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REFLECTIONS ON RELIGIOUS FREEDOM AND SECURITY IN EUROPE – – 2019 OSCE GUIDELINES

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Abstract. Freedom of thought, conscience and religion as one of the fundamental freedoms and human rights, the source of which is inherent, inalienable and inviolable human dignity, is guaranteed in addition to the provisions of international law also in documents issued by the Conference/Organization for Security and Cooperation in Europe (CSCE/OSCE). They emphasize a clear link between religious freedom and the need to ensure security. Of special importance to this issue are the political guidelines: Freedom of Religion or Belief and Security: Policy Guidance, which are entirely devoted to this subject in accordance with the concept of comprehensive security. The document formulates guiding principles, practical tips and recommendations on many important issues related to freedom of religion or belief and security in the OSCE region. In the study, the content of the indicated document was analyzed and an attempt was made to evaluate it. This allows for the conclusion that ensuring religious freedom is an important element in ensuring security.

Keywords: freedom of religion or belief; security; Conference/Organization for Security and Co-operation in Europe; the concept of comprehensive security; Freedom of Religion or Belief and Security: Policy Guidance

INTRODUCTION

Freedom of thought, conscience and religion is one of the fundamental freedoms and human rights which have their source in the inherent, inalienable, and inviolable human dignity. It is safeguarded by both the provisions of European international legal acts and those of universal application [Krukowski 1999, 178-99]. It should be noted that the importance of religious freedom is also emphasized in documents issued by the Conference (CSCE) and then by the Organization for Security and Cooperation in Europe (OSCE). As early as in the Final Act of the CSCE of 1 August 1975,[1] guarantees of religious freedom were included [Jach 2017, 163-64]. In accordance

[1] *Conference on Security and Co-operation in Europe. Final Act*, Helsinki 1975, https://www.osce.org/files/f/documents/5/c/39501.pdf [accessed: 05.11.2021].

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with the content of Rule No. VII, all states undertook to respect human rights and fundamental freedoms, including religious freedom, regardless of race, sex, language, and religion [Matysiuk 2008, 36; Kącka 2013, 165; Sobczak 2013, 317]. Subsequent documents issued under the CSCE/OSCE confirmed religious freedom and specified its guarantees of protection [Jach 2017, 178]. However, the content of the political guidelines titled "Freedom of Religion or Belief and Security: Policy Guidance",[2] a document which is entirely devoted to this subject, is of particular importance for the issue of the relationship between religious freedom and security. The aim of this study is to analyze the content of the indicated document and to attempt to evaluate the considerations presented in it regarding the relationship between the basic human freedom, which is freedom of thought, conscience and religion, and security.

1. THE CONCEPT OF COMPREHENSIVE SECURITY AND THE OSCE GUIDELINES OF 2019

The FRBS political guidelines were published on 9 September 2019 by the OSCE Office for Democratic Institutions and Human Rights[3] to clarify the interrelationships and links between religious freedom and security. This document was issued as part of the Human Dimension Implementation Meeting in 2019 in Warsaw.[4] The rationale behind the issue of this document was to emphasize the clear relationship between freedom of thought, conscience and religion and the need to ensure security in the light of the challenges related to the diversity of religions and beliefs throughout the OSCE region and the emerging threats in this regard. The document notes that, in line with contemporary debate on freedom of religion or belief and security, a balance between these values is necessary or it is suggested that at least some aspects of religious freedom must be sacrificed to ensure security. It was stressed that such positions contradict the OSCE's comprehensive approach to security, which considers that freedom of religion or belief and security are not competing rights, but are regarded as complementary, interdependent and mutually reinforcing values that can and should be pursued jointly. Therefore, as with other human rights, an all-embracing security system is needed for freedom of religion or belief to be fully respected, protected and exercised.[5]

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[2] Hereinafter: FRBS. See https://www.osce.org/odihr/429389 [accessed: 05.11.2021].

[3] Hereinafter: ODIHR.

[4] See https://www.osce.org/odihr/430463 [accessed: 05.11.2021].

[5] FRBS, p. 5-6.

As noted in the doctrine, the OSCE (formerly the CSCE) is the first organization to put forward the concept of comprehensive security. It understands that security consists of three dimensions: political and military, economic and environmental, and the human dimension, which is protection of basic human rights, including religious freedom. All these three dimensions are equally important for lasting peace and security and must be realized and assured simultaneously [Ferrari 2020a, 104]. This was already evident in the Final Act of the CSCE of 1 August 1975, the overall content of which was divided into four baskets associated with: European security, cooperation in the economic, scientific and technical fields and the environment, cooperation in the humanitarian and related fields, and issues related to the continuation of the process of the Conference. The highlight of this document is undoubtedly so-called basket linking, meaning that progress in one area should go hand in hand with progress in others.

The issue of comprehensive security was also discussed in the documents issued after successive OSCE conferences.[6] As already noted in the doctrine, growing religious diversity and the role of religion in individual countries are no doubt significant issues. It should be emphasized that ensuring religious freedom is an important element contributing to assurance of security [Ferrari 2020a, 103-104; Ferrari 2020b, 5; Bieńkowska 2019, 97-108].

2. THE CONCEPT OF COMPREHENSIVE SECURITY VERSUS STANDARDS OF PROTECTION OF FREEDOM OF RELIGION OR BELIEF

The first of the four chapters of the FRBS concerns the issue of human rights and the concept of comprehensive security of the OSCE. Referring to the concepts underlying the previously adopted documents, it was determined that security means comprehensive cooperation based on equality, indivisibility, and the protection of human rights. Each of the three complementary dimensions of OSCE operation (political-military, economic and environmental, and human) is seen as equally important, which underscores the OSCE's comprehensive approach to security. It was emphasized

[6] CSCE Helsinki Document 1992 The Challenges of Change, see: https://www.osce.org/files/f/documents/7/c/39530.pdf [accessed: 05.11.2021]; CSCE Budapest Document 1994 Towards a Genuine Partnership in a New Era. Corrected version 21 December 1994, see https://www.osce.org/files/f/documents/5/1/39554.pdf [accessed: 05.11.2021]; Lisbon Document 1996, see https://www.osce.org/files/f/documents/1/0/39539.pdf [accessed: 05.11.2021]; Istanbul Document 1999, see https://www.osce.org/files/f/documents/6/5/39569.pdf [accessed: 05.11.2021]; Access to justice as a key element of the rule of law 16-17 November 2017, Hofburg, Vienna, Final Report, see: https://www.osce.org/files/f/documents/d/e/383745.pdf [accessed: 05.11.2021].

that freedom of religion or belief is recognized as one of the basic principles governing mutual relations between OSCE participating States and as an integral aspect of the OSCE security concept.[7] Such a combination of these two human rights, that is, freedom of religion or belief and security, aimed at protecting human dignity, provides a better opportunity to deal with their possible conflict of rights [Ferrari 2020a, 104].

The second chapter of the FRBS guidelines deals with the issue of OSCE obligations and international standards for the protection of freedom of religion or belief. It is, as it were, a recapitulation of the OSCE's achievements to date and the effects of actions taken to protect the freedom in question. It was stressed that freedom of religion or belief is a multi-faceted human right, encompassing an individual, collective, institutional, educational and communication dimension, and is explicitly recognized in OSCE commitments and in universal and regional norms.[8]

The latter part of the second chapter of the guidelines in question draws our attention to the distinction between the internal and external aspects of religious freedom, well-established in doctrine and international law [Stanisz 2020, 44-46; Sobczak 2013, 287-88; Hucał 2012, 19-25]. *Forum internum* refers to the internal dimension of this freedom, namely the freedom to have or accept religion or beliefs of one's choice and to change them. It was indicated that the internal aspect of religious freedom, in line with international standards of human protection, is under absolute protection.[9] On the other hand, the freedom to manifest religion or belief is the external aspect of freedom of religion or belief, i.e. *forum externum*. This dimension of religious freedom includes the freedom to profess and teach, to practice and uphold one's religion or beliefs.[10] Certain restrictions are permissible in this respect, but they must be strictly justified. Such a restriction must be provided for by law and is to protect public security, public order, public health or morals, or the fundamental rights and freedoms of others; it must be necessary for the attainment of one of these aims and proportionate

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[7] See: Decision No. 3/13 Freedom of Thought, Conscience, Religion or Belief, see https://www.osce.org/files/f/documents/e/6/109339.pdf [accessed: 05.11.2021].

[8] FRBS, p. 12-13.

[9] See Article 18 of International Covenant on Civil and Political Rights, 19 December 1966 (Journal of Laws of 1997, No. 38, item 167) and Article 9 of the European Convention for the Protection of Fundamental Rights and Freedoms of 4 November 1950 (Journal of Laws of 1993, No. 61, item. 284 as amended); FRBS, p. 15.

[10] See Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-Operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference, see: https://www.osce.org/files/f/documents/a/7/40881.pdf [accessed: 05.11.2021].

to the aim pursued; it should interfere with this freedom as little as possible and should only be used as a last resort.[11]

3. GUIDING PRINCIPLES

An important element of the content of the FRBS are the guiding principles that are to help OSCE states in formulating and implementing measures, policies and legal provisions to ensure both freedom of religion or belief and security. They were formulated in the third chapter of this document.

The first principle emphasizes the crucial importance of education that fosters respect for religious or denominational diversity. According to this principle, schools and other institutions should teach about different religions and beliefs.[12] While formulating the second principle, attention was drawn to the necessity to establish cooperation between the state and religious communities, as well as other entities and the media in order to inform the public about religious communities.[13] The third principle emphasizes the importance of dialogue and cooperation between religious communities that support understanding and mutual respect for the different religions or beliefs of each human being.[14] The fourth principle, on the other hand, concerns initiating dialogue and fostering commitment of states and religious communities with respect to issues relating to guarantees of freedom of religion or belief and security.[15] When formulating the fifth principle, it was emphasized that it is of fundamental importance for the security and peaceful development of society to promote respect for religious diversity and to speak out resolutely and immediately against all forms of hatred, discrimination, hostility or religious violence.[16] The sixth principle, on the other hand, indicates the need to guarantee freedom of religion or belief to every human being under the law, as it is an integral part of ensuring security.[17] The seventh principle sets out the requirements that should be met by states when introducing legal measures limiting freedom of religion or belief, which are deemed necessary for ensuring security.[18]

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[11] FRBS, p. 16-19.
[12] Ibid., p. 20-21.
[13] Ibid., p. 21.
[14] Ibid., p. 22.
[15] Ibid., p. 22-23.
[16] Ibid., p. 23-24.
[17] Ibid., p. 24-25.
[18] Ibid., p. 25-26.

4. DETAILED PROBLEMS AND RECOMMENDATIONS REGARDING THE FREEDOM OF RELIGION OR BELIEF IN RELATION TO SECURITY

The most extensive, fourth chapter of the FRBS, focuses on specific issues and recommendations related to freedom of religion or belief and security. It should be emphasized that the analysis of the identified problems and recommendations presented in chapter four should be read in the light of the seven guiding principles that were formulated in chapter three [Ferrari 2020a, 105].

The first section deals with the registration and de-registration of religious communities in the light of security. Obtaining legal personality is considered an element of the right to freedom of religion or belief in the collective and institutional aspect [Ferrari 2020a, 105; Ożóg 2015, 23-40; Mezglewski 2015, 123-34]. According to the recommendations, the OSCE states should refrain from using such terms as "extremism" or "religious extremism" in their legislation or other activities, because their meaning is unclear and they are likely to cause discrimination [Ferrari 2020b, 5-8]. State authorities should clearly define the rules for obtaining legal personality by religious communities, in line with the criteria set out in Article 18(3) of the ICCPR. Religious communities are encouraged to engage in dialogue with state authorities and other stakeholders.[19]

The second section refers to extremist statements and publications.[20] As recommended, participating countries should consider formulating educational programs that increase knowledge of religious communities in collaboration with various religious actors and communities. Knowledge about different religions and beliefs and respect for human rights should be taught in schools. Participating states are encouraged to promote interreligious dialogue and cooperation, respecting the autonomy of religious communities. States are encouraged not to follow the practice of relying solely on the opinion of designated experts to interpret and evaluate sacred texts for "extremism". Religious community leaders are also encouraged to make a firm and swift statement against the promotion of hatred, discrimination, hostility, or violence.[21]

On the other hand, social organizations and the media are encouraged to support the said activities promoting knowledge about religious communities. Therefore, the media are encouraged to develop guidelines

[19] Ibid., p. 29-36.
[20] Ibid., p. 37-47.
[21] Ibid., p. 48-50.

and standards, such as journalists' ethical codes for impartial and appropriate reporting on matters related to religion and belief.[22]

The third section deals with inspection, monitoring and searches in places of worship and those for meetings.[23] The doctrine emphasizes that such actions, which also apply to non-violent believers, despite their validity for security reasons, are perceived as a restriction of religious freedom [Ferrari 2020a, 103].

As recommended, participating countries should develop guidelines and procedures for checking, monitoring, and searching such sites. They should be in line with relevant international human rights standards and national legislation. It was emphasized that control or monitoring measures in such places should only be taken when absolutely necessary and in the least invasive manner and proportionate to the risk that arises. They should be conducted as far as possible with the consent and cooperation of the religious community. Information and data obtained from such actions should be processed in accordance with relevant international legal standards. It was also emphasized that the closure of a place of worship or a meeting place should be a last resort and taken if absolutely necessary in agreement with a given religious community.[24]

Religious communities, on the other hand, should be vigilant against activities that pose a real threat to security by anyone present at the place of worship or meeting place. In addition, religious community leaders should strongly oppose such actions so that they are not identified with the entire religious community. Such activities should be supported by social organizations, and information on such activities should be disseminated by the media in an ethical manner, so as not to harm the religious community as a whole.[25]

The last section deals with issues related to limiting the scope of conversion and restrictions on the activity of religious communities related to foreign cooperation.[26] The doctrine indicates that the right to convert may be subject to certain restrictions, especially when connected with the use of coercion, because in such a case both freedom of religion or belief and personal security may be at risk [Ferrari 2020a, 105; Rozner 2002, 121-22].[27]

According to the recommendations, security concerns should not be used by states to restrict the right of individuals to convert (accept, leave,

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22 Ibid., p. 50-52.
23 Ibid., p. 52-59.
24 Ibid., p. 60-62.
25 Ibid., p. 62-63.
26 Ibid., p. 64-68.
27 See Judgment of the European Court of Human Rights of 25 May 1993 Kokkinakis v. Greece (14307/88).

or change religion or belief), which is strictly protected by international law. Participating states should ensure that persons changing religious beliefs are protected against violence, harassment, intimidation, or discrimination. However, participating countries may restrict this right if they fulfil all the criteria set out in Article 18 (3) of the ICCPR, e.g., if there is evidence that such actions are taken using coercion or constitute incitement to discrimination, hostility or violence. Participating States are encouraged to support religious communities in order to eliminate fears or tensions about conversion through dialogue and cooperation. Moreover, participating states should not restrict the entry or stay of foreigners in the country (including clergy) on the basis of their religion or beliefs, unless it concerns the converting person who is promoting hatred, discrimination, hostility or violence.[28]

As regards religious communities and including their leaders, they should consider that the right to conversion is an integral part of the freedom of religion or belief, which enjoys absolute protection. Religious or philosophical communities and interreligious organizations are encouraged to develop guiding principles for encouraging the exercise of their religion or belief without coercion. Civic organizations are also encouraged to support religious communities in addressing these challenges and activities. In contrast, the media are encouraged to provide unbiased and accurate information in this regard.[29]

CONCLUSIONS

The content of the FRBS guidelines of 9 September 2019 proves that modern states recognize the need to ensure guarantees of religious freedom and security in the world. The presented analysis of the content of the document shows how important it is to maintain harmony between religious freedom and security. The guiding principles formulated in the document and the recommendations based on them were addressed to many entities. Individual states, as the addressees, are responsible for introducing appropriate legal provisions which guarantee that everyone enjoys the freedom of thought, conscience and religion while maintaining their safety. However, the recommendations spelled out in the document are also addressed to religious communities, social organizations, and the media. They emphasize the need for all these entities to engage in dialogue and cooperation in order to guarantee both religious freedom and security.

[28] FRBS, p. 69-70.
[29] Ibid., p. 71.

The document at hand is part of the uniform line of documents issued by the OSCE in terms of understanding the concept of comprehensive security and emphasizing the importance of freedom of religion or belief. Disrupting the development of any of the three areas identified as key by the OSCE interferes with human security. It should also be emphasized that the abovementioned solutions and recommendations provided by the document conform to international standards for the protection of human rights and freedoms.

It should be emphasized that the document points out the significant role of education and teaching about religions. Providing information about different religions is to prevent misunderstanding that may lead to conflicts, unjustified restriction of the freedom to manifest religion and, consequently, to disturb the sense of security.

Significantly, the document indicates individual issues that are essential to guarantee religious freedom and security, such as the determination of the legal status of religious communities, which implies the possibility of registering and deregistering such entities. Properly formulated regulations specifying the registration procedure guarantee religious freedom, especially in the collective and institutional aspect, but also security. The document indicates that public statements and publications on religious matters may also affect security; therefore, in this context the important role of education and spreading knowledge about religions and beliefs as well as social dialogue is underscored in excluding all kinds of extremist activity.

However, it should be remembered that when achieving the objectives set out in the guidelines, particular care should be taken to ensure due respect for the autonomy of religious communities, which is generally respected in the document [Stanisz 2015, 159-85; Ferrari 2020b, 5]. This is especially important when it comes to interpreting and evaluating sacred texts in terms of "extremism", because religious freedom, for its part, guarantees, above all, the right for religious communities to present their own interpretations of the sacred texts or doctrinal works of a given community.

The document also notes the threat to both religious freedom and security, namely, the extremist activity undertaken by some individuals and justified religiously. This necessitates special measures to secure places of worship and meetings in the form of control and monitoring, plus carrying out personal searches, including peaceful individuals.

The last point concerns the right to convert. In this respect, the great role of cooperation and dialogue between various entities functioning in society in order to ensure respect for religious and philosophical diversity was noticed.

