships with every consumer. The principle of freedom of contract works both ways” [Derlatka 2018, 120-21]. As regards the allegation of discrimination against consumers, attention was drawn to the wording of second sentence of Article 32(1) of the Constitution, according to which “all persons shall have the right to equal treatment by public authorities”, and therefore “transferring the prohibition of discrimination from public-law relations to private-law relations would lead to absurdity” [ibid., 122].

If there is no obligation to provide services and the provision of a particular service is performed within the framework of economic freedom and the principle of freedom of contract, thus the problem of the application of the conscience clause will not arise at all. Only if there is an obligation to provide a particular service and the performance of such an obligation results in a conflict of conscience, then the service provider may, being motivated in his or her behaviour by conscientious objection, refuse to provide the service. If the law regulated under which circumstances a service provider could refuse to provide a particular service, then they would be able to invoke the conscience clause as a legal institution.

In the absence of implementation of the conscience clause in the law, service providers have, in the author’s view, the right to demonstrate their conscientious objection, which stems directly from the constitutional values. Whereas, the potential implementation of a formal conscience clause will limit their capacity to invoke conscientious objection only to the circumstances provided for in the law.

Therefore, the issue arises as to whether, from the point of view of legal security, the situation is more favourable if the legislation includes provisions explicitly referring to the possibility of refusing to provide a service or whether a legal assessment of the refusal to provide a service is made on the basis of general provisions, having regard to the international and constitutional levels of law. Of course, the view, according to which no explicit statutory authorisation is necessary to invoke the conscience clause, is acceptable, since pursuant to Article 53(1) of the Constitution: “Freedom of conscience and religion shall be ensured to everyone”. Thus, in practice, anyone can refuse to perform a certain action due to conscientious objection. Therefore, we can pose the questions: Is a statutory authorization necessary? And if the answer is yes, who does it benefit, the service provider or the service recipient?

### 3. THE CONCEPT OF LEGAL SECURITY WITH RESPECT TO THE RELATIONSHIP BETWEEN SERVICE PROVIDER AND SERVICE RECIPIENT

Legal security is a state achieved by means of positive law in which the life goods and interests of the subject of that security are safeguarded as completely and effectively as possible [cf. Potrzeszcz 2013, 405]. Legal security is a gradable value in the sense that the level of its achievement may be more or less corresponding to the standards of the rule of law.

While defining the concept of legal security, the issue of specifying the concept of the subject of legal security cannot be omitted. We can distinguish between a passive subject and an active subject of legal security. The passive subject of legal security is the entity that is entitled to protection in legal order, the entity that is a beneficiary of legal security. Whereas the active subject of legal security is the entity which acts in order to realise the idea of legal security [Idem 2015, 76].

With regard to the undertaken research problem, the active subject of legal security in respect of the relationship: service provider – service recipient, it is the legislator, as well as the bodies applying the law, which are competent to realise the legal state achieved by means of positive law, in which the life goods and interests of the passive subject of legal security are safeguarded as completely and effectively as possible.

With regard to the service provider – service recipient relationship, this paper focuses on both: the service provider and the service recipient as the passive subjects of legal security.

### 4. THE ISSUE OF JUSTIFYING THE REASON FOR A REFUSAL TO PROVIDE A SERVICE

In the service provider – service recipient relationship, similarly as in any social relationship, the predictability of the partner's behaviour is of significant importance. Such predictability allows to plan actions in advance and to prepare for possible "emergency scenarios". In the author's opinion, the implementation of a statutory authorisation for refusal to provide a service, i.e. the conscience clause as a legal institution, would improve the predictability of behaviours in the service provider – service recipient relationship and thus contribute to increasing the level of legal security of the service provider as well as the service recipient.

In order to achieve such a postulated state, a catalogue of reasons for refusing to provide a service should be specified and implemented into the legal system. As a result, the service provider and the service recipient would

both be aware of the terms on which the service is provided and under which circumstances the service provider may refuse to provide it. However, the question of creating such a catalogue may be difficult, if not impossible, to achieve.

Nevertheless, it should be noted that a certain attempt to specify a justified reason for refusal to provide a service was undertaken by the Supreme Court in one of its media-famous rulings, concerning the printer of Łódź [Potrzeszcz 2019a, 49-91]. In Poland, the problem of refusing to provide a service due to objection of conscience, and in particular due to religious convictions, has emerged and become current as a result of the so-called “case of the printer of Łódź”, Adam J., an employee of a printing house in Łódź. By its decision of 14 June 2018, ref. no. II KK 333/17, the Supreme Court dismissed the cassation filed by the Public Prosecutor General in favour of the accused printer [Szcucki 2019, 197-215].