The document has an advantage of attempting to formulate guiding principles and resultant recommendations in order to develop solutions guaranteeing both religious freedom and security. It should be emphasized that the guiding principles indicated in the document and the recommendations formulated are the result of joint discussions during the meeting, during which there was an exchange of experiences in the field of protection of religious freedom and ensuring the security of individual OSCE states. It should be appreciated that the document emphasizes the importance of religious freedom as the fundamental freedom of human beings as stemming from their dignity. It indicates that ensuring the possibility of exercising religious freedom builds and supports a sense of personal security, but also supports security in the institutional dimension.

The document emphasizes and recommends establishing cooperation and dialogue between the state and other entities. It seems that it can be concluded that the document is of the opinion that both religious freedom and security are not only the rights of every human being, but also constitute a common good, important for whole nations.

REFERENCES

Bieńkowska, Daria. 2019. "Transkulturowa Europa a prawo do wolności religijnej. Analiza w oparciu o art. 9 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności oraz jurysprudencję strasburską." In *Prawa człowieka i ludzkie bezpieczeństwo. Osiągnięcia i wyzwania. W 70. rocznicę ogłoszenia Powszechnej Deklaracji Praw Człowieka*, edited by Daria Bieńkowska, and Ryszard Kozłowski, 97-108. Warszawa: C.H. Beck.

Ferrari, Silvio. 2020a. "Are freedom of religion or belief and security reconcilable?" *Religious Freedom* 24:100-106.

Ferrari, Silvio. 2020b. "Freedom of religion in the age of insecurity." In *Securitisation of Religious Freedom: Religion and Limits of State Control (Sécurisation de la liberté religieuse : La religion et les limites du contrôle de l'Etat). Proceedings of the XXIXth Annual Conference, Tallinn, 16-18 November 2017 (Actes du XXIXème colloque annuel, Tallinn, 16-18 novembre 2017)*, edited by Merilin Kiviorg, 3-9. Granada: Editorial Comares, S.L., Polígono Juncaril.

Hucał, Michał. 2012. *Wolność sumienia i wyznania w orzecznictwie Europejskiego Trybunału Praw Człowieka*. Warszawa: C.H. Beck.

Jach, Anna. 2017. "Akt końcowy KBWE i jego wpływ na instytucjonalizację ruchu praw człowieka w krajach Europy Środkowo-Wschodniej w perspektywie porównawczej 1975-1991 (wybrane aspekty)." *Nowa Polityka Wschodnia* 2:158-62.

Kącka, Katarzyna. 2013. "Geneza i źródła wolności religii w europejskiej przestrzeni politycznej i prawnej." *Seminare* 34:155-74.

Krukowski, Józef. 1999. "Godność ludzka podstawą praw i wolności człowieka w umowach międzynarodowych." In *Kościół i prawo. Podstawy jedności europejskiej*,

edited by Józef Krukowski, and Otto Theisen, 178-99. Lublin: Towarzystwo Naukowe KUL.

Matysiuk, Renata. 2008. "Bezpieczeństwo i prawa człowieka w systemie KBWE/OBWE." In Renata Matysiuk, and Ryszard Rosa, *Bezpieczeństwo i prawa człowieka w systemie KBWE/OBWE*, 31-51. Siedlce: Wydawnictwo Akademii Podlaskiej.

Mezglewski, Artur. 2015. "Utworzenie oraz rejestracja związku wyznaniowego jako przejawy wolności religijnej." *Studia z Prawa Wyznaniowego* 18:123-34.

Ożóg, Michał. 2015. "Rejestrowanie kościołów i innych związków wyznaniowych w trybie administracyjnym." *Forum Prawnicze* 2:23-40.

Rozner, Monika. 2002. "Prawo do wolności religijnej w Europejskiej Konwencji Praw Człowieka z 1950 r." *Studia z Prawa Wyznaniowego* 5:121-22.

Sobczak, Witold. 2013. *Wolność myśli, sumienia i religii – poszukiwania standardu europejskiego*. Toruń: Dom Wydawniczy Duet.

Stanisz, Piotr. 2015. "Konstytucyjne zasady określające relacje państwa z kościołami i innymi związkami wyznaniowymi: autonomia i niezależność oraz współdziałanie." In *Katolickie zasady relacji Państwo-Kościół a prawo polskie*, edited by Józef Krukowski, Mirosław Sitarz, and Henryk Stawniak, 159-85. Lublin: Towarzystwo Naukowe KUL.

Stanisz, Piotr. 2020. *Religion and Law in Poland*. Kluwer Law International.

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WILL THE RAIL REGULATION (EU) 2021/782 IMPROVE PASSENGERS' LEGAL POSITION?

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Abstract. The objective of this paper is to analyse the legal position of train passengers to whom provisions of Regulation (EU) 2021/782 of the European Parliament and of the Council on rail passengers' rights and obligations apply. This regulation will replace Regulation 1371/2007. The article attempts to answer the question whether the provisions of the new regulation truly strengthen the legal situation of passengers, as assumed therein. After an analysis and comparison of prescripts of both of these regulations the author points out that the aim of the new one has not been fully achieved. It is because the new law also introduces such provisions which do not only not improve the degree of protection of passengers, but also definitively weaken this protection. The author also points out the inadequacy of certain measures and formulates relevant *de lege ferenda* conclusions.

Keywords: Regulation (EU) 2021/782; rights and obligations of passengers; passenger rail transport

INTRODUCTION

On 29 April 2021 the European Parliament and the EU Council adopted Regulation 2021/782 on rail passengers' rights and obligations.[1] It will enter into force on 7 June 2023. On this day Regulation (EU) 1371/2007[2] will be repealed. The aim of the new Regulation 2021/782, as seen in recital (1) of its preamble, is to enhance protection for passengers and to encourage an increase in rail travel. It is at the same time emphasized that rail passengers should be fully protected, regardless of the part of the EU territory they are travelling through. Therefore, as a rule, passengers that travel internationally and domestically have been granted the same rights. At the same time, it allowed an introduction of exclusions with regard to rail services offered for a historical or touristic use, and also with regard to urban, suburban and

[1] Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations, OJ L 172/1, 17.05.2021.

[2] Regulation (EC) 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ L 315/14, 03.12.2007.

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regional services. New solutions have been introduced which allow, for example, a railway undertaking[3] to release itself from the payment of compensation for delays, missed connections and cancellations; it also introduces regulations on the transport of bicycles or on issuing through-tickets. Provisions on the use of railway services by persons with disabilities and persons with reduced mobility have also been amended and supplemented.

Already at the stage of legislative works on the new law, the EU Council announced in its press release of 25 January 2021[4] that the reform of rail passenger rights will strengthen the rights of all passengers, and in particular those with disabilities, it will make it easier to transport bicycles and to re-route and it will increase the popularity of through-tickets. Some representatives of authorities took a similar stance, for example, the Portuguese Minister of Infrastructure and Housing Nuno Santos,[5] and, after the adoption of Regulation 2021/782 , prof. Bogusław Liberadzki, a Polish EMP,[6] or Germany's Federal Minister of Justice and Consumer Protection Christine Lambrecht. She pointed out that in the future there will be clear rules and a stronger protection of all train travellers throughout the EU and boosting train travels is key to environmental protection and to achieving EU's climate goals.[7] However, there have been also views that criticised this reform, especially for introducing, as has already been outlined, the force majeure clause that excludes carrier liability.[8] Only few scholars and commentators have offered their opinions on the reform [Rott 2021].[9]

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[3] A railway undertaking, pursuant to Article 3(1) of Regulation 2021/782, should be understood as an undertaking defined in Article 3(1) of Directive 2012/34/EU of 21 November 2012 establishing a single European railway area (OJ L 343/32, 14.12.2012 as amended), that is any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only.

[4] *Większe prawa pasażerów kolei: Rada przyjęła nowe przepisy*, https://www.consilium.europa.eu/pl/press/press-releases/2021/01/25/improved-rail-passenger-rights-adopted-by-council/ [accessed: 11.08.2022].

[5] Ibid.

[6] *PE rozszerza prawa pasażerów kolei. Czy aby na pewno?*, https://podroze.onet.pl/aktualnosci/parlament-europejski-rozszerza-prawa-pasazerow-kolei/nxvqbkb [accessed: 11.08.2022].

[7] *Mehr Rechte für Bahnreisende in der Europäischen Union*, https://www.datev-magazin.de/nachrichten-steuern-recht/recht/mehr-rechte-fuer-bahnreisende-in-der-europaeischen-union-35521 [accessed: 11.08.2022].

[8] *Kolej w UE. Brak odszkodowań w przypadku "siły wyższej"*, https://www.dw.com/pl/kolej-w-ue-brak-odszkodowa%C5%84-w-przypadku-si%C5%82y-wy%C5%BCszej/a-55131848 [accessed: 11.08.2022]; Madrjas 2021.

[9] Also, at the stage of drafting the amendments see Góra and Kłosowski 2018, 114-18.

The purpose of this article is to assess the measures adopted in Regulation 2021/782 and to solve the question of whether the new law improves protection of passengers compared to the standard in force now under Regulation 1371/2007, and whether it will help increase the share of rail transport in the transportation market, as assumed by the EU legislator. The author puts forward a thesis that this objective has not been fully achieved. Some of the adopted solutions do not improve passengers' situation, but actually worsen it. Moreover, she points to measures she believes insufficient and formulates relevant *de lege ferenda* conclusions. This study discusses the most important changes. The author uses the method of interpretation of norms of the law in force, legal comparison and a historical analysis of development of laws.

1. SCOPE

Regulation 2021/782 directly states that it applies to international and domestic rail journeys throughout the Union provided by railway undertakings licensed in accordance with Directive 2012/34/EU of the European Parliament and of the Council.[10] However, this does not mean that it will cover all journeys in the territory of the EU. This regulation gives Member States a possibility to introduce exemptions from the application of the regulation's provisions (as a rule, this does not apply to provisions relating to persons with disabilities and persons with reduced mobility). Exemptions may apply to services which are operated strictly for historical or touristic use (which is a novum, Article 2(2)) and to urban, suburban and regional rail passenger services, and international rail passenger services of which a significant part is operated outside the Union[11] (Article 2(6)). It also honours exemptions relating to domestic passenger services, granted under Article 2(4) of Regulation 1371/2007, but before the expiry of such an exemption Member States may exempt such domestic rail passenger services from the application of certain provisions of Regulation 1371/2007 for an additional period of no more than five years. Therefore, the changes introduced, which concern the scope of application of the new rail regulation are minute when compared to the existing one.

Maintaining the possibility for Member States to introduce such exclusions (as under Regulation 1371/2007[12]) will surely not contribute, at least

[10] See more about the licensing of railway undertakings Dąbrowski 2018, 51-52.

[11] Pursuant to Article 2(6)(b) of Regulation 2021/78, international rail passenger services of which a significant part is operated outside the Union are those services in which at least one scheduled station stop is outside the EU.

[12] For exemptions of its application under Regulation 1371/2007 in the territory of the Republic of Poland [Ambrożuk, Dąbrowski, and Wesołowski 2020, 37-40; Stec 2010, 973-74].

not soon, to a full unification of rules of operating transport services in the territory of the EU. While it is understandable to honour exemptions granted under Regulation 1371/2007 in national passenger services, the possibility to use further exemptions under the new Regulation is puzzling. The introduction of such exceptions is justified by having to adjust the national rail and infrastructure system to the requirements of the regulation. However, it seems that a two-year period from the moment of entry into force of Regulation 2021/782[13] till the moment when it becomes effective, that is until 7 June 2023 (and when it comes to Article 6(4) till 7 June 2025[14]), in consideration of the scope of new obligations imposed on rail companies, is a sufficient time to do such adjustments and there is no need to introduce exemptions for another period.

In practice there may also be problems in the context of introduction of exemptions relating to services operated only for historical or touristic use because they are not identified in Regulation 2021/782. Recital (6) of the preamble only points out that such rail services usually do not serve to satisfy regular transport needs and are isolated from the rest of the EU rail system and use the technology that may limit their availability. While the distinction "for historic use" should not bring any problems, identification of services solely for touristic use may raise doubts. It is not always possible to differentiate between a regular need to travel from the need to travel due to being a tourist. Member States may qualify services operated for touristic use differently, and thus apply relevant exemptions. It seems that due to the drive to unify as much as possible the rules applicable throughout the EU these questions should be specified in the regulation itself.

2. TRANSPORT OF BICYCLES

Regulation 2021/782 greatly extends the subject matter of transport of bicycles (Regulation No 1371/2007 devoted only one provision to this issue[15]). As pointed out in the communication from the Council,[16] this is to encourage passengers who use soft transport modes to use rail transport.[17] Most of

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[13] The Regulation entered into force on the twentieth day following its publication, that is on 6 June 2021.

[14] This provision applies to a minimum number of places for bicycles.

[15] Pursuant to Article 5 of the Regulation 1371/2007, "railway undertakings shall enable passengers to bring bicycles on to the train, where appropriate for a fee, if they are easy to handle, if this does not adversely affect the specific rail service, and if the rolling-stock so permits".

[16] See *Większe prawa pasażerów kolei: Rada przyjęła nowe przepisy*.

[17] It is puzzling why it was emphasized that it applies to passengers who use soft transport modes. If facilitations in the transport of bicycles are to encourage the choice of rail services,

all, transport of bicycles has become a passenger right, albeit with certain limitations. Such limitations may be introduced by a railway undertaking for safety or operational reasons (e.g. capacity limits applicable during peak hours, or where technical considerations do not permit it) but also due to the weights and dimensions of the bicycles (Article 6(3)). Terms and conditions for the transport of bicycles, including information on the availability of capacity, are published on railway undertakings' websites.

It will be down to the railway undertaking, as a rule, to determine the number of places allocated to bicycles in a given train composition. The Regulation points out that this railway undertaking specifies an adequate number of such places taking into account the size of the train composition, type of services and demand for transport of bicycles. However, it is reserved that each train composition must have at least four places for bicycles, but Member States may set a higher limit for the minimum number. When ordering a new rolling stock, or when performing an upgrade of an existing rolling stock (where it is necessary to obtain authorisation for placing it on the market) places for the transport of bicycles must be ensured, though this shall not apply in relation to restaurant cars, sleeping cars or couchette cars (Article 6(4)). However, these provisions will only be effective from 7 June 2025 onwards.

A railway undertaking will have the right to collect fees for the transport of bicycles in a reasonable amount. If a reservation is required on a train, passengers must be able to make a reservation of a place for their bicycles. Where despite having made a reservation a passenger is refused the carriage of his bicycle without a duly justified reason, the passenger is entitled to re-routing or reimbursement (pursuant to Article 18), to a flat-rate compensation (pursuant to Article 19)[18] and assistance (pursuant to Article 20(2))[19]. It is about rights afforded to passengers in the event of a delay or loss of connection or cancellation of the service. Rights of passengers are equalled here because a railway undertaking fails to provide a service of transport of a bicycle with rights of passengers in the event of failure to perform or improper performance of the service of transporting the passenger himself.

These changes must be introduced as a "step in the right direction". However, they are insufficient to achieve the objective stipulated in the regulation.

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and thus become part of the achievement of EU's climate policy, then they should most of all encourage car users to "abandon" their vehicles and switch to train services, e.g. if travelling on holiday and taking bicycles.

[18] It is about a flat-rate compensation in an adequate percentage (25% or 50% of the ticket price).

[19] This provision stipulates, for example, providing passengers with meals and refreshments in reasonable relation to the waiting time, with transport to an alternative departure point or to the final destination.

It does not seem that specification of the minimum number of places allocated for the transport of bicycles at four places per given composition is adequate, especially during the holiday season. This allows for only one average family to take their bicycles on board (in the two-plus-two model). Admittedly, it is a minimum level, but we do not know if railway undertakings will be interested in increasing this number, especially on rail routes that are exceptionally busy. Taking an economic calculation into account, they may obtain higher profits from the surface area dedicated to the transport of passengers than from the surface area dedicated to the transport of bicycles. The cost of transporting a bicycle is usually a small fraction of the price of a ticket and often does not depend on the route length.[20] Situations where passengers interested in transporting their bicycles are refused such carriage as the places have been occupied already will certainly not encourage travellers to use train services. Thus, contrary to assumptions of the new regulation, these situations will not contribute to the achievement of the EU's climate policy. Therefore, it seems that specifying a minimum number of places for bicycles should be made dependent on an estimate number of passengers transported, route, season and weather conditions (e.g. majority of people opt not to cycle in winter). There is hope that individual Member States will introduce a reasonable correction (pursuant to Article 6(4) of Regulation 2021/782).

It is also puzzling why the application of Article 6(4) that stipulates the minimum number of places for bicycles was postponed (till 7 June 2025). The period of more than two years between the regulation is passed and the moment of its entry into force (save for the already mentioned Article 6(4)) seems sufficient for railway undertakings to prepare to transporting bicycles, all the more so that this transport is stipulated in Regulation 1371/2007 that is currently in operation and some of railway undertakings already have such transport in their offer (e.g. PKP Intercity).

However, granting passengers who made a reservation for the transport of bicycles and who were denied such transport without a reasonable cause the right to reroute or to have their tickets reimbursed, the right to a flat-rate compensation or the right to specific assistance deserves approval. There will certainly be disputes here between passengers and railway undertakings on the understanding of the concept "a duly justified reason" and we will have to wait at least a few years for the courts to solve this issue.

[20] E.g. the price for transporting a bicycle on a PKP Intercity train is a flat-rate fee of PLN 9.1, irrespective of how long the route is, see *Transport of bicycles*, https://www.intercity.pl/en/site/for-passengers/offers/special-offers-for-domestic-transport/bikes/ [accessed: 21.08.2022].

3. EXCLUSION OF THE RIGHT TO A FLAT-RATE COMPENSATION

The most important changes from the point of view of protection of passengers' rights concern principles of liability of railway undertakings and granting passengers the right to the so-called flat-rate compensation. Current provisions of Article 17 of Regulation 1371/2007 specify principles of this liability and grant passengers the right to compensation in the event of delay of a service but do not allow a railway undertaking to evade the payment of compensation, even if force majeure occurs [Góra and Kłosowski, 2018; Kłosowski, 2014]. CJEU's case law also confirms such a position.[21] Such a regulation was criticised among the transport community who are responsible for harmonising requirements on compensation in rail and air transport that recognizes the lack of exclusion of carrier liability in the event of force majeure as it brings an excessive burden on railway undertakings.[22]

As a response to this criticism, a catalogue of exonerating premises was introduced to Regulation 2021/782 which release a railway undertaking from the obligation to pay a flat-rate compensation, which are sometimes erroneously referred to as the "force majeure clause".[23] Thus, pursuant to Article 19(10) of the regulation: "A railway undertaking shall not be obliged to pay compensation if it can prove that the delay, missed connection or cancellation was caused directly by, or was inherently linked with: (a) extraordinary circumstances not connected with the operation of the railway, such as extreme weather conditions, major natural disasters or major public health crises, which the railway undertaking, in spite of having taken the care required in the particular circumstances of the case, was unable to avoid and the consequences of which it was unable to prevent; (b) fault on the part of the passenger; or (c) the behaviour of a third party which the railway undertaking, in spite of having taken the care required in the particular circumstances of the case, was unable to avoid and the consequences of which it was unable to prevent, such as persons on the track, cable theft, onboard emergencies, law enforcement activities, sabotage or terrorism. Strikes by the personnel of the railway undertaking, acts or omissions by another

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[21] See CJEU of 26 September 2013 in C-509/11, ÖBB-*Personenverkehr AG*, ECLI:EU:C:2013:613.

[22] See *Kolej w UE. Brak odszkodowań w przypadku "siły wyższej"*. E.g. Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46/, 17.02.2004) stipulated that "An operating air carrier shall not be obliged to pay compensation […], if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken." There is no such solution in Regulation No 1371/2007.

[23] See *Kolej w UE. Brak odszkodowań w przypadku "siły wyższej"*.

undertaking using the same railway infrastructure and acts or omissions of the infrastructure and station managers are not covered by the exemption referred to in point (c) […]."

Introduction of these exonerating premises, though largely understandable as it is difficult to impose liability on a carrier where there are extraordinary weather conditions, certainly did not improve the level of protection of passengers who use rail services that Regulation 2021/782 applies to, but actually greatly undermined this level compared to the existing one. The premise that releases one from liability, i.e. unavoidable and overwhelming extraordinary circumstances related to rail traffic, will certainly inspire numerous controversies. It was built out of under-defined terms, just like the example catalogue of these circumstances, which the legislator assumed was surely intended to interpret this premise. However, it does not seem that it can play this role. This provision will undoubtedly be subject of many judicial rulings. We cannot rule out that railway undertakings, wanting to avoid liability for damages, will try to qualify as exonerating premises such cases for which they are liable or jointly liable themselves (e.g. delayed service caused by both a bad condition of the rolling stock and very bad weather conditions).

However, it needs to be emphasized that the EU legislator, formulating the exonerating premises, referred to the description formula and did not use the term "force majeure", commonly used in national legislations. It is a consequence of the different treatment offered to this phrase in national legal systems of individual countries.[24] The formula adopted in the regulation has a broader scope than the concept "force majeure," at least in those countries that condition the force majeure premise on such an event being external.

Doubts arise around the premise that releases the carrier from the obligation to pay compensation, worded as "the fault on the part of the passenger." This requirement should rather be worded as "the sole fault on the part of the passenger," whereas the "fault on the part of the passenger," if there are no circumstances to apply at least one of two remaining exonerating premises identified in (a) and (c), should provide a basis to lower the amount of compensation due to the traveller as a way of limiting this compensation.

Although the new regulation makes the situation of passengers worse in this aspect, we cannot agree with the position of certain consumer organizations that the introduction of the "force majeure clause" also eliminates offers of support to passengers (when it comes to the right to meals, refreshments or accommodation in the event of a delayed arrival or departure or

[24] For more see Ambrożuk and Wesołowski 2004.

cancellation of service), who got stuck in their travels.[25] Exemptions referred to in Article 19(10) of the new regulation only concern compensation. The right to assistance is addressed in Article 20 of Regulation 2021/782. The only connection between Article 20 and Article 19(10) is when there are circumstances referred to in Article 20(2)(b) sentence 2. In essence, where the railway undertaking is obliged under the right to assistance to provide the traveller with accommodation free of charge due to a delay or cancellation of a service, then in the case of circumstances referred to in Article 19(10) (that is the occurrence of these releasing causes), the railway undertaking may limit the duration of accommodation to a maximum of three nights. This means that apart from the case described above, the passenger has the right to full assistance provided for in Article 20 of Regulation 2021/782, which must be considered an appropriate solution.

The amount of the flat-rate compensation was left unchanged at 25% and 50% of the price of the ticket (Article 19(1) of Regulation 2021/782) where the railway undertaking may not be eligible to pay the compensation if such a price does not exceed the minimum threshold of EUR 4 per ticket (Article 19(8) of the Regulation).

4. RIGHTS OF PERSONS WITH DISABILITIES AND PERSONS WITH REDUCED MOBILITY

Regulation 2021/782 undoubtedly improves the legal position of passengers with disabilities and passengers with reduced mobility. From the moment this Regulation enters into force (7 June 2023), provisions of Chapter V dedicated to such passengers[26] will apply not only to international and domestic carriage within the EU, but also to regional services (Article 2(8)).

A *novum* here involves granting the right to transport to personal assistants of persons with disabilities recognised as such in accordance with national practices (Article 21(1)) with the proviso that where the railway undertaking requires that the passenger should travel with such an assistant[27], this assistant is entitled to travelling free of charge (Article 23(1)(a)). In other cases, he will travel with a special tariff or free of charge (Article

[25] See *Kolej w UE. Brak odszkodowań w przypadku "siły wyższej"*.

[26] Chapter V (Persons with disabilities and persons with reduced mobility) regulates, among other things, the question of the right to transport, of information given to persons, of assistance at railway stations and on board and of conditions under which it is provided, of compensation in respect of mobility equipment, assistive devices and assistance dogs and also of staff training.

[27] It may require this only where it is absolutely necessary in order to ensure compliance with availability laws.

23(1)(b)). At that, he should where practicable, be seated next to the person he assists.

What is also a novelty is the direct regulation of the question of transport of assistance dogs that may accompany persons with disabilities and persons with reduced mobility in accordance with any relevant national law[28] (Article 23(1)(c)).

Railway undertakings and station managers were given an obligation to ensure that all staff providing, in their regular duties, assistance to persons with disabilities and persons with reduced mobility or who deal directly with the travelling public, receive disability-related training and regular refresher training courses (Article 26).

The period in which the passenger should notify the railway undertaking, the station manager, the ticket vendor or the tour operator about him wishing to receive assistance, free of charge, at railway stations and on board, was reduced from 48 to 24 hours. Member States, however, may allow this period to be extended to 36 hours, but only until 30 June 2026 (Article 24(1)(a)).

Regulations concerning compensation due to such passengers in respect of mobility equipment and other assistive devices, including assistance dogs, were also extended (Article 25). Railway undertakings and station managers who caused the loss of, or damage to such equipment or the loss of, or injury to, assistance dogs will be liable as part of this compensation to cover the cost of replacement or repair of such device or costs of replacement or treatment of an assistance dog (without limits as to the amount that apply to another luggage) and also reasonable costs of temporary replacement of such devices or assistance dog where this replacement is not provided for by the railway undertaking or station manager and where they were immediately necessary.

The changes introduced above undoubtedly strengthen the rights of passengers with disabilities and rights of persons with reduced mobility. The provisions on compulsory staff training and those concerning assistants of persons with disabilities and assistance dogs, including the granting of compensation for the loss of or injury to such a dog, deserve a special praise. However, the literature rightly points out that a passenger who was granted a special right, e.g. as part of assistance in accordance with Article 21, may sometimes have a problem with deciding on who to file the claim with if they experience damage as a result of not being given assistance [Rott 2021]. Therefore, we should discuss the introduction of joint and several liability

[28] In Poland this question is regulated by Article 20a of the Act of 27 August 1997 on professional and social rehabilitation and employment of persons with disabilities (Journal of Laws of 2021, item 573 as amended).

of entities obliged to provide such assistance. An alternative, which might prove more difficult though, would be to introduce a strict separation of responsibilities between railway undertakings and the station manager.

It is regretful that provisions that grant specific rights to persons with disabilities and persons with reduced mobility do not stipulate directly the flat-rate compensation referred to in Article 19 or the right to assistance laid down in Article 20 (right to meals, refreshments and accommodation in the event of a delayed or cancelled arrival or departure) if the passenger does not board such a train or loses connection because they were not provided assistance pursuant to Article 21 at the train station or on board. Introduction of a flat-rate compensation here would make it much easier for passengers to pursue such claims as they would not have to evidence the amount of the damage, but only the fact that (due) assistance was not given to them. Therefore, it should be postulated that further amendments be made in this regard.

5. THROUGH-TICKETS

Regulation 2021/782 introduces a novelty, not stipulated in Regulation No 1371/2007, that is through-tickets,[29] which should be offered where long-distance or regional rail passenger services are operated by sole railway undertakings. Such companies should be understood as all railway undertakings which are either wholly owned by the same owner or which are wholly-owned subsidiary undertakings of one of the railway undertakings involved (Article 12(1)). For a journey covered with such a ticket, the passengers were granted rights stipulated in Article 18 (right to reimbursement of the cost of the ticket or to reroute), Article 19 (right to a flat-rate compensation) and Article 20 (right to assistance) of Regulation 2021/782, if they miss the next connection or connections.

Introduction of such a measure is praiseworthy. Through-tickets, as rightly pointed out in recital (22) of the preamble, allow passengers to travel seamlessly and their introduction as part of services provided by the same railway undertaking does not require any contracts (recital 22 of the preamble). On the other hand, founding the railway undertaking's liability on Article 18, 19 and 20 of Regulation 2021/782 is an encouragement for passengers to opt for travels with interchanges, as such travels are, as a rule, considered one journey.

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[29] Pursuant to Article 3(9) of Regulation 2021/782, a 'through-ticket' means a through-ticket as defined in Article of Article 3(35) of Directive 2012/34/EU (see footnote 3), that is a ticket or tickets representing a transport contract for successive railway services operated by one or more railway undertakings.

CONCLUSIONS

As seen in the comments above, a clear assessment of Regulation 2021/782 as a legislative act that rises the level of protection of passengers who use the services of railway undertakings is too optimistic. Undoubtedly, the situation of persons with disabilities and persons with reduced mobility will improve, though we should not expect far-reaching measures such as granting the right to a flat-rate compensation and the right to care where due assistance is not provided or improperly provided.

When it comes to all passengers who use the services of railway undertakings, measures relating to through-tickets and transport of bicycles are to their benefit. The latter, however, are not sufficient due too low norms for the number of places allocated to bicycles. This will not ensure implementation of the objectives of the new Regulation not only in reference to the protection of passengers but also in terms of the EU's climate policy.

The introduction of circumstances that release railway undertakings from the obligation to pay a flat-rate compensation clearly worsens the position of passengers, especially that these reasons are formulated using vague terms, which will undoubtedly bring numerous disputed in practice. However, on the other hand, it is difficult to question, as a rule, the existence of the foundation to introduce such exclusions. They also apply in other branches of transport. After all, the very fact of a certain approximation of regulations that concern protection of passengers in various branches of transport is without a doubt a positive development. The relevant literature has already pointed to the negative consequences of an unfounded differentiation of regulations and thus the level of protection of passengers in similar situations in various branches of transport [Wesołowski 2014].

REFERENCES

Ambrożuk, Dorota, Daniel Dąbrowski, and Krzysztof Wesołowski. 2020. *Prawo przewozowe. Komentarz.* Warsaw: Wolters Kluwer.

Ambrożuk, Dorota, and Krzysztof Wesołowski. 2004. "Siła wyższa jako przesłanka zwalniająca przewoźnika od odpowiedzialności za stan przesyłki". *Zeszyty Naukowe Uniwersytetu Szczecińskiego* 423. *Problemy Transportu i Logistyki* 3, 125-37.

Dąbrowski, Daniel. 2018. „Podstawy odpowiedzialności przewoźnika kolejowego za uszkodzenie ciała, rozstrój zdrowia bądź śmierć pasażera." *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 7, no. 7:49-59. DOI: 10.7172/2299-5749.IKAR.7.7.4

Góra, Ignacy, and Karol Kłosowski. 2018. "Nowelizacja przepisów rozporządzenia (WE) nr 1371/2007 Parlamentu Europejskiego i Rady dotyczącego praw i obowiązków pasażerów w ruchu kolejowym – najważniejsze projektowane zmiany." *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 7, no. 7:114-18. DOI: 10.7172/2299-5749.IKAR.7.7.10

Kłosowski, Karol. 2014. "Siła wyższa nie wyłącza prawa co częściowego zwrotu ceny biletu. Glosa do wyroku TSUE z 26 września 2013 r. w sprawie C-509/11, ÖBB-Personenverkehr AG." *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 7, no. 3:112-20.

Madrjas, Jakub. 2021. "Nowe prawa pasażera przyjęte! Już za kilka lat... prawie nic się nie zmieni". https://www.rynek-kolejowy.pl/wiadomosci/nowe-prawa-pasazera-przyjete-juz-za-kilka-lat-prawie-nic-sie-nie-zmieni-102242.html [accessed: 15.08.2022].

Rott von, Peter. 2011. "Rechte von Menschen mit Behinderungen unter der neuen Eisenbahn-Passagierrechte-Verordnung." Post E1-2021. https://www.reha-recht.de/fachbeitraege/beitrag/artikel/beitrag-e1-2021/ [accessed 14.09.2022].

Stec, Mirosław. 2010. "Ochrona pasażera w transporcie kolejowym w świetle rozporządzenia (WE) nr 1371/2007 Parlamentu Europejskiego i Rady." In *Prawo handlowe XXI wieku. Czas stabilizacji, ewolucji czy rewolucji. Księga jubileuszowa Profesora Józefa Okolskiego*, edited by Małgorzata Modrzejewska, 969-85. Warsaw: Wolters Kluwer.

Wesołowski, Krzysztof. 2014. "Konsekwencje sposobu unormowania ochrony pasażerów w prawie Unii Europejskiej." *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 362. Zmiany prawodawstwa gospodarczego w okresie transformacji ustrojowej w Polsce*, edited by Tadeusz Kocowski, and Katarzyna Marak, 399-412.

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INDIRECT COMMERCIALIZATION OF SCIENTIFIC RESULTS BY RESEARCH INSTITUTES. SELECTED ISSUES

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Abstract. The subject of the article is the characterization of the commercialization of the results of scientific activity. The starting point is to point out the Polish specificity of the legal regulation of the conduct of scientific activity and its coherence with the market environment. A special place in this regard is occupied by research institutes. The author presents the legal possibilities of commercialization of the results of scientific activity conducted by research institutes focusing on the so-called indirect commercialization, which he discusses in detail. In addition to procedural issues, the article discusses in detail the prerequisites for commercialization, including in particular the legally defined objectives of its implementation, the regulation of which indicates the specificity of Polish solutions.

Keywords: commercialization of scientific results; research institute; scientific activities; types and rationale of commercialization of scientific results

INTRODUCTION

On the 5th of September 1977, the Voyager 1 space probe was launched from Cape Canaveral in the U.S. Its name comes from the space program of the U.S. National Aeronautics and Space Administration (NASA). 16 days before the launch of Voyager 1, on the 20th of August 1977, Voyager 2 was launched. The purpose of the Voyager program was to conduct studies of the outer planets of the Solar System and the outer part of the heliosphere.[1] The realization of the program was helped by a special alignment of Jupiter, Saturn, Uranus and Neptune, occurring once every 175 years, which allowed both space probes to take advantage of the so-called gravitational assist.[2] It

[1] The Heliosphere is the space where the Sun's influence is dominant in the Solar System.

[2] The possibility of using gravitational assist due to the unique arrangement of gas giants (outer planets of the Solar System) was discovered in 1965 by Gary Flandro, an employee of one of NASA's research centers, the Jet Propulsion Laboratory [Flandro 1966, 329-37; Ziółkowski 2017].

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provided the probes with optimal conditions for achieving flight parameters to reach the planned celestial bodies and study them thoroughly. After the original goal was achieved, the Voyager program's mission was extended, and the two probes traveling through the abyss of space were assigned further targets.[3]

To this day, on board both probes are 12-inch disks made of gold-plated copper, which are a kind of time capsule and a source of knowledge about us and our planet. The data stored on the disks make it possible (as it seems to us) to determine the location of the Solar System and Earth, contain basic mathematical information, the pattern of the DNA code, human anatomy, but also include 115 encoded images illustrating humans and animals,[4] as well as numerous sounds (including folk songs of various cultures, music and human laughter) and sounds of nature, including, among others, the sound of the wind, the thunder of a thump lightning, birdsong.[5] On the gold disc were recorded greetings to potential recipients spoken in 55 languages. Unfortuitously, because not quite corresponding to the essence of the matter, but the famous "Witajcie istoty z zaświatów" in Polish was uttered by Maria Nowakowska-Stykos.[6]

1. INTRODUCTION. THE RELATIONSHIP BETWEEN SCIENCE AND PRACTICE

Human activity in space, although it is only one of many examples of the synergy of science and economy, is an exceptionally spectacular one. Today we all benefit from computers, cell phones, geo-location, durable and flexible materials and other wonderful inventions and discoveries, without always remembering that their sources are in the vast majority of cases related to space research. The strong coupling between the results of scientific research and the conveniences they bring us in everyday life is usually not apparent at first glance. Only a deeper reflection on the origins of most modern devices and practical solutions leads us to the conclusion that they are the result of the work of scientists. This remarkable interpenetration of

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[3] Since the Voyager 1 and Voyager 2 space probes continued to perform admirably after achieving successive scientific goals, the mission of the Voyager program was extended 3 times.

[4] The disk also recorded images of cities, building architecture, food and Earth's landscapes.

[5] It takes more than 5 hours to play all the sounds recorded on the "golden disc". The full record of the disks is available at: https://voyager.jpl.nasa.gov/golden-record/ [accessed: 01.11.2022]. The placement of some of the data on the "golden disks" was accompanied by heated discussion. With the safety of our species at stake, there was concern, in particular, about revealing the location data of the Solar System.

[6] You can listen to the recording at https://soundcloud.com/nasa/golden-record-polish-greeting

science and everyday life is the driving force behind the development of modern civilization.