In the reasoning of its decision, the Supreme Court accepted the view that the source of the obligation arising from Article 138 (in the wording in force until 4 July 2019<sup>9</sup>) of the Act of 20 May 1971, the Code of Petty Offences<sup>10</sup> was the very fact of professional providing of services, thus the above provision does not impose a contractual obligation to provide a service. The wording of Article 138 of the CPO as of 14 June 2018, on which the Supreme Court issued the said decision, was as follows: “Whoever, while professionally engaged in the provision of services, demands and collects for the provision of services a payment higher than the prevailing one or intentionally refuses, without justified reason, to provide the service to which he is obliged, shall be punished with a fine”.

The Supreme Court shared the appellate court’s view according to which merely an individual worldview or subjective understanding of a professed religion cannot be a justified reason for the refusal of providing a service under Article 138 of the CPO. However, in the Supreme Court’s opinion, it can provide a justified reason for the refusal of providing a service, under Article 138 of the CPO, only if it is referred to the circumstances of a particular situation, as in the case of the accused printer, which are assessed in an objectivised manner. The Supreme Court held that the phrase “justified reason”, pursuant to Article 138 of the CPO, understood “as a circumstance justifying the refusal to provide a performance, is a kind of general

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<sup>9</sup> Article 138 of the CPO was in part found inconsistent with Article 2 of the Constitution by the judgment of the Constitutional Tribunal of 26 June 2019, ref. no. K 16/17 (Journal of Laws 2019, item 1238) as of 4 July 2019. Pursuant to the judgment, the aforementioned provision shall be repealed in the passage “or intentionally without a justified reason refuses the performance to which he or she is obliged”.

<sup>10</sup> Journal of Laws of 2018, item 618. Currently: Journal of Laws of 2021, item 281 [hereinafter: the CPO].



clause which, when assessing the obligor's motivation, allows for the comparison of various values underlying such refusal, also including constitutional rights and freedoms. Moreover, the clause also enables the application of extra-legal criteria, such as moral, custom and religious norms".

According to the reasoning of the Supreme Court, we can conclude (*a contrario*) that providing a service may arise in a particular case an obvious conflict with moral, custom or religious norms. However, if the provision of a service is not in obvious conflict with the above values, in the Supreme Court's view, the right of the service provider to act in accordance with his or her conscience, understood as a person's moral self-awareness, as well as the right to freedom from being forced to act against their conscience, is not limited. Whether such a conflict has arisen should be assessed in each particular case, having regard to its circumstances.

The Supreme Court concluded that if in the course of providing a particular service "a conflict of fundamental freedoms and rights arises between the service provider and the consumer, then the concept of »justified reason«, under Article 138 of the CPO, also refers to religious convictions, which means that when they are in obvious conflict with the features and nature of the service, the provision of such service may be refused, even if they remain in conflict with other values, also constitutional ones, such as the prohibition of discrimination. However, the refusal to provide a particular service cannot be justified by individual personal aspects of the entity (e.g. religious convictions, manifested views or sexual preferences) for whom a particular provider is obliged to provide such a service".

The Supreme Court's decision was issued on 14 June 2018, hence a few days after the judgment of the Supreme Court of the United States of 4 June 2018, concerning the case of a Colorado confectioner who refused – due to his religious convictions – to make a wedding cake for a gay couple. The US Supreme Court upheld the confectioner's appeal and adjudicated that the ruling of 2013, issued by an administrative law judge of the Colorado Civil Rights Commission, which ordered the confectioner to provide wedding cake orders to all couples, had been incorrect. The US Supreme Court upheld the arguments of the confectioner's defence counsel, Kristen Waggoner, who portrayed her client as an artist and consequently she took the position that her client was entitled to equal safeguards of freedom of expression as a sculptor or painter. In the defence lawyer's view, if the confectioner was selling ready-made products, he could not have refused to sell a cake to a gay couple. However, since making of a bespoke cake requires creative invention, the same as a work of art, a confectioner may refuse to make a cake, as a sculptor or painter may refuse to make a sculpture or painting whose meaning is contrary to his or her religious convictions.

The reasoning of the Supreme Court's decision of 14 June 2018 is manifestly inspired by the above argumentation of the confectioner's defence counsel, which has been upheld by the Supreme Court of the United States. As the Polish Supreme Court observed in its decision, "we cannot exclude a situation in which a person obliged to provide a service, who performs artistic work, e.g. a painter or a sculptor, and who manifests his or her affiliation to a particular religious community and living according to its canons, having a direct impact on the final image of the service by engaging their sensitivity as well as moral and customary norms, which he or she respects, can refuse to perform such work when in a particular case their own religious convictions and the dignity of the artist are superior to other values that would be violated, e.g. the prohibition of discrimination. Thus, they shall constitute a justified reason for refusing to provide such a service under Article 138 of the CPO." The Supreme Court did not conceal the source of its inspiration, but explicitly referred to the US Supreme Court judgement of 4 June 2018: "Similar argumentation was one of the reasons for the ruling of the Supreme Court of the United States of America of 4 June 2018 in the case no. 16-111 of *Masterpiece Cakeshop, LTD., ET AL. v. Colorado Civil Rights Commission ET AL*, regarding a Colorado confectioner, which found him to be an artist who manifests Christian views in his work".