Bearing it in mind, the Law on Higher Education and Science[7] emphasizes the specific purpose and mission of the system of higher education and science, indicating that one of their key elements is to contribute to the innovation of the economy (preamble, Article 2 of the Law). Hence, scientific activity should be in close correlation with the needs of the social and economic environment of scientific entities [Agmon and von Glinow 1991]. Thus, it includes not only strictly theoretical research, but also research that has a practical dimension. In order to take advantage of the potential of science, European and national legislators have introduced numerous legal instruments and economic mechanisms that promote the transfer of knowledge from the scientific sector to the economy. In order for scientific activity to remain in close correlation with the needs of the market, the need for active involvement of universities and other scientific institutions in the activities of entrepreneurs is emphasized. Such a goal was served, among other things, by the establishment of a package of Laws on innovation, the law introducing implementation doctorates, the law on research institutes,[8] or the law on the Research Network: Lukasiewicz.[9] Building bridges between science and the economy is also the subject of the government's national economic strategy,[10] or the National Research Program.[11]

According to Article 4 of the Law on Higher Education and Science, scientific activity includes scientific research, development work and artistic activity. The law divides scientific research into basic research and applied research. Basic research is understood as empirical or theoretical work aimed primarily at acquiring new knowledge about the fundamentals of phenomena and observable facts without aiming at direct commercial application, while applied research is work aimed at acquiring new knowledge and skills, aimed at developing new products, processes or services or introducing significant improvements to them. Development work is defined as activities involving the acquisition, combination, formation and use of currently available knowledge and skills, including information technology

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[7] Law of 20 July 2018, i.e. Journal of Laws of 2022, item 574 as amended.

[8] Law of 30 April 2010, Journal of Laws of 2022, item 498.

[9] See justifications to the bills, substantive opinion to the government bill on the Research Network: Łukasiewicz, parliamentary print no. 2148, NIK report KNO.410.003.00.2018 – Transfer wiedzy i technologii poprzez spółki jednostek naukowych, p. 5.

[10] Resolution No. 8 of the Council of Ministers of 14 February 2017 on the adoption of the Strategy for Responsible Development until 2020 (with an outlook until 2030 (M.P. item 260).

[11] Assumptions of the state's science, technology and innovation policy – Annex to the Resolution of the Council of Ministers No. 164/2011 of August 16, 2011 on the establishment of the National Research Program.

tools or software, for production planning and the design and development of changed, improved or new products, processes or services, excluding activities involving routine and periodic changes made to them, even if such changes are improvements. The definitions of scientific research indicated above and set forth by the law have not only a theoretical dimension, but also relate directly and indirectly to practice, including, first and foremost, the possibility of using their results in the economy. Already within the framework of basic research alone, which is considered primarily theoretical, is also included empirical work, which, even if not aimed at direct commercial application, must take into account the realities of the market within which it is conducted. There is no difference with applied research, and development work shows the greatest connection with market practice. It is impossible to carry out this type of scientific activity without contact with the real needs of the market, without knowledge of the current research results and anticipation of the directions of change and development of social and economic needs in the future. As a result, all centers scientific and cooperating specialists must be in permanent contact with the socio-market environment and constantly improve their skills.

2. THE CONCEPT AND ROLE OF RESEARCH INSTITUTES

In this context, the system of higher education in Poland is built on the basis of universities, which focus their activities on conducting scientific activities and education, and a special type of entity whose primary task is to combine science and practice, which are research institutes. The statutory definition of a research institute clearly indicates the primary purpose of its activities, which is to conduct research and development work for the purpose of implementation and application in practice. According to Article 1 of the Law on Research Institutes, a research institute is a state organizational unit, legally, organizationally and economically and financially separate, which conducts scientific research and development work aimed at their implementation and application in practice. Unlike universities, where the emphasis is primarily on conducting scientific activity and education, research institutes are established for close cooperation between science and the market environment, so as to provide a bridge between the worlds of science and economy. Serving this purpose is the internal organizational structure of the institutes, the rules of their operation, the possibility provided by the law to create science and industry centers, which can take the form of clusters, technology parks and technology platforms, but above all the subject matter and scope of their activities. The realization of both goals, i.e. the conduct of scientific activities and their implementation by research institutes, is the sine qua non of their existence. The bond connecting the two

goals is so strong that the legislator treats them as one. Both objectives of the activities of research institutes must be implemented simultaneously. The requirement that research institutes simultaneously carry out scientific research and development work and their implementation is unanimously emphasized in the reports and inspection reports of the Supreme Audit Office, case law and the doctrine of the subject. Consequently, both the insufficient amount of research carried out by an institute and the failure to implement their results in practice may be grounds for their liquidation. The decision of the minister supervising a given institute in this regard is discretionary, and in making the decision is guided by substantive, financial and organizational considerations (Article 7(1) of the Law on Research Institutes).

The law identifies three main scopes of research institutes' activities: core activities, educational activities and other activities. The core activity of an institute is based on conducting scientific research and development work, adapting the results of such scientific activity to the needs of practice, and implementing them (Article 2(1) of the Law on Research Institutes). The development of the institute's possible core activities is specified in Article 2(2) of the Law on Research Institutes. Educational activities are specified more precisely as education in doctoral school and postgraduate studies, related to the scientific research and development work conducted by the institute, but the law does not exclude the possibility of the institute also conducting other forms of education. The remaining, so-called "other" activity of research institutes includes within its scope a business activity that is financially and accountably separate from the rest of its activity and is carried out in accordance with the principles set forth in the Business Law [Cilak 2015, 72ff]. However, the so-called other activity of the institute must be related to the scientific research and development work conducted by the institute and carried out to the extent and in the form indicated in the institute's statutes.

3. COMMERCIALIZATION OF THE RESULTS OF RESEARCH AND SCIENTIFIC WORK BY RESEARCH INSTITUTES

In the context of the interface between science and the economy, both representatives of the doctrine and the legislator use three specific concepts, the content of which should be clearly distinguished. These are technology transfer, commercialization and technology implementation. By the term technology transfer is understood the totality of activities related to making available the results of scientific research, a term often used in the context of broad and widespread transfer of research results. Technology transfer can be paid or unpaid, and in this way it fundamentally differs from commercialization, which is understood as the totality of activities related to making research results available to third parties for a fee or transferring the results

to such entities. On the other hand, technology implementation is the introduction of the developed technology to the market in the form of specific products or services [Barszcz 2016, 20; Witek 2008, 56; Jarosz-Żukowska and Żukowski 2014, 230-31].

The Law on Research Institutes does not contain a normative definition of the concept of commercialization of the results of scientific research and development work.[12]

The Law on Higher Education also does not provide such a definition, although it also uses the concept. The gap created in this regard is filled by the doctrine.[13]

The views expressed in this regard in the doctrine differ in detail, but the common axis in defining commercialization is the conviction that it is a process whose immanent and fundamental purpose is the transfer of knowledge from scientific institutions to the market, for the benefit of both the entity disposing of specific knowledge (the so-called innovator) and the entity acquiring it. As a result, the innovator obtains economic benefits from the implementation of the results of the scientific work carried out into the practice of market operation, but may also combine these benefits with feedback related to the practical use of knowledge for further scientific research or development.[14]

This approach to commercialization allows us to distinguish its two types: direct and indirect. Direct commercialization is not defined in the Law on Research Institutes, but the Law on Higher Education and Science, which is applicable in this regard on the basis of systemic interpretation, stipulates that it consists in the sale of the results of scientific activity or know-how related to these results, or in putting these results or know-how to use, in particular on the basis of a license, lease and rental agreement (Article 148(4) of the Law on Higher Education and Science).[15] Its essence is thus based on the personal (direct) involvement of the entity that holds the right to the results of scientific activity in their transfer to the economy. Indirect commercialization, on the other hand, is defined in Article 17(5) of

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[12] Hereinafter: commercialization.

[13] See, for example Markiewicz 2009, 38-39; Kluczek 2011; Łobejko and Sosnowska 2013; Matusiak 2010; Jasiński, Ludwicki 2007; Jasiński 2011; Głodek and Pietras 2011; Jarosz-Żukowska and Żukowski 2014, 219ff.

[14] See Evaluation of the process of commercialization of the results of R&D work and cooperation of scientific units with entrepreneurs under Priority Axis I of the Operational Program Innovative Economy (Sub-measure 1.1.2 and Sub-measure 1.3.1), December 2013; NIK Information materials: Information on the results of the audit: Commercialization of scientific research results, KNO.410.006.00.2015, Warsaw 2016.

[15] See also Barszcz 2016, 28ff.

the Law on Research Institutes.[16] Thus, the essence of indirect commercialization is the indirect transfer of knowledge from scientific institutions to the market. For this purpose, the institute research, as an entity that has the right to the results of scientific activity, can create capital companies or join existing ones, which, however, meet certain requirements. These are known as special purpose companies. The task of these companies is to transfer the results of scientific research or development work to interested beneficiaries operating commercially in the market.

It should be emphasized the compatibility of the process of commercialization of the results of research and development work carried out at the institute with the object of its core business of adapting the results of such scientific activity to the needs of practice and their implementation.

4. RATIONALE FOR INDIRECT COMMERCIALIZATION

The legal basis for the indirect commercialization of the results of research and development work of a research institute is provided by Article 17 of the Law on Research Institutes, and first of all, its paragraphs 5, 5a and 6. According to it, an institute may, with the consent of the supervising minister, in order to commercialize the results of research, development work and know-how related to such results, as well as in order to carry out activities in the field of technology transfer and dissemination of science and to obtain funds for statutory activities, establish capital companies and take up or acquire shares in such companies, and generate income therefrom. In addition, in the event that an institute establishes a capital company for the purpose of implementing or managing research infrastructure projects, as well as taking up or acquiring shares and interests in such companies, the supervising minister is required to consult with the minister responsible for science before granting approval. Regardless of the assumed purpose of commercialization, the object of the company's activity, must be related to the scientific research and development work carried out by the institute. Thus, the performance of indirect commercialization by a research institute is possible only if the following prerequisites are met together: 1) the establishment of the special-purpose company or the acquisition or purchase of shares in the special-purpose company is preceded by the prior approval of the relevant minister supervising the activities of the research institute; 2) the object of activity of the special-purpose company must be related to the scientific research and development work carried out by the institute; 3) a special purpose vehicle may be established only for the purpose of

[16] The Law on Higher Education and Science defines indirect commercialization analogously in Article 149.

commercialization of the results of scientific research, development work and know-how related to these results, as well as to carry out activities in the field of technology transfer and dissemination of science, and to raise funds for statutory activities or to implement or manage research infrastructure projects.

The establishment of a special-purpose company or accession to such a company does not, in principle, deviate from the standard registration procedure for a capital company. The exception in this regard is the obligation to obtain the approval referred to in para. 1. In formal terms, obtaining the consent of the minister supervising the activities of the research institute is the final stage of preparatory work (preceding registration in the National Court Register) in the process of establishing a special-purpose company or taking up or acquiring shares in such a company. Before obtaining approval, the institute should prepare a set of documents justifying the need for and legitimacy of establishing such a company (or joining it). Among them should also be documents confirming that the prerequisites referred to in items. 2 and 3. The law does not prejudge the form and procedure in which the minister supervising the activities of the research institute should apply for approval. However, the minister's consent is a form of business rationing and as such takes the form of an administrative decision issued in administrative proceedings. Hence, a request for consent should meet the requirements set forth in Article 63 of the Code of Administrative Procedure.[17] The party applying for consent is entitled to all the legal remedies available to a party to standard administrative proceedings. It should be noted that in the consent procedure, Article 17(5a) of the Law on Research Institutes imposes an additional requirement on the minister supervising a specific research institute to consult with the minister responsible for science, in the event that the research institute intends to establish a special-purpose company or join such a company by taking up or acquiring shares in it, and its purpose will be to implement or manage research infrastructure projects. However, this additional requirement relates to the consent authority and is beyond the scope of influence of the consent applicant. However, in view of the possible obligation to consult (consult the minister responsible for science), the research institute should, when preparing the relevant documentation, take into account this procedural aspect so that its analysis by the body issuing the opinion is convincing to it as well.

Regardless of whether a research institute forms a special-purpose company or joins an existing one, the Law requires that the object of the company's activities be related to the institute's scientific research and development work. First of all, it should be emphasized that the Law does not require

[17] Law of 14 June 1960, Journal of Laws of 2021, item 735.

that the company's subject matter be limited only to activities that are in such connection. Thus, a special-purpose company may also carry out other activities, even if they are not in any way related to the scientific activities of the institute. An absolute and sufficient condition at the same time is the conduct of activities that remain in such a relationship, but this does not determine the scope of the company's conduct of other activities.

In this regard, however, some caution should be exercised due to the peculiarities of research institutes, which are state legal entities. Hence, it is necessary to distinguish between the legal situation in which a research institute forms a special purpose company and the legal situation in which a research institute joins an already existing company. In the first case, the indication by the research institute of the object of its activity beyond the scope of its scientific activity may be taken into account by the authority granting approval for the establishment of the company rather exceptionally, i.e. only if it is justified by other circumstances (e.g. financial, organizational, or logistical support of the company or institute, in the scope of its research). In other cases, going beyond the boundaries of the connection between the scientific activity being carried out and the company's activities will certainly be met with a refusal of the minister's approval to establish the company.

The second situation, i.e. when a research institute joins an already existing company, is slightly different. In this case, it is understandable that the company may conduct a relatively wide range of business activities, not always related to the scientific activities of the institute. Then, the involvement of the research institute in the company will be evaluated from the point of view of the scale and importance of the information obtained from cooperation with the company (regardless of its other activities) for the scientific research and development work carried out at the institute.

It should be emphasized that the Law on Research Institutes does not specify what kind of relationship the object of the special-purpose company's activity has to do with the scientific activity conducted at the institute, i.e. how strong this relationship is to be, on what scale this relationship is to occur. Since the consent of the minister overseeing the activities of a research institute to establish (join) a special-purpose vehicle is discretionary, it is up to the competent minister (and, in the case referred to above, also the minister responsible for science) to assess whether and how strong the relationship is to be. Without a doubt, however, it seems reasonable that the relationship must be based on the mutual exchange of information between the SPV and the research institute. The transfer of such information should bring tangible economic, financial, organizational, commercial, etc. benefits to the SPV, while the research institute should provide information gained from the practical experience of the SPV's operations. This was also the

position taken by the Supreme Audit Office in its information on the results of the audit, stating that "in the case of proper cooperation, the benefits of information exchange will be mutual. The scientific sector can obtain information on the desired directions of research and development, which will create the premises for the proper use of scientific potential, while business entities would get access to those research results that will create the possibility of generating profits."[18] Taking into account the definitions of scientific research and development cited above, which are the main axis of research institutes' activities, it can be assumed that the degree of involvement of a research institute in a special purpose vehicle should be proportional to the value of the information it obtains as a result of this cooperation and the effectiveness for its scientific activities, bearing in mind that scientific activities are of an unquantifiable nature and often cannot be easily translated into concrete results.[19]

It is also worth noting that the minister granting approval for the establishment of a special-purpose company or the institute's accession to such a company, regardless of the above, will also be guided by the criteria of legality, reliability, expediency, economy and economy. This is because these are criteria for evaluating the institute's activities in managing its property (Article 16(4) of the Law on Research Institutes). When applying for the approval in question, the institute, expecting a favorable decision, should also demonstrate the reasonableness of the appropriate involvement of its property either in the establishment or in the subscription or acquisition of shares in the SPV from the perspective of these criteria.

Associated with the establishment of a special-purpose company by a research institute is the need to transfer to it the rights to the results of scientific activities developed at the institute. In this regard, a sales contract may be used, the legal construction of the contribution of intellectual property rights as a contribution to the company (in-kind contribution), the establishment of a license on intellectual property rights and the contribution thereof to the company, the establishment of a paid license on the intellectual property rights, or contribution of intellectual property rights for a fee in exchange for subscription warrants.[20]

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[18] NIK Report KNO.410.003.00.2018 – Transfer wiedzy i technologii poprzez spółki jednostek naukowych, p. 5.

[19] Scientific researches, especially creative ones, are combined with an immanent risk of failure. Their effects cannot be predicted with 100% certainty. However, this does not affect the nature of the relationship between the institute and the company [Krzewiński 2014, 8].

[20] See more extensively Barszcz 2016, 20.

4.1. Commercialization objectives

The third premise of indirect commercialization by a research institute relates to its purpose. In this regard, the law basically indicates four possibilities: 1) commercialization of the results of scientific research, development work and know-how related to these results; 2) carrying out activities in the field of technology transfer and dissemination of science; 3) raising funds for statutory activities, or 4) implementation of projects in the field of research infrastructure or its management.

It should first be noted that the research institute independently chooses the purpose or purposes for which it wants to commercialize. The law does not require that commercialization be carried out for all of the aforementioned purposes together.

The first objective listed is the most commercial in nature. Indirect commercialization carried out through the establishment or incorporation of a company by a research institute in the simplest form of this purpose amounts to the transfer of intellectual property rights to interested third parties, usually entrepreneurs, in exchange for appropriate compensation. The second and fourth legally permissible purposes allow the institute's scientific activities to be most fully realized through close cooperation between representatives of science and marketing practice. These goals correspond directly to the definition of scientific research, especially applied research and development work, which was mentioned in the first part of this paper.

Commercialization, as the purpose of forming a company, should be understood as the desire to monetize (obtain property benefits) the results of research, development work and the know-how associated with these results. It is no coincidence that the phrase "commercialization" is repeated here when defining the first of the possible purposes of forming a special purpose vehicle (this term is used in the process of indirect commercialization). This procedure is intended to emphasize the non-altruistic nature of the undertaking undertaken by the institute. In order to carry out commercialization understood in this way, the institute must equip the SPV with the appropriate intellectual capital, transferring to it the results of its research, development work and the right to dispose of them. Thus, the realization of this goal requires the transfer of rights to information resulting from the scientific activities carried out by the research institute to the company. The results of NIK inspections of special-purpose companies operating in the market, established by scientific entities, clearly indicate a low rate of return of these companies, which was mainly due to the insufficient knowledge resources transferred to them.[21] As NIK points out, the turnover of SPVs is

[21] NIK Report KNO.410.003.00.2018 – Transfer wiedzy i technologii poprzez spółki jednostek naukowych, p. 9ff.

an indirect indicator of the effectiveness of information exchange between science and the economy. Hence, the NIK recommends that when creating or joining SPVs, adequate intellectual resources should be contributed and that the companies should be equipped with appropriate legal instruments that allow them to effectively manage these resources.[22]

The practice to date, accepted by the bodies that control the activities of research institutes and other scientific units that create SPVs, indicates that this objective consists, in particular, in: 1) selling rights to the results of scientific research or development work; b) concluding confidentiality, cooperation, agency, partnership, framework or consulting agreements, as well as exchanging letters of intent; c) granting licenses; d) establishment of spin-off companies; d) carrying out consulting and research projects; e) filing of industrial designs and utility models; f) obtaining patents in Polish and foreign patent offices.[23]

The second legally permissible purpose of a research institute's involvement in a special-purpose company is to carry out activities in the field of technology transfer and dissemination of science.

The constituent elements of this purpose are combined on a conjunction basis, which means that this purpose is legally permissible only on the condition that its two elements are fulfilled simultaneously. This determination of the permissibility of forming or joining an SPV is not coincidental. The establishment of a company for the purpose of commercializing the results of research, development work and the know-how related to these results is static in nature. In this case, the institute already possesses specific knowledge, which it makes available through commercialization to interested parties, usually entrepreneurs. Meanwhile, technology transfer is a dynamic process and involves adapting the results of ongoing research and development work to their practical application. This is also how the legislator understands it, *expressis verbis* indicating that it is about "conducting activities in the field of ..." Of course, the transfer of technology can be based only on its transfer to interested beneficiaries without modification and improvement of the developed results of scientific activity (patents, ideas, new solutions and technologies). However, then it would be sufficient to form a company on the basis of the purpose specified in para. 1. With the above in mind, the essence of the second legally permissible purpose of establishing / joining/ a special purpose vehicle of a research institute comes down to the establishment of a specific cooperation between the research institute and

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[22] See also: NIK: Komercjalizacja wyników badań naukowych, KNO.410.006.00.2015, Warsaw 2016.

[23] See also Commission Regulation (EU) No. 316/2014 of 21. March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, Official Journal of the EU of 28 March 2014, L 93/17.

the special purpose vehicle, as well as any subsequently established spin off or spin out companies. This cooperation should be based on the mutual interpenetration of the institute's research or development work and the needs of the market, including, in particular, the verification of models, solutions, technologies developed by scientists (employees of the institute), and informed by the institute by the SPV.[24] The emanation of such cooperation may be the creation of a special organizational unit in the special purpose vehicle, the purpose of which will be to mediate the exchange of information, including, above all, the needs and experience gained by the company and the institute's employees.

Dissemination of science, which is an immanent part of the first element of the objective in question, can be implemented through training, consulting and other forms of popularization of knowledge and science.

The third objective of indirect commercialization of the results of scientific activity, as indicated in the law, is the acquisition of funds for statutory activities. As it seems, it constitutes an independent and separate purpose of capital involvement of a research institute, permitted by law. This interpretation of the provision is supported by its historical interpretation[25] and the essence of the enumeration, which is the subject of the regulation of Article 17.5 of the Law on Research Institutes. In addition, the provision formulated in this way meets the findings of the Supreme Audit Office made in connection with the audit of the economic efficiency of the activities of the commercialization of universities and research institutes in Poland.[26] Treating the goal of "raising funds" as separate from the other goals of indirect commercialization may also be justified by the need to increase the competitiveness of research institutes, as state legal entities. However, the separation of raising funds for statutory activities as a separate objective of indirect commercialization of the results of scientific activity may be questioned. The basis for doubts in this regard may be the construction of the provision. For the legislator used here not very fortuitously a conjunction "and", which, in accordance with the principles of logic, suggests the necessity of combining

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[24] See W. Włosiński: https://forumakademickie.pl/fa-archiwum/archiwum/2000/04/artykuly/22-okolice_nauki.htm [accessed: 01.11.2022].

[25] It is worth noting that at the stage of parliamentary work, the original wording of the current Article 17(5) (Parliamentary print No. 1629 of January 9, 2009) did not include the premise of raising funds. It was added only at the stage of work in the parliamentary committee. Until this change was made, the wording of Article 17(5) was essentially consistent with Article 14(8) of the previous law in this regard, i.e. the Law of 25 July 1985 on research and development units, which omitted the element of raising funds.

[26] See NIK report KNO.410.003.00.2018 – Transfer wiedzy i technologii poprzez spółki jednostek naukowych; NIK: Informacja o wynikach kontroli: Komercjalizacja wyników badań naukowych, KNO.410.006.00.2015, Warsaw 2016; See also Kotowicz-Jawor 2017; Sieniewska 2014.

the acquisition of funds for statutory activities with the activity of conducting activities in the field of technology transfer and dissemination of science, i.e. the second legally defined objective of indirect commercialization of the results of scientific activity indicated above. Meanwhile, taking into account the arguments indicated above, the conjunction "and" does not so much refer to the content of the individual objectives referred to in Article 17(5) of the Law on Research Institutes, but to their catalog. However, this issue may be debatable and, for these reasons, would require statutory clarification on the occasion of the next amendment of the Law.

Assuming the legitimacy of singling out this purpose as separate from the other purposes of indirect commercialization of the results of scientific activity, it should be emphasized that it does not mean that the research institute is free to determine the object of activity of the company formed on its basis. Regardless of the purpose for which the institute forms a company, Article 17(5) must always be interpreted together with Article 17(6) and (8) of the Law on Research Institutes. Consequently, the subject matter of the company's activities must be related to the scientific research and development work carried out by the institute. Otherwise, the institute will not obtain the approval of the competent minister referred to in Article 17(5) of the Law on Research Institutes, and may face refusal of registration by the registration court, which is also required to examine the compliance of the registered company's documents with the applicable laws.

The fourth stated purpose that allows a research institute to be involved in a special purpose vehicle is to implement or manage research infrastructure projects. "Research infrastructure" is a broad term under which various types of investments can be included, e.g. laboratories, data banks, energy banks, observatories, archives, collections or libraries, research vessels and aircraft, power plants, and above all infrastructure IT (e-infrastructure). The construction and operation of research infrastructures requires extensive expertise, which the SPV can acquire from the research institute. Since the construction and operation of infrastructures are costly undertakings, and the work on their establishment and operation requires extensive expertise, cooperation between a research institute and a special purpose vehicle operating a specific research infrastructure is an ideal combination of science and economy.

It should be noted that the objective in question was defined relatively broadly. In fact, the legislator used the phrase "implementation of research infrastructure projects," which means that the SPV does not have to be established to produce the research infrastructure in question, but it is sufficient that it participates in part of the process aimed at its creation or is part of the structure related to its operation. Consequently, a special purpose vehicle may also be established for the sole purpose of providing support

services to the entity operating a particular research infrastructure or being responsible for its proper operation.

The legislator emphasizes that the establishment of a special-purpose company or accession to it by an institute may not only take place within the framework of projects related to research infrastructure, but also the purpose may be to carry out projects related to the management of already existing research infrastructure. This means that the SPV may manage such infrastructure, participate in its management, or provide other, auxiliary, additional services in this regard.

Although, in defining the third purpose, the law does not explicitly require that it be for-profit, the involvement of a research institute in a special-purpose vehicle, disregarding the commercial nature of this type of investment, will be met with the refusal of approval by the relevant minister overseeing the institute's activities. In this regard, Article 16(4) of the Law on Research Institutes is applicable, mandating that the institute's property be managed in accordance with the principles of legality, reliability, expediency, economy and economy.

CONCLUSIONS

The current speed of the Voyager 1 space probe is estimated at about 62,140 km/h.[27] This is the highest speed ever achieved by a manufactured object in human history. Assuming that it takes about 10 minutes to read this article, during this time the Voyager 1 probe has moved another 10,000 km away from Earth, i.e. about ¼ of the Earth's circumference.

Currently, both Voyager probes are exploring the outer limit of the heliosphere in interstellar space, although this was not their original goal. On Aug. 25, 2012, Voyager 1 became the first man-made object to leave the Solar System and enter interstellar space. A few years later, in 2018, signals sent by Voyager 2 also confirmed its entry into interstellar space.

On the 14th of February, 1990, Voyager 1 sent a photo to Earth that went down in history under the name Pale Blue Dot.[28] Carl Sagan, in a book titled Pale Blue Dot. A Vision Of The Human Future In Space[29], from the title of which was taken the name of the Earth seen from a distance of more than 6 billion kilometers, described our pollen suspended in the immensity of space as follows: "[...] Look again at this dot. This is Our home. This is Us. On it everyone you love, everyone you know. Of whom you have ever

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[27] For comparison, the velocity of a bullet fired from an AK-47 rifle is about 2574 km/h.

[28] Photo from NASA collections, accessed at https://www.jpl.nasa.gov/images/pia00452-solar-system-portrait-earth-as-pale-blue-dot [accessed: 04.11.2022].

[29] Published by Random House Publishing Group, A Ballantine Books, Ney York 1994.

heard. Every person who has ever existed has lived their life there. It is the sum of Our joys and sorrows. [...] Every saint and every sinner in the history of Our species, lived there. On a speck of dust suspended in the rays of the sun."

Admittedly, he didn't mention research institutes in this statement, but I think he can be forgiven for that. However, it is worth noting that Voyager's voyage would not have been possible if it were not for the cooperation of the world of science and practice to realize man's dream of conquering space.

REFERENCES

Agmon, Tamir, and Mart A. von Glinow. 1991. *Technology Transfer in International Business*. New York: Oxford University Press.

Barszcz, Michał. 2016. *Komercjalizacja B+R dla praktyków.* Warszawa: Wydawnictwo NCBiR.

Cilak, Małgorzata. 2015. *Instytuty badawcze jako forma działalności naukowej i gospodarczej państwa – problematyka pozycji i formy prawnej*. Toruń: Prawo Budżetowe Państwa i Samorządu.

Flandro, Gary A. 1966. *Fast Reconnaissance Missions to the Outer Solar System Using Energy Derived from the Gravitational Field of Jupiter*. Pasadena: Astronautica Acta. Edited California Institute of Technology.

Głodek, Paweł, and Paweł Pietras. 2011. *Finansowanie komercjalizacji technologii i przedsięwzięć innowacyjnych opartych na wiedzy*. Warszawa: PARP.

Jarosz-Żukowska, Sylwia, and Łukasz Żukowski. 2014. "Wolność akademicka w kontekście komercjalizacji wyników badań naukowych." In *Aktualne wyzwania ochrony wolności i praw jednostki. Prace uczniów i współpracowników dedykowane Profesorowi Bogusławowi Banaszakowi*, edited by Mariusz Jabłoński, and Sylwia Jarosz-Żukowska, 219-38. Wrocław: Uniwersytet Wrocławski.

Jasiński, Andrzej, and Dominik Ludwicki. 2007. *Metodyka transformacji wyników badań naukowych do zastosowań praktycznych. Studia i materiały*. Warszawa: Wydział Zarządzania UW No. 1.

Jasiński, Andrzej. 2011. *Zarządzanie wynikami badań naukowych, poradnik dla innowatorów ITE*. Radom: Wydawnictwo ITE RADOM.

Kluczek, Aldona. 2011. "Komercjalizacja technologii jako instrument wsparcia rozwoju gospodarczego." In *Instytucjonalne aspekty rozwoju sektora B+R w Polsce. Od gospodarki imitacyjnej do innowacyjnej*, edited by Kazimierz Meredyk, and Anna Wildowicz-Giegiel, 130-42. Białystok: Wydawnictwo Uniwersytetu w Białymstoku.

Kotowicz-Jawor, Joanna. 2017. *Źródła niskiej efektywności proinnowacyjnej pomocy z Unii Europejskiej*. Warszawa: PAN Instytut Nauk Ekonomicznych.

Krzewiński, Zbigniew. 2014. *Organizacja komercjalizacji wyników badań naukowych – nowe wyzwania*. Warszawa: CoWinners Sp. z o.o.

Łobejko, Stanisław, and Alicja Sosnowska. 2013. *Komercjalizacja wyników badań naukowych. Praktyczny Poradnik dla naukowców*. Warszawa: Urząd Marszałkowski

Województwa Mazowieckiego w Warszawie Departament Rozwoju Regionalnego i Funduszy Europejskich Wydział Innowacyjności.

Markiewicz, Damian. 2009. *Komercjalizacja wyników badań naukowych*. Kraków: CCT Politechnika Krakowska.

Matusiak, Krzysztof. 2010. *Budowa powiązań nauki z biznesem w gospodarce opartej na wiedzy*. Warszawa: SGH.

Sieniewska, Barbara. 2014. *Trudności we współpracy uczelni z biznesem w zakresie komercjalizacji wiedzy w świetle badań naukowych*. Katowice: Uniwersytet Śląski.

Witek, Rafał. 2008. *Ochrona i komercjalizacja wyników badań uzyskiwanych we współczesnych naukach przyrodniczych*. Warszawa: WTS PATENT.

Ziółkowski, Krzysztof. 2017. *Poza Ziemię: Historia lotów międzyplanetarnych*. Warszawa: Wydawnictwo Naukowe PWN SA.

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CONFLICT OF VALUES SUBJECT TO MEDIATION PROCEEDINGS

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Abstract. The aim of this study was to reflect scientifically on the possibility of resolving value conflicts through mediation proceedings and on methods of resolving them. First, the relationship between law and values was discussed, stating that law and values form an interconnected system of vessels. When it comes to conflict resolution through mediation, law and values provide a mediator with a normative-axiological framework to communicate with the conflicting parties and assist in creating adequate solutions. A deeper analysis of the nature of value conflicts led to an observation that they are caused by divergent value systems upheld by the people involved, but that the difference in preferred values alone does not necessarily lead to conflict. A factor that is a catalyst for value conflicts is a determined imposition of one's own values on others, without tolerance towards the others' axiology. The final section of the article emphasises that mediation is a legal and values-based instrument, but at the same time it offers an advantage of minimally formalised proceedings. This is why mediation provides an advantageous space for resolving values conflicts, when led by a professional mediator. Based on the assumption that values are non-negotiable, three possible ways for a mediator to intervene in a values conflict were identified, i.e. avoiding defining the problem in terms of values, seeking an overarching value, reframing the parties' perception of the object of the dispute and of the opposing party through the mediator's sharing their own experience of values.

Keywords: mediation; conflict; value conflict; values; law

INTRODUCTION

Mediation is a conflict resolution instrument that has its place in the international, European as well as Polish legal order. It is a practical method of preventing and managing conflicts, with emphasis on their amicable resolution. This is because in its essence mediation safeguards the autonomy and independence of the parties to find out and choose how to resolve conflicts with due care for the confidentiality of the proceedings. Thus, mediation creates both opportunities for the disputing parties and the mediator, but also challenges for the way mediation proceedings are arranged and conducted. Therefore, mediation often leads to more satisfactory solutions for both parties than a court judgment.

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At the core of conflict are usually interests, resources, needs, information, relationships or values. One particular type of conflict that is difficult, if not impossible, to resolve is conflict over values. Can such a conflict be resolved through mediation proceedings? How to mediate in such cases? In order to answer these questions, we first discuss the relationship between values and law. Then me move to discuss the defining characteristics of conflict, including conflict of values, and examples of ways to resolve or mitigate it.

1. VALUES AND LAW

The notion of "value" as an axiological concept is considered contentious and even questionable [Ingarden 1970, 220-57]. It is impossible to give one exhaustive definition of value. At best, we can specify the elements that make it up. Thus, on the one hand, people experience values as their ideas of value and as a perceived value of objects. The idea of value should be understood here as a person's authentic perception of the importance of a value. Whereas, under the second sense, people experience values as factual, and this is why they have meaning for them. They are value qualities assigned by humans to objects [Kość 1998, 170]. At the same time, the notion "value" is used in a variety of contexts and discourses, which makes the concept vague owing to its highly diversified meanings [Kamiński 1983, 105].[1] Some consider value to be "a quality or characteristic (or set of characteristics) of something, and [...] x is a value as long as x displays valuable characteristics (qualities)" [ibid., 110].[2] Others emphasise that value is that which "is valuable or makes something valuable" [Stępień 1975, 54], which is "worthy of desire, which is attributable to positive experiences and hence is the goal of human aspirations" [Łobocki 1993, 125] These are only selected examples to illustrate difficulties in delineating one, unambiguous definition of value, which is a virtually impossible endeavour due to highly divergent ways of understanding this complex construct.

Defining "values" in the legal context appears to be at least as difficult as in philosophy and anthropology. They can be located within the legal

[1] In his view, the notion of value has its anthropological formulation. Scientific reflection on value as an anthropological category can contribute to its general explication. Furthermore, people are becoming increasingly aware that the hierarchy of values shaped according to the scientistic-technicist-economic model tend to fail in personal life.

[2] Complementing his ontological, fundamental definition of value, Stanisław Kamiński distinguishes between transcendental and categorical values. The first is the quality of being as being in relation to the personal acts of the Creator. The second is the quality of being in a particular category vested in it when the being "realises its proper form, that is, its nature, so it marks an actual realisation of properties that constitute the *definiens* of the essence of the thing [...]" [Kamiński 1983, 111].

system itself, but they can fall outside it, as well. Indeed, they can be related to law itself (e.g. regulatory clarity, certainty of law), but they can equally well relate to the values that law should serve (e.g. security of the state and citizens, protection of the public interest). Finally, one can speak of values as an assessment instrument of applicable law [Blicharz 2022, 23]. Thus, on the one hand, following the functional analysis of the legal norm, one can speak of the instrumental value of law through its reference to the world of values outside the legal normative system. Under this view, law has as a relational value, influenced by other axiological systems (morality, religion, economics, technology etc.). Law is instrumental in actuating values, and it shapes the framework of socially recognised values. On the other hand, law has an intrinsic (autonomous) value due to its status of a framework of instruments and measures – law as a value in itself [Barankiewicz 2004, 54-55].