The Supreme Court recognized that "justified refusal under Article 138 of the CPO could, for instance, also arise in a case of a printer who, as a Catholic, receives an order to print an advertisement that promotes content obviously contrary to the principles of his faith. A similar situation may apply to followers of other religions or atheists, who represent different professions, provided that the kind of service results in a real and dramatic conflict between their commonly accepted convictions and the rights and freedoms of the consumer."

Applying the above interpretation to the case of the printer of Łódź, the Supreme Court concluded that "the defendant had no justified reason to refuse to make a printout based on the design of a roll-up delivered by the L. Foundation. His work was merely reproductive and involved performing technical activities. Although the graphical design also included the colourful logo of the said foundation, its message was of a neutral nature and hence it could not violate the defendant's religious convictions."

In the author's assessment, the Polish Supreme Court's reasoning is not correct. First of all, because the Court arbitrarily assumed, following the US Supreme Court's judgment, that a justified reason for refusing to provide a service must relate to the service provider's creative rather than reproductive work. However, the printer of Łódź explicitly stated in his email correspondence with a volunteer of the LGBT Business Forum Foundation: "I refuse to make a roll-up from the graphics I received. We do not

contribute to the promotion of the LGBT movement with our work.” Whether the making of the roll-up is merely reproductive work or also in a certain sense creative one is a minor issue, especially in the view of the fact that each time the manufactured materials were marked with the name and address of the printing house, and thus the printing house was “signed” on it. Hence, the printer might have had a reasonable conviction that by making the roll-up he would thus contribute to the promotion of the LGBT movement and not anonymously. Therefore, we cannot – following the argumentation of the Colorado confectioner’s defence counsel – compare his work to selling a cake “straight off the shelf.”

Although the Supreme Court’s decision of 14 June 2018 (ref. no. II KK 333/17) was unfavourable for the accused printer and it casts certain doubts as to the coherence of the argumentation, the Court’s recognition that the concept of “justified reason”, as provided for in Article 138 of the CPO in the wording in force until 4 July 2019, also encompasses religious convictions. Therefore, when they are in obvious contradiction with the features and nature of a particular service, it is permitted to refuse to provide it, could be of fundamental importance for the interpretation and application of Article 138 of the CPO in the future. The interpretation provided by the Supreme Court created the impression that Article 138 of the CPO was likely to become a provision implementing the conscience clause for service providers or, applying the term used by Wojciech Ciszewski, the “commercial conscience clause” [Ciszewski 2017, 46-51].

However, the Constitutional Tribunal, in its judgment of 26 June 2019, ref. no. K 16/17, adjudicated that Article 138 of the CPO, in the passage “or intentionally without a justified reason refuses the performance to which he or she is obliged”, is not in compliance with Article 2 of the Constitution. Thus, the provision which could have provided the conscience clause in the field of service provision has been derogated from the Polish legal order. Currently, there is no other provision explicitly designed for service providers which would regulate the issue of refusal to provide a service. In such circumstances, the service provider, as any other individual, may directly invoke the constitutionally safeguarded freedom of conscience and religion. Nevertheless, for reasons of legal security of both the service provider and the service recipient, it would be desirable to implement such provisions at the statutory level, which would precisely specify the conditions and circumstances of the refusal to provide a particular service. Amendments to the law regulating the provision of services are needed, aimed at providing precise conscience clauses, reminding that conscientious objection is a rationally justified moral judgment that qualifies a legal obligation as ethically wrong (objective evil) and justifies refusal to perform it [cf. Olszówka 2019b, 274]. That would enable a higher predictability

of the behaviour of both parties in the service provider – service recipient relationship.

## CONCLUSIONS

The considerations presented in this paper lead to the conclusion that currently there are no legal provisions, at the statutory level, in the Polish legal order which specify the conscience clause in the field of service provision. After the Supreme Court judgment of 14 June 2018 (ref. no. II KK 333/17), the provision that could provide the conscience clause for service providers was Article 138 of the CPO. However, the Constitutional Tribunal, in its judgment of 26 June 2019, ref. no. K 16/17, adjudicated that Article 138 of the CPO, in the passage “or intentionally without a justified reason refuses the performance to which he or she is obliged”, is not in compliance with Article 2 of the Constitution.

The absence of a formally specified statutory provisions of the conscience clause in the field of service provision must be critically assessed from the point of view of the legal security of both the service provider and the service recipient. Hence, the current legislation lacks a precise definition of under which circumstances and for what reason a service provider may refuse to provide a particular service. Therefore, it is appropriate to postulate relevant statutory amendments. From the point of view of legal security of service providers, it will ensure that they may refuse to provide a particular service in the circumstances and for the reasons explicitly specified in the law, thus it will legally safeguard their freedom of conscience. From the point of view of legal security of service recipients, the implementation of the above clause into the legal order will contribute to enhancing the predictability of the behaviour of service providers and thus it will improve planning and execution of service recipients’ objectives.

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