That values exist is a fact. In order to live, be themselves and develop, people need values. They need them to form their attitudes to life, to judge the attitudes and actions of others and to build social relationships. Through values, people "look at" other people as well as at themselves. Values are a focal point for human thoughts, aspirations and actions. Ultimately, it is in the human being as being *per se* that value becomes a person. All values are therefore values because they are something for the human person and for the sake of the human person [Tischner 2001, 13-14].

Becoming a member of society one discovers a certain value system in it. Law is a regulator of social relations and is based on the values recognised by society.[3] Thus, whoever makes and applies law should be guided by values [Larenz and Canaris 1995, 192-95]. Through the establishment of legal norms societies can equip their axiologies with direct binding force to assess behaviours and motivate actions. This is why each society needs to bind the framework of values within the framework of law. As observed by A. Kość, "the connection between law and social axiology is so tight that one can speak of the reception of the social axiology through law" [Kość 1998, 176]. Values and axiological principles that are part of legal systems share the binding force of these systems. The role of law in relation to socially important values is, among other things, to protect them in and for society, which law does with regard to the behaviour of the addressees of legal norms. This function manifests itself through the formal organization of law which formally codifies positive values, and by doing so, it constructs means of assessment for relationships and behaviours within the social sphere. As a result, ways of behaviour that seem worthy of recognition from the point

[3] The social order of values include basic universal human values, values and value principles relating to human relations, e.g. honesty, political values that form the basis for creating and maintaining the political and state order, personal and community values relevant to social life e.g. freedom of conscience, freedom of assembly [Kość 1998, 173-74].

of view of the values embodied in the legal norms are judged to be lawful, while in the opposite situations, they are judged to be unlawful. The law thus delineates the areas of legally permissible and impermissible behaviour, and becomes the guarantor of the social order of values. Related to this role is the protective function of law, which consists in acting against violations of values and preventing such behaviours with appropriate measures [Idem 2008, 215].

Law also fulfils a very important function in resolving conflicts of interest, which always represent conflicts of values experienced by the parties. It will be a success of the legal framework if it is able to develop an effective and amicable resolution in a situation of value conflicts between the parties.[4] The institution that serves this purpose is mediation, on condition it is properly regulated by law and based on values, because law and values are a system of communicating vessels. Thus, in Polish law we have civil,[5] criminal[6] and administrative[7] mediation regulations. The key types of values underpinning the institution of mediation include social values of a cultural nature that are the heritage of Western tradition: European values (e.g. human dignity, freedom, equality, respect for personal beliefs), the values

[4] In a conflict of individual or community values that cannot be resolved by compromise, but only by sacrificing one conflicting value, a "weighing up" of certain incommensurable values is carried out. For more on this topic, see: Potrzeszcz 2005, 107-22; Blicharz 2022, 32-42.

[5] The following regulations apply in civil mediation: Act of 23 April 1964, the Civil Code (Journal of Laws of 2019, item 1145); Act of 17 November 1964, the Code of Civil Procedure (Journal of Laws 2019, item 1460); Act of 28 July 2005 on court costs in civil proceedings (Journal of Laws of 2020, item 755); Act of 27 July 2001 on the system of common courts (Journal of Laws of 2020, item 365); Regulation of the Minister of Justice of 20 June 2016 on the amount of remuneration and reimbursable expenses of a mediator in civil proceedings (Journal of Laws item 921); Regulation of the Minister of Justice of 20 January 2016 on the registry of permanent mediators (Journal of Laws item 122); Regulation of the Minister of Justice of 18 June 2019 on rules of procedure of public courts (Journal of Laws item 1141).

[6] The following regulations apply in criminal (penal) mediation: Act of 6 June 1997, the Penal Code (Journal of Laws of 2019, item 1950); Act of 6 June 1997, the Code of Criminal Procedure (Journal of Laws 2020, items 30, 413, 568); Act of 6 June 1997, the Executive Penal Code (Journal of Laws of 2020, item 523); Regulation of the Minister of Justice on mediation proceedings in criminal proceedings (Journal of Laws of 2015, item 716); Regulation of the Minister of Justice of 18 June 2003 on the amount and manner of calculation of State Treasury expenses in criminal proceedings (Journal of Laws 2013, item 663).

[7] The following regulations apply in administrative mediation: Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws of 2020, item 256); Regulation of the Minister of Internal Affairs and Administration of 2 June 2017 on the amount of remuneration and reimbursable expenses of a mediator in administrative court proceedings (Journal of Laws item 1087); Regulation of the Minister of Internal Affairs and Administration of 2 June 2017 on the amount of remuneration and reimbursable expenses of a mediator in administrative court proceedings (Journal of Laws item 1088).

contained in the Constitution of the Republic of Poland[8] (e.g. good, truth, beauty) and the particular branch of law regulating the institution of mediation. When it comes to conflict resolution in mediation proceedings, it is the legal system and values that set the normative-axiological framework for the mediator to communicate with the conflicting parties and assist in developing effective solutions.

2. CONFLICT OF VALUES

Human beings, in order to be themselves, live and develop, need *ethos*. They live by values and for values. There are unchanging values – objective and universal – whose essence and normative function are not determined by subjective human predilection or the socio-cultural context; but there also changing values, dependent on socio-cultural factors and on the free, spontaneous perception of individuals [Mazurek 2008, 65]. Humans are "entangled" in the web of values, which they create throughout lifetime, taking decisions and making choices. When a person is in conflict with others, disagrees or argues with them, this person becomes an opponent to the others and their views. Hence, this person's axiology is at tangent with that of the others and the person's value system "disintegrates." So what is conflict?

We speak of conflict when two (or more) people or groups perceive irreconcilable differences in interests, inability to satisfy important needs and/or values or to gain important resources, and, consequently, they take action to alter the status quo.[9] Conflict is – in most general terms – a divergence of interests or the belief of the parties that such a divergence exists, and hence, that the interests of either party cannot be realised equitably.[10] To be more

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[8] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended. See Piechowiak 2020.

[9] An "interest" should be understood as "a need that is revealed in a particular social structure and recognised individually, as long as we assume that certain conscious behaviours of individuals or social groups are always underpinned by some needs recognised by these actors" [Groszyk and Korybski 2006, 20]. On the other hand, "need" is defined as "an aspiration of a given social actor to achieve or restore a state of equilibrium in a given social environment; consequently, a state of equilibrium can be defined as a specific framework of social relations in which the position occupied by a given actor is conducive to both effective functioning and development of the environment; also, it unveils the actor's developmental opportunities in the environment. When it arises, a need triggers the pursuit towards satisfaction, while interest – as a need that has been consciously recognised – directs these pursuits. Interest determines the type, intensity and form of behaviour necessary to achieve such goods/benefits that can enable the social actor's survival and/or prosperity" [ibid.].

[10] The concept of conflict can be approached from three angles: psychological – which concerns the psychological tension between the parties to an antagonistic relationship; behavioural – which addresses the divergent, contradictory actions of the parties; and social

precise, conflict is "an arrangement of opposing behaviours of at least two social actors (individuals, groups or organisations), each pursuing their own goals (interests) and facing counteraction from the other participants in the conflict" [Korybski 1993, 20].[11] A conflict emerges when "a person realises that they have a choice between at least two different behavioural trajectories, different goals to achieve, or two different needs to satisfy" [Płużek 1991, 91].

Conflicts and the resulting disputes are a regular feature of social life.[12] They are dynamic and temporal in nature. Conflict is a natural process even in well-functioning relationships. If people meet and communicate, sooner or later, as trust in others increases, differences in values, opinions, habits, tastes, interests etc. must surface. This situation is a natural consequence of the fact that people differ. For example, they have different interests or uphold different values.[13]

Conflicts are a specific type of relationship and are inevitable; hence it is both impossible and even inexpedient to eliminate them. Neither should they be held back, but managed, instead, as they can be instrumental in reformulation of the rules hitherto in force between the parties. In this way, new relational qualities can emerge, and thus, conflict becomes a developmental factor. Positive consequences of conflict include motivation increase as people need to raise their level of commitment; innovation drive since new solutions are sought; a signal of dysfunctionality that may indicate that certain areas need enhancement; an increase in knowledge about oneself and the other party, about desires, goals, value systems and emotions; an increase in trust and a sense of understanding which may make it easier to overcome problems in the future and lead to a renewed sense of justice.[14] A well-managed conflict can contribute to positive change and encourage better self-knowledge [Cybulko 2009, 66-67; Suchanek 2018, 130-31].

– which marks an attempt to combine the two previous aspects [Mucha 2011, 342-44; Kalisz 2007, 13].

[11] One of the definitions of conflict encountered in the literature on mediation is that of J. Boulding, as cited by Ch. Moore. He discusses conflict in terms of a competition between people or groups, that is a situation in which a minimum of two related parties argue over scarce resources, or they pursuit interests that are, or appear to be, irreconcilable. In consequence, the parties take action to change the problematic situation [Cybulko 2009].

[12] A dispute is "a socially revealed conflict of specific social actors (individuals, groups or their organisations), involving the belief that either party has violated some rights of the other party" [Korybski 1993, 26]. In this study, these terms are used interchangeably.

[13] For more on this topic, see: Balawajder 1998.

[14] Conflicts also have negative consequences since they puts the participants' vital interests at risk, which is a source of negative emotions. These can result in broken human bonds, suspicion, mistrust or withering cooperation.

When two or more parties are interdependent, a potential conflict situation arises. Whether this situation develops into a dispute depends on the behaviour of a party or parties. Values play a vital role in such circumstances since they have multiple functions in the process of individual and social human development. Above all, they regulate the satisfaction of needs, which are expressions of what is important for the life and proper functioning of an individual. Values define needs and determine how they are satisfied. Furthermore, values enable an individual to decide which needs are to be satisfied and in what order. It is also important to note that values influence the choice of goals and the ways in which these are pursued. They affect the individual's self-assessment, e.g. the assessment of one's own appearance, abilities or relationships. Finally, they underlie the assessment of the outcomes of one's own actions and, consequently, satisfaction or dissatisfaction with the achievements. In other words: As you think, so you act. As an autonomous subject, the human person makes their own choice concerning values. Each person chooses what is important for them, what is and worth their effort and commitment, or even sacrifice – what constitutes a worthy goal. The value system an individual adopts influences their personality and behaviour, including the way they respond to conflict and methods of its resolution.[15]

Effective conflict management demands knowledge of the causes of the conflict. Among typologies of conflict there is the wheel of conflict proposed by Ch. Moore. This construct helps a mediator to carry out a conflict diagnosis, which consists in identification of discrepancies between the parties in any of the five areas demarcated in the wheel (structure, emotions, history, communication, values). Relying on the diagnosis, a mediator can take adequate measures to increase the chance of effective conflict resolution. The wheel is based on an underlying assumption that, at its outbreak, conflicts are more less similar to each other, and when a mediator learns about its causes, they can locate its roots in one of the five areas [Moore 2003, 76-77]. Over time, as conflict develops and escalates, the areas of contention seem to overlap, and the conflicting factors start acting simultaneously. It is because a single, main source of conflict can be reinforced by others [Cybulko 2009, 56]. The course of a conflict largely depends on which of its components play a dominant role. For example, unresolved relationships, values, or history conflicts are conducive to increased hostility and can reinforce each other. In order to resolve the conflict, it is necessary to understand the structure of the situation and the interests of the people involved, i.e. to get to the roots of the conflict. Otherwise, the conflicting parties will tend to fight each other instead of seeking resolution.

[15] For more on the issue of the value-personality interdependence, see e.g.: Oleś 1989; Oleś 2009.

One of the types of conflict listed in the wheel of conflict by Ch. Moore is a conflict of values. It is driven by the divergent value systems of the disputants. A mere difference in preferred values does not necessarily lead to conflict. A factor that fuels conflict is the strong display of one's own values without due tolerance towards the values of another stakeholder. Lack of tolerance and a lack of respect for the values recognised by others, further aggravated by rejecting attempts to seek solutions that are acceptable to all parties regardless of their value systems lead to higher antagonism, and can hinder or block cooperation between the parties.

Conflict can concern core values, such as existential values (abortion, euthanasia), as well as peripheral values, i.e. so-called every day, practical values (e.g. the vulgar joke told). One need to keep in mind that values are never subject to negotiation. This is because they form the foundation of personal identity. People experience immense discomfort and distress when their values are threatened. Hence, they defend them very strongly, often by venturing an counterattack on opposing values.

3. OPPORTUNITIES AND SELECTED WAYS OF RESOLVING VALUE CONFLICTS IN MEDIATION

By its very nature, mediation is an art of working out an agreement between disputing parties. Legally speaking, mediation belongs to confidential proceedings (Article 183^4 of the Code of Civil Procedure). Its adequate course and procedure is guaranteed by a mediator who is impartial (Article 183^3 of the Code of Civil Procedure) towards the parties, neutral[16] towards the object of the dispute and independent, that is they are not subject to any external pressure or influence. The conduct of the mediation meeting rightly remains outside the area of standardisation. However, the law provides a formal basis for mediation proceedings to be conducted with due diligence and by a suitably prepared person. This is to ensure adequate guarantees concerning the mediator, and relevant to the parties. The settlement reached by the parties cannot be contrary to generally applicable law or the rules of social life. It cannot aim at circumventing the law, it must be comprehensible, and it cannot contain contradictions (Article 183^{14} of the Code of Civil

[16] Neutrality is not normative under the Civil Procedure Code; it is, nevertheless, acknowledged in the Mediation Standards (Standard II) alongside the principle of impartiality. See Standards for the Conduct of Mediation and the Conduct of a Mediator, enforced as of 26 June 2006 by the Social Council for Alternative Methods of Resolving Conflicts and Disputes under the Minister of Justice, https://www.ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/download,188,6.html [accessed: 10.08.2022]. For more on the principles of mediation, see e.g.: Kalisz and Zienkiewicz 2014, 58-61; Dąbrowski 2019, 116-25.

Procedure). In contrast, the values incorporated into mediation proceedings influence the parties' emotions, behaviour, attitudes and decision-making, which motivates them to seek fair and just solutions. Therefore, they provide the foundation and space for the resolution of value conflicts by supporting the parties' dialogue, helping to analyse, understand and recognise each other's needs, which influences the final content of the settlement.

When conducting mediation, a mediator should consider the values that are crucial to the parties, representing particular legal, social, religious, state, ethnic or local contexts as well as personal beliefs. A mediator also needs to bear in mind that the course and the final outcome of the mediation is equally influenced by the values they recognise as participants in the proceedings. A mediator brings added value to the mediation proceedings, such as, among other things, the values they live and the views they hold. At the same time, all participants in mediation should keep in mind the universal values underlying constructive conflict resolution, and take their best effort to comply with them. Some of such fundamental principles include reciprocity (treat the other party as you would like to be treated yourself); equality (each person is equally entitled to just and respectful treatment, taking into account their own needs and the right to fundamental freedoms such as freedom of conscience); social community (belonging to a larger community, sharing basic norms and values); the right to be wrong (knowing that one's own judgement and that of others may be wrong); non-violence (renunciation of all coercive tactics by either party e.g. brutality or violence) [Bok 2002, 15-16 and 56-57].

Can mediation be conducted in abstraction from a coherent value system in which it is rooted? A mediator should use a values-based approach to ensure that the proceedings and their outcomes do not violate the principles of mediation. For example, identifying specific behaviour as "bullying" will require the parties to understand the value of equality and respect for human dignity. In a family dispute, introducing values into the dispute resolution process can make the dominant parent aware of the child's needs and rights, and the dominant husband aware of his wife's rights and needs. Even if rethinking or reflection does not take place, the mediation procedure will protect individuals or groups from worsening the situation. Introducing values to mediation proceedings can facilitate communication. They can help the parties demonstrate understanding towards the opposing party and recognise each other's needs and interests. This can empower the ultimate desired result of a fair settlement that satisfies all the participants, but it also leads to enhanced trust and renewed cooperation in the future.

Thus, adopted here is a view of mediation as an instrument that combines the legal system with the framework of values, and rests on a precondition that values are inherent in the proceedings. Also, it is assumed

that mediation is characterised by flexibility and gives its participants the possibility to retain control over the course of the proceedings. Hence, when properly designed and structured, when headed by a professional mediator as an active and creative consensus agent, mediation provides an adequate space for the resolution of value conflicts. Of course, as evidenced by mediation practice to date, not all value conflicts can be resolved, but the very fact that the parties enter into conversation will mark a success because, unlike court proceedings, it will create the parties' relationship and encourage communication between them. However, this raises the question of methods of value conflict resolution.

Firstly, it should be emphasised that the "quality of a mediator" largely determines the effectiveness of the final outcome of the proceedings, and not only the parties who have failed to deal with the conflict themselves. Above all, a mediator should create conditions conducive to consensus-building, [17] motivating the parties to work together. He should focus the mediation communication on problems, yet avoiding at all costs that these problems be formulated from the perspective of the conflicting values [Moore 2009, 76]. A simple example can help illustrate our argument: *After 10 years of marriage, the husband declares that he has become an atheist and he wishes to raise the children in the spirit of atheism, irrespective of their prior baptism under parental decision and consent. The wife, a person of deep faith, definitely refuses to accept this kind of marital settlement. She wants to protect the children from their father's influence at all costs. She is attempting to terminate his parental authority and is seeking a ban on contact. However, she recognises the marriage as indissoluble (her recognised value system is*

[17] There are five basic styles of acting and responding to conflict, differing in their degree of cooperativeness and assertiveness. These are avoiding, accommodating, competing, compromising and collaborating. Avoiding means a way of ignoring a conflict and reacting to it with silence and passiveness – putting it off. The conflict then takes a covert form and neither party has a chance to have its needs met. Excessive conflict avoidance causes decision paralysis and provokes further conflicts. Accommodating is acting in accordance with the interests of the opposing party by giving up one's own objectives and positions. Underlying here is the fear of losing good relationships with others. When parties compete, they look at the conflict as a game to be won. Winning is a measure of achievement and success, while losing means failure, weakness and loss of prestige. Compromise and cooperation/collaboration are desirable behaviours in conflict resolution. Compromise is an attitude of finding a solution by partially giving up one's own needs when expecting adequate concessions from the partner. All those responding to conflict in a compromising manner assume that it is sometimes necessary to give up at least a little of one's own interests and show understanding for the interests of the other party. Finally, one of the most effective styles of responding to conflict is collaboration or cooperation. It involves a willingness to accept the goals of the other party to the dispute without giving up one's own goals. Therefore, a conflict becomes a problem to be solved together [Blake and Mouton 1964; Moore 2016, 162].

Catholic, and Catholics do not divorce) and hence cannot file for divorce. It seems that the core problem here is how to define the interests of either party [Ury 1998, 36-38] as regards their relationship and how to determine concrete actions whose implementation could provide a solid basis for substantive dialogue. It is also important for either party to become aware of what they themselves are feeling and of the other spouse's emotions, then to name these emotions and comprehend their causes. Only at the next stage of the proceedings will it be possible to discuss further co-parenting, focusing, for example, on establishing mutually acceptable forms of contact with the child or parental authority. Besides, it cannot be ruled out that there are needs behind the declared atheism and Catholicism which the parties do not explicitly talk about, and which are the main root of the ongoing dispute. Starting the mediation by talking about the parties' highest values, namely atheism and Catholicism, would rather intensify emotions and put a quick end to the proceedings. However, a conversation about the value systems of the parties to the dispute, covering reasons that led the husband to become an atheist and his understanding of the principles of Christian life, should not be ruled out at later stages of the proceedings. This is because values influence attitudes by becoming goals of the parties' aspirations and strongly motivate their pursuit.

Secondly, in resolving a conflict of values, a mediator may seek together with the disputing parties overarching goals with which all parties identify; a value higher than the one involved in the dispute – an overarching value or an absolute value that will unite the disputants and will be shared by them. Perhaps for the parties in the case study cited above, such an overriding value could be the well-being of the children or the good of the family.

Thirdly, it is crucial to emphasise that a mediator, as an actor in the mediation proceedings, should seek to reframe the parties' thinking about the subject matter of the dispute and about the opposing party. With this mindset, a mediator can find it easier to resolve value conflicts, particularly if the mediator shares with the parties their own experience of values, insights, examples and assessment of the nature of the conflict, communicating their own value system. It is a mistake to use cliche expressions like "please, reconciliate!" Above all, it is necessary to build, through dialogue, a golden bridge that, despite disparities, at least to some extent connects the parties [Ury 1998, 126-27]. Furthermore, in view of the case study referred to above, it is also worth pointing out to the parties that, as parents, they need to reckon with an option of living together after the proceedings, and therefore, it seems worthwhile to ensure that this life be as harmonious as possible and evoke as little negative emotions and experiences as possible [Kalisz 2016, 166].

Moreover, it should be borne in mind that during the mediation proceedings, either party points to their own, subjective rationale based on their exclusively own interests (subjectivism). Thus, a mediator's task is to ensure that either party move to a more objective stance in their rationales. Either party needs to re-examine their own rationale and learn to acknowledge the leading motives, interests, facts determining the other party's position, and to take into account the values that are important to both. What is relevant is therefore not only the good and interest of the disputants, but also the social order of values. Thus, when resolving a conflict through mediation, the parties should reject a position of extreme subjectivism as well as extreme objectivism, as either thwarts agreement. Instead, it is vital to consider the socially important values shared by all the stakeholders.

CONCLUSION

Conflicts of values are inherent to social life. To solve them, it is necessary to separate the people from the problem. The parties to a value conflict should be partners in the resolution process – they should resolve the conflict instead of engaging in power struggle. This requires getting to the roots of the conflict, trying to understand the structure of the situation and the interests of those involved. These actions in mediation proceedings are based on the foundation of a legal system and values.

REFERENCES

Balawajder, Krystyna. 1998. *Komunikacja, konflikty, negocjacje w organizacji*. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Barankiewicz, Tomasz. 2004. "Aksjologiczna problematyka prawa." *Roczniki Nauk Prawnych* 14, no. 1:45-58.

Blake, Robert, and Jane Mouton. 1964. *The Managerial Grid: The Key to Leadership Excellence*. Houston: Gulf Publishing Company.

Blicharz, Rafał. 2022. "Ważenie wartości w publicznym prawie gospodarczym." In *Aksjologia publicznego prawa gospodarczego*, edited by Andrzej Pawłowski, 21-43. Warszawa: C.H. Beck.

Bok, Sissela. 2002. *Common Values.* New York: University of Missouri Press.

Cybulko, Anna. 2009. "Konflikt." Edited by Ewa Gmurzyńska and Rafal Morek, 51-67. Warszawa: Wolters Kluwer Business.

Dąbrowski, Marek. 2019. *Mediacja w* świetle *przepisów kodeksu postępowania cywilnego.* Lublin: Wydawnictwo KUL.

Groszyk, Henryk, and Andrzej Korybski. 2006. "O pojęciu interesu w naukach prawnych (przegląd wybranej problematyki z perspektywy teoretycznoprawnej)." In *Pojęcie interesu w naukach prawnych, prawie stanowionym i orzecznictwie sądowym*

Polski i Ukrainy, edited by Andrzej Korybski, Mychajlo Kostickij, and Leszek Leszczyński. 7-26. Lublin: Wydawnictwo UMCS.

Ingarden, Roman.1970. "Czego nie wiemy o wartościach." In *Studia z estetyki*, vol. 3, 220-57. Warszawa: PWN.

Kalisz Anna, and Adam Zienkiewicz. 2014. *Mediacja sądowa i pozasądowa. Zarys wykładu*. Warszawa: Wolters Kluwer Business.

Kalisz, Anna. 2007. "Rozwiązywanie konfliktów przez państwo i obywateli." In *Konflikty i mediacje we współczesnej rzeczywistości społecznej*, edited by Dorota Czakaj, and Andrzej Margasiński, 7-23. Częstochowa: AJD.

Kalisz, Anna. 2016. *Mediacja jako forma dialogu w stosowaniu prawa*. Warszawa: Difin.

Kamiński, Stanisław. 1983. "O wartości jako kategorii antropologicznej." *Roczniki Filozoficzne* 31, no. 2:105-16.

Korybski, Andrzej. 1993. *Alternatywne rozwiązywanie sporów w USA*. Lublin: Wydawnictwo UMCS.

Kość, Antoni. 1998. *Podstawy filozofii prawa*. Lublin: Pracownia Poligraficzna przy Prywatnym Katolickim Liceum Ogólnokształcącym.

Kość, Antoni. 2008. "Relacja prawa i wartości w społeczeństwie demokratycznym." In *Wartości dla życia*, edited by Kazimierz Popielski, 205-17. Lublin: Wydawnictwo KUL.

Larenz, Karl, and Claus-Wilhem Canaris. 1995. *Methodenlehre der Rechtswissenschaft*. Berlin: Springer.

Łobocki, Mieczysław. 1993. "Pedagogika wobec wartości." In *Kontestacje pedagogiczne*, edited by Bogusław Śliwerski, 119-35. Kraków: Oficyna Wydawnicza Impuls.

Mazurek, Franciszek. 2008. "Wartości uniwersalne i relatywne." In *Wartości dla życia*, edited by Kazimierz Popielski, 61-80. Lublin: Wydawnictwo KUL.

Moore, Christopher. 2009. *Mediacje. Praktyczne strategie rozwiązywania konfliktów.* Translated by Anna Cybulko, and Marcin Zieliński. Warszawa: Wolters Kluwer Business.

Moore, Christopher. 2016. *Mediacje. Praktyczne strategie rozwiązywania konfliktów.* Translated by Grzegorz Łuczkiewicz. Warszawa: Wolters Kluwer.

Mucha, Janusz. 2011. "Jak badać dynamikę i konflikt w społeczeństwie polskim." *Studia socjologiczne* 3-4:339-51.

Oleś, Piotr. 1989. *Wartościowanie a osobowość – psychologiczne badania empiryczne.* Lublin: Wydawnictwo KUL.

Oleś, Piotr. 2009. *Wprowadzenie do psychologii osobowości*. Warszawa: Wydawnictwo Naukowe Scholar.

Piechowiak, Marek. 2020. *Preambuła Konstytucji Rzeczypospolitej Polskiej z 1997 r. Aksjologiczne podstawy prawa*. Warszawa: C.H. Beck.

Płużek, Zenomena. 1991. *Psychologia pastoralna.* Kraków: Instytut Teologiczny Księży Misjonarzy.

Potrzeszcz, Jadwiga. 2005. "Ważenie wartości w prawie a problem ich absolutności i relatywności." *Principia* 62-63:107-22.

Stępień, Antoni. 1975. *Propedeutyka estetyki.* Warszawa: Akademia Teologii Katolickiej.

Suchanek, Marek. 2018. "Mediacja jako metoda rozwiązywania konfliktów społecznych." *Studia Administracyjne* 10:129-47.

Tischner, Józef. 2001. *Wobec wartości*. Poznań: Wydawnictwo W drodze.

Ury, William. 1998. *Odchodząc od nie.* Warszawa: Polskie Wydawnictwo Ekonomiczne.

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GERMANY'S CYBERSECURITY POLICY

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Abstract. The German Federal Republic is one of the states whose state policy in the field of cybersecurity is considered to be coherent and effective. However, even Germany is a country exposed to numerous attacks. Ubiquitous technology in every aspect of our lives, and in addition the COVID-19 pandemic, introducing widespread mobile work and online education, have created even greater threats. By adapting internal legislation, indicating strategic and specific goals, Germany is part of the EU cybersecurity policy in its cybersecurity strategies. Prior to the adoption of the NIS 2 directive, Germany had already created a legal basis that would effectively and efficiently protect German cyberspace. In order to strengthen the effectiveness of their cybersecurity policy, Germany is strengthening cooperation between federal authorities, business, science and strengthening digital sovereignty.

Keywords: cybersecurity; cybersecurity competent authorities; Germany; cybersecurity strategy

INTRODUCTION

Nowadays, presenting cybersecurity as an important element of state policy is already a truism. Cybersecurity has become our everyday life in almost every aspect of our lives. Many of our daily tasks, regardless of whether they concern private, economic or social life, depend on modern technologies. The COVID-19 pandemic has further accelerated this process. In the report on cybersecurity published by BSI in 2021 in Germany, threats in the form of malware and ransome attacks posed the greatest threat, and as indicated in the report, the pandemic increased the threat to cybersecurity and attacks became more frequent and more expensive (ANSSI and BSI report). Professionalization of criminal groups and the growth of network systems caused by the transition to mobile work contributed to an increase in the attack surface through the provided and used communication services and devices, which made it possible to take advantage of the gaps in network security systems.

In order to take full advantage of all the possibilities, advantages and needs of digitization, it is necessary to protect against these threats. It is the state's responsibility to assess the rapid development of digitization in the

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interests of citizens together with business, science and civil society, and actively shape the necessary framework for a high level of security and protection in cyberspace is guaranteed. The protection of the critical and civil infrastructure network has become a priority in Germany's policy. Since the adoption in 2005 of the National Plan for the Reconstruction of Information Protection Infrastructure, the National Information Protection Plan and the adoption of further cybersecurity strategies for Germany in 2011, 2016 and 2021 were aimed at building and then extending the cyberspace protection system, focusing on technical and preventive measures [Schallbruch and Iskierka 2018, 15].

The aim of the article is to analyze the legal solutions and the adopted policy set by the federal government in the field of cybersecurity in the international context, especially within the EU policy and the obligations of the NIS directive. The question is, what is this policy like? Is it effective and efficient, also bearing in mind the upcoming changes in the form of the NIS 2 Directive?

1. LEGAL BASIS OF CYBERSECURITY IN GERMANY

The literature recognizes that the beginning of the federal government's activities in the field of IT systems protection was the establishment in 1990 of the BSI (Bundesamt für Sicherheitin der Informationstechnik – Federal Information Security Office) [ibid., 16]. This was due to the fact that BSI was granted the competence to coordinate the security of the government and the economy. Solutions adopted in other countries in the field of cybersecurity and the international situation, especially after the attacks of September 11, 2001, contributed to the intensified cooperation in this area [Guitton 2013, 22] which resulted in the presentation of the Nationalen Plan zum Schutz der Informationsinfrastrukturen (NPSI) in 2005. It was introduced as a comprehensive umbrella strategy for IT protection. Created by the Ministry of the Interior with the support of BSI. The government has set three basic goals: to harmonize the appropriate protection of the IT structure, to be ready to respond effectively to incidents related to IT control, and to increase competences in the field of IT security. These goals were to be achieved through prevention, preparedness and sustainable development. According to these solutions, two plans were to be implemented, compulsory for federal administration and public-private for critical infrastructure (KRITIS) [Schallbruch and Iskierka 2018, 18]. This the last Umsetzungsplan KRITIS Plans zum Schiutz der Informationsinfrastrukturen (KRITIS Implementation Plan – National Information Infrastructure Protection Plan) developed by the Ministry of the Interior in 2007 was addressed to private entrepreneurs who operated in key sectors of the economy for the state

[Oleksiewicz 2019, 121]. The plan was developed in an IT security management schema through the following cycle: plan, implement, check, improve.[1] Changes in the law strengthened the position of BSI in the field of cybersecurity (Gesetz zur Stärkung der Sicherheit in der Informationstechnik des Bundes Vom 14. August 2009). This intensified the work of the government in the field of increasing the level of security through cooperation with international organizations and internal stakeholders, which led to the creation in 2011 of the Cybersecurity Strategy.

The first cybersecurity strategy was adopted by the federal government in 2011. The strategy focused mainly on the civilian aspects of cybersecurity. They are complemented by measures taken by the Bundeswehr to protect its capabilities and measures necessary to make cybersecurity part of Germany's preventive security strategy. The strategy recognizes the necessity of international coordination and the creation of appropriate networks focusing on aspects of foreign and security policy. This was to include cooperation not only in the United Nations, but also in the European Union, the Council of Europe, NATO, G8, OSCE and other multinational organizations [Chałubińska-Jentkiewicz and Brzostek 2021, 129]. As goals and means, the Strategy identified the protection of critical IT infrastructure, construction of secure IT systems in Germany, strengthening IT security in public administration, establishment of the National Cybersecurity Council, development and implementation of the effectiveness of crime control in cyberspace, development of human resources in federal administration and international cooperation.[2] As a result of adopting the strategy, work on the adoption of the IT security law was initiated, which should improve the protection of critical infrastructure by regulating critical infrastructure operators.

In June 2015, the federal government adopted one of the first laws on IT security in Europe (Gesetz zur Erhöhung der Sicherheit informationstechnischer Systeme, IT-Sicherheitsgesetz). IT security discussions mechanisms for critical infrastructure operators have been operating at the European level for several years, and the Directive NIS (Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 on measures for a high common level of security of network and information systems in the territory of the Union, Journal of Laws of the EU, L 194/1) was introduced only a year later, in 2016 [Schallbruch and Iskierka 2018, 22-23].

The IT Security Act imposed a number of obligations on critical infrastructure operators in seven sectors (energy, health, information and telecommunications technologies, transport, water, food, and the financial and

[1] Umsetzungsplan KRITIS des Nationalen Plans zum Schutz der Informationsinfrastrukturen, Bundesministerium des Innern, Berlin 2007, p. 10-11.

[2] Cybersecurity Strategy Germany, 2011, p. 6-7.

insurance sectors). Government administration as well as media and culture are classified as: critical infrastructure, but already regulated by other legal acts, and therefore not covered by the IT Security Act. The law creates mandatory reporting requirements requiring Critical Infrastructure Operators to report potential and actual IT relevant security incidents to BSI. In addition, critical infrastructure operators must implement mandatory minimum IT security standards. [ibid.].

Due to the fact that the most important NIS solutions were already included in the German legislation in the IT Act, this meant that the federal government changed the federal law only to a small extent. The NIS Directive was implemented by the Act of 27 April 2017 on measures to ensure a high level of common network and information security in the Union (Gesetz zur Umsetzung der Richtlinie (EU) 2016/1148 des Europäischen Parlaments und des Rates vom 6. Juli 2016 über Maßnahmen zur Gewährleistung eines hohen gemeinsamen Sicherheitsniveaus von Netz- und Informationssystemen) BSI and some safety management provisions. Critical infrastructure, CISIRT regulations and special regulations for digital service providers, included in the BSI or on the Military Counterintelligence Service [Adamiec, Branna, Dziewulak, et al. 2021, 301-302]. In Germany's Cybersecurity Strategy in 2016, the federal government planned to focus its cybersecurity policy in four areas in the coming years: safe and independent operation in the digital environment, joint cybersecurity mission of the state and business, powerful and sustainable cybersecurity architecture throughout the state, and active positioning Germany in the European and international cybersecurity policy.[3] Mobile incident response teams (MIRT) have been established at the Federal Information Security Authority (BSI) [Schallbruch and Iskierka 2018, 26], which analyzed and removed cyber incidents in institutions. A specific feature of German solutions is entrusting BSI with control over the implementation of detailed protective procedures in those sections of the critical infrastructure that determine the way the society functions. The following systems were considered to be: banking, energy, water (drinking water supply), food, telecommunications and information technology. Due to the fact that the tasks relate to teleinformation network operators and institutions using them in the field of data protection, forms of security in the event of their digitization and attempts to hack into personal accounts in the system, it was decided to divide the competences of federal institutions in such a way [Mickiewicz 2017, 76]. The BSI was expected to play the role of a national CERT in administration and for critical infrastructure operators, the economy and citizens, as well as a central point of contact for foreign and international CERTs. The 2016 strategy is broader than the

[3] Cyber-Sicherheitsstrategie für Deutschland, 2016, p. 9.

2011 strategy, it is a work program for individual federal government agencies, it is not a strategic program. He defined goals and directions for action, without specific and measurable ways of achieving them [Schallbruch and Iskierka 2018, 27]. The assumptions of the bodies' activities adopted in the strategy have been criticized by experts. It was argued that the composition of the National Cyber Security Council was too general. It was noted in a confidential report of the Federal Audit Office that the council was not an appropriate institution to counter the attack because it did not have enough staff and its area of operation was not clearly defined [Steller 2017, 52-53]. There were also opinions of experts that the involvement of Germany in foreign cooperation indicated in the strategy should be described in more detail and precisely, is exactly what this cooperation should look like [ibid., 53].

The introduction of the new cybersecurity strategy was preceded by the adoption of the ICT network security act on May 7, 2021 (I IT-Sicherheitsgesetz 2.0). The act substantially strengthened the competences of BSI as the competent authority in the field of cybersecurity. In addition to the abovementioned competences, BSI has broadened its scope of activity in five key areas of activity. The first is to indicate that BSI is the national authority competent for cybersecurity certification, in accordance with §9a para 1, within the meaning of Article 58(1) of the EU Regulation 2019/881. The BSI is responsible in particular for the monitoring and enforcement of European cybersecurity certification schemes. Another one is threat detection and defense against cyber attacks. As a central cybersecurity competence center, BSI can design digital security strategies by setting binding standards for federal authorities and monitoring them effectively. The next area concerns the security of cellular networks and the certification of key components. Another area is consumer protection, which has become a BSI task. It has become an independent IT consumer advice center at federal level and the competent authority to introduce uniform, transparent IT certification. In the field of corporate security, BSI will monitor the implementation of IT security measures and information exchange.[4]

The cybersecurity strategy of September 8, 2021 created the framework for the federal government to operate for the next five years. The NIS Directive required the Member States to create a steering framework in the strategy and to identify goals and priorities, and to designate the bodies that would be responsible for achieving these goals. The implementation of the specifications and strategic goals is carried out primarily by the departmental bodies of the Federal Chancellery and ministries. As part of activities at

[4] IT-Sicherheitsgesetz 2.0, p. 11.

the federal level, two levels of action have been identified: strategic and operational [Chałubińska-Jentkiewicz and Brzostek 2021, 139].

2. INSTITUTIONS COMPETENT IN CYBERSECURITY

The activity of institutions competent in the field of cybersecurity in Germany is based on the structure of the division of the level of their operation into political, strategic and operational. Politically and strategically, responsibility for shaping cybersecurity policy lies with the federal government, internal cybersecurity policy is the responsibility of BMI (Bundesministeriums des Innern und für Heimat) and the Federal Office of Foreign Affairs (Auswärtiges Amt – AA) in the area of foreign policy cybersecurity. The BMVg (Federal Ministry of Defense – Bundesministerium der Verteidigung) is responsible for cyber defense. At the operational level, however, the system is structured around the BSI. The Federal Office for Security and Information (Bundesamt für Sicherheit in der Informationstechnik – BSI) is the central federal authority for security, within the Ministry of the Interior. Established in 1991 (Gesetz über die Errichtung des Bundesamtes für Sicherheit in der Informationstechnik) and as a result of several amendments to the law in 2009, 2015 and 2017, the legislator successively extended the scope of tasks and BSI currently serves as the central authority for cybersecurity in Germany. According to § 3 of the BSI Act, its main task is to promote information technology security in order to ensure the availability, integrity, confidentiality and processing of information. BSI is responsible for shaping information security through testing, standardization, certification, approval and consulting services for the state, business and society, and closely cooperates with entities from all areas of the economy.[5] BSI is both the federal government's central reporting office on information technology security and the central reporting office for critical infrastructure operators on information technology security issues. It is responsible for collecting and assessing the information necessary to counteract security threats in information technology, analyzing their potential impact on the availability of critical infrastructure in cooperation with the competent supervisory authorities, and constantly updating the situation report on IT security of critical infrastructure or companies of special public interest (section 8b of the BSI Act) [Mollers 2020, 6]. BSI is also the central accreditation and certification body for IT security in Germany. BSI is also empowered to investigate the IT security of products and services on the market and may publish alerts when it detects an IT security failure of products or services. Only in

[5] Cybersicherheitsstrategie für Deutschland, 2021, p. 8.

the years 2013-2017, 45 additional laws and regulations were adopted that entrusted BSI with such tasks [Schallbruch and Iskierka 2018, 32].

The law implementing the NIC Directive of June 2017 created the basis for the establishment of mobile MIRT incident response teams at BSI. On the other hand, the telecommunications law has expanded the options for detecting and blocking cyber attacks. Mobile Incident Response Teams (MIRTs) are established at BSI to analyze and remove cyber incidents in institutions. At the request of MIRT, BSI will be able to provide support to constitutional bodies, federal authorities and operators of critical infrastructure and similarly important local facilities, in order to quickly restore the technical efficiency of a given facility.[6] A specific feature of German solutions is entrusting BSI with control over the implementation of detailed protective procedures in those sections of the critical infrastructure that determine the way the society functions. The following systems were considered to be: banking, energy, water (drinking water supply), food, telecommunications and information technology. Due to the fact that the tasks relate to ICT network operators and institutions using them in the field of data protection, forms of security in the event of their digitization and attempts to break into personal accounts in the system, it was decided to allocate such competences of federal institutions. BSI is entitled to implement procedures regarding the way of using IT systems by elements of the critical infrastructure, relating both to the way they are used, as well as to changes and investments made in order to secure their functionality [Mickiewicz 2017, 76]. BSIs have CERT as one of the specialized units under the national cybersecurity umbrella unit [Backman 2015, 9-26]. The BSI includes the Security Operations Center (BSOC), the Federal Computer Emergency Response Team (CERT-Bund) and the National Center for IT Situations. The IT Security Act contains many provisions to strengthen the role of BSI. The main task was to evaluate reports on potential cyber attacks on critical infrastructure and in this respect he cooperates with the Federal Intelligence Service (BND), the Federal Office for the Protection of the Constitution (BfV) and the National Center for Counteracting Cyber Threats (NCAZ, also known as Cyber A-Z) [Oleksiewicz 2019, 131].

The NCAZ operates within the BSI structure. Established in 2011, it is a platform for cooperation and operation of the federal level and the competent authorities of individual federal states. At the time of its establishment, it was to become the first link in the fight against cyber threats and a platform for cooperation between the relevant German administration bodies. The Germans decided not to institutionalize the Centre's work due to the order in force in Germany to separate (Trennungsgebot) the secret services

[6] Strategy 2016, p. 29.

from the police services [Sacewicz 2012, 129-30]. Currently, the Center consists of, among others from the Federal Office for Military Counterintelligence, the Federal Criminal Police Office, the Federal Office for Teleinformation Security (BSI – Bundesamt für Sicherheit in der Informationstechnik), the Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz – BfV); Federal Office for Civil Protection and Emergency Response (Bundesamt für Bevölkerungsschutz und Katastrophenhilfe – BBK); The Federal Criminal Police Office (Bundeskriminalamt – BKA); The Federal Intelligence Service (Bundesnachrichtendienst – BND); The Federal Police (Bundespolizei – BPol) and the cybernetic and information space of the Bundeswehr command. The following were added as external partners: cyber defense of Bavaria, prosecutors of cyber protection specialists from Bamberg and Cologne and the Federal Office of Financial Supervision [Oleksiewicz 2017, 48-49].

The Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz – BfV) protects internal security and informs the federal government and the public about the state of security. The BfV is responsible for gathering information and assessing it about extremist or terrorist-motivated cyber attacks. The Federal Intelligence Service (Bundesnachrichtendienst-BND) is responsible for providing the necessary information. Acquiring knowledge about other countries that are important for Germany from the point of view of foreign and security policy, also for the purpose of collecting and assessing them in cyberspace. The cybernetic and information domain service (Kommando Cyber- und Informationsraum – KdoCIR) coordinates cyber defense in the Bundeswehr.[7] In the defense sector, these tasks are performed by the Military Shield Service (MAD). The Federal Intelligence Service (BND) can observe an attack in both the preparation and implementation phases, and information outflows resulting from attacks are also recorded. The Bundeswehr may also use its organizational components (including incident response teams) to contribute to general security measures within constitutional limits. In the opinion of experts, the creation of MAD is considered to be a change of the paradigm from defensive to offensive cyber defense [Bendiek 2016, 13].

The strategy emphasizes that the federal government has specific tasks resulting from the provisions on risk prevention in certain areas (for example, in the area of international terrorism, as well as security in the area of federal railroad facilities, border protection or self-security), which also includes cyberspace. These tasks are carried out by the Federal Criminal Police Office (BKA), the Federal Police (BPOL) and the BSI. The judiciary is responsible for prosecution in cyberspace with the support of state

[7] Cybersicherheitsstrategie für Deutschland, 2021, p. 20.

investigation and investigation offices and state police authorities or by the BKA and BPOL within their respective competences. Coordination between these and other competent authorities at the operational level takes place, *inter alia*, at Cyber A-Z (within the BSI structure), which serves as a central information and coordination platform. The Central IT Security Sector (ZITiS) works to strengthen cyber skills and digital sovereignty as a service provider to the security authorities of the Federal Ministry of the Interior. In addition, the federal government agencies entrusted with securing the federal IT infrastructure are of particular importance. These include the Federal Agency for Digital Radio for Authorities and Organizations with Security Tasks (Bundesanstalt für den Digitalfunk der Behörden und Organizationen mit Sicherheitsaufgaben – BDBOS) – federal network operator, the Federal Center for Information Technology (Informationstechnikzentrum Bund – ITZBund), as well as the Ministry of Foreign Affairs - operator of his international IT.

3. STRATEGIC GOALS OF THE POLICY AND ITS FUTURE

There has been a clear shift in the stated strategic goals that the federal government wanted to achieve. In the strategy of 2010, the goals were indicated most extensively, in as many as 10 points, i.e. protection of critical infrastructure as the main priority, security of IT systems (i.e. security of state documents provided – identity card or e-mail), strengthening of IT security of public administration by creating a uniform and secure network infrastructure, establishment of the NCAZ and the National Cyber Security Council, effective control of digital crime and international cooperation in the field of cyber security, development of human resources and creation of a coordinated and comprehensive set of tools to respond to cyber attacks.[8]

In the 2016 cybersecurity strategy, the federal government already planned to concentrate its policy in four main areas: safe operation in a digitized world, joint cooperation in the field of government and business security, building a sustainable cybersecurity architecture and active participation of Germany in European and international cybersecurity policy.[9]

In turn, the 2021 strategy defines the goals in four areas, i.e. cybersecurity as a joint task of the state, business, science and public participation, strengthening the digital sovereignty of the state, business, science and society, ensuring safe digitization and making the indicated goals measurable and transparent.[10]

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[8] Cyber-Sicherheitsstrategie, 2011, p. 3-7.

[9] Cyber-Sicherheitsstrategie für Deutschland, 2016, p. 9.

[10] Cybersicherheitsstrategie für Deutschland, 2021, p. 8.

By reviewing only the goals that the federal government set in subsequent cybersecurity strategies, one can see the evolution of not only issues related to the perception of cybersecurity, but also changes that took place in international and European policy, the construction of the cybersecurity system (as a result of the IT 2.0 Act and the NIS Directives), the role of society and business in shaping a coherent and effective cybersecurity policy. Education in each area remains a separate issue, the first strategy focuses on the education of clerical staff, while the next ones recognize the need to educate the society from an early age. The fastest changes came with the COvid-19 pandemic. Remote work, remote education and interrupted supply chains in the economy made the federal administration aware that the most expedient is to focus on cooperation, i.e. to identify four actors as the goal of this policy: the state, business, science and society. Achieving this goal requires secure digitization and digital sovereignty. The federal government has decided that the implementation of the strategy is to be constantly monitored and verified.

At the same time, work was underway on a new European cybersecurity policy package. Already in December 2020, the European Commission presented a proposal for the NIS 2 Directive [Schmitz-Berndt and Chiara 2022]. This concerned the enactment of the IT 2.0 Act in May 2021, which significantly changed the existing national cybersecurity law, tightening the obligations in the field of NIS security. The upcoming changes concern, *inter alia*, the scope of the Directive, revised cybersecurity risk management measures and reporting obligations, the strengthening of supervisory powers and the introduction of harmonized administrative sanctions. As noted by S. Schmitz-Berndt, P.G. Chiara adopted by the German state legislation is in line with the NIS2 legal standard and already covers, *inter alia*, waste management sector. Nevertheless, it requires changes in relation to, *inter alia*, postal and courier services, chemicals, food production, processing and distribution. The NIS 2 provisions also correspond to the indicated cybersecurity management measures and reporting obligations. This applies, *inter alia*, to cybersecurity risk management in the supply chain, internal rules introducing a manufacturer credibility assessment that reflects an EU-coordinated risk assessment of critical supply chains in accordance with Article 19 of the NIS2 project. Minor adjustments concern the notification timeframe which, according to the NIS2 proposal, will be adjusted to the uniform notification procedure. Regarding the role of supervisory authorities, the German legislators considered it appropriate to strengthen and extend the mandate of the BSI. It will be the national competent authority and single point of contact for the NIS and the national cybersecurity certification authority. Progress with ITSiG 2.0 ahead of the vote on the NIS2 directive means that entities in Germany will face the adoption of a new law in the

near future, which will result in an adaptation of business policy and action plans in the field of cybersecurity. Legislators should take the opportunity to harmonize their national cybersecurity legislation into a single, organic, comprehensive and coherent legislative text that meets the objectives of the NIS2 Directive while taking into account specific national requirements. This will bring significant benefits to the competent national authorities, economic operators and legal practitioners and avoid overlapping and duplication of requirements under different legal acts [Schmitz-Berndt and Chiara 2022]. Reflected under national legislation, there are no administrative fines yet, which should follow the RODO sanctions model, as demonstrated in section 14 of the BSI Act.

CONCLUSIONS

Germany's cybersecurity policy is consistently built around the central authority of the Federal Office for Information Security – BSI. The Act on BSI and the Act on IT 2.0 as well as numerous regulations strengthen the position of the authority. Other federal ministries and agencies complement the cybersecurity policy in their area of operation. When assessing the effectiveness of German policy, its complexity should be taken into account. In legal and organizational terms, Germany's cybersecurity system is built coherently and effectively. It operates at the federal and local level, involving state authorities taking into account their specificities. This gives the opportunity to involve many actors, taking into account specialist solutions, information technology, protection of critical infrastructure. Germany's cybersecurity policy is also consistent in its management system. Analyzes needs such as education, cooperation between the state and business, the development of science and new technologies and manages their development. The purposefulness and effectiveness of such a policy can also be seen in the response to events in international politics. In the strategy adopted in September 221, the mere indication of strategic goals makes it possible to emphasize this. Building digital sovereignty and greater emphasis on cooperation with business and science give grounds to assume that the German state will be even more effective in its policy. Finally, it should be emphasized that the federal government has already changed the regulations, even before the adoption of the NIS 2 Directive, in order to adequately respond to the changing threat landscape.

REFERENCES

Adamiec, Danuta, Justyna Branna, Dobromir Dziewulak, et al. 2021. "Informacja na temat legislacji dotyczącej systemu cyberbezpieczeństwa w wybranych państwach

Unii Europejskiej (Belgia, Czechy, Estonia, Francja, Holandia, Niemcy, Szwecja)." *Zeszyty Prawnicze. Biuro Analiz Sejmowych Kancelarii Sejmowych* 3 (71):280-314.

Backman, Sarah. 2015. "Organising National Cybersecurity Centres." *Information & Securites: An International Journal* 32, no. 1:9-26.

Bendiek, Annegret. 2016. *Sorgfaltsverantwortung im Cyberraum: Leitlinien für eine deutsche Cyber-Außen- und Sicherheitspolitik*. Berlin: Stiftung Wissenschaft und Politik.

Chałubińska-Jentkiewicz, Katarzyna, and Agnieszka Brzostek. 2021. *Strategie cyberbezpieczeństwa współczesnego świata*. Warszawa: Towarzystwo Wiedzy Obronnej.

Guitton, Clement. 2013. "Cyber insecurity as a national threat: overreaction from Germany, France and the UK?" *European Security* 22, no. 1:21-35.

Mickiewicz, Piotr. 2017. "System bezpieczeństwa cybernetycznego państw europejskich. Analiza porównawcza." *Rocznik Bezpieczeństwa Międzynarodowego* 11, no. 1:65-80.

Mollers, Norma. 2020. "Making Digital Territory: Cybersecurity, Techno-nationalism, and the Moral Boundaries of the State." *Science, Technology, & Human Values* 46, no. 1:112-38.

Oleksiewicz, Izabela. 2017. "Polityka bezpieczeństwa cybernetycznego RFN." *Studia Bobolanum* 28, no. 3:41-56.

Oleksiewicz, Izabela. 2019. *Zarys polityki cyberbezpieczeństwa Unii Europejskiej. Casus Polski i RFN*. Warszawa: Elipsa.

Sacewicz, Kamila. 2012. "Niemiecka strategia ochrony cyberprzestrzeni." *Przegląd Bezpieczeństwa Wewnętrznego* 4:129-35.

Schallbruch, Martin, and Isabel Skierka. 2018. "The Organisation of Cybersecurity in Germany." In Martin Schallbruch, and Isabel Skierka, *Cybersecurity in Germany*, 31-47. Springer.

Schmitz-Berndt, Sandra, and Pier G. Chiara. 2022. "One step ahead: mapping the Italian and German cybersecurity laws against the proposal for a NIS2 directive." *International Cybersecurity Law Review* 3 (2):289-311.

Steller, Stephan. 2017. "Die Cyber-Sicherheitsstrategie für Deutschland." *Arbeitspapiere zur Internationalen Politik und Außenpolitik – AIPA*. No. 1.

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THE PRINCIPLE OF EQUALITY BEFORE THE LAW VIS-A-VIS SOCIAL EXCLUSION

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Abstract. The aim of this study, whose material scope will be determined by the Polish (constitutional), international (human rights-related) and EU legal order, is to refer the principle of equality before the law to the subject matter of social exclusion. The doubt whether this principle provides a normative anchoring for the protection of an individual against social exclusion and to what extent from the perspective of efficiency of this protection a possible reference to the principle of equality before the law is sufficient has been placed in the framework of a research hypothesis. It is because if we recognize, *de lege lata*, that the formulation (identification) of the right to protection against social exclusion is premature, we must ask a question about programme guarantees of protection against exclusion, and in consequence, whether the principle of equality before the law plays the function of such a guarantor. The settlement of this question was made the research purpose of this study and the author uses the analytical method and the method of interpretation of the law in force in the course of her research.

Keywords: principle of equality; equality before the law; human rights; social exclusion

1. INTRODUCTORY NOTES IN THE CONTEXT OF THE PRINCIPLE OF EQUALITY BEFORE THE LAW

The principle of equality before the law is without a doubt one of those legal categories which, from the political perspective, are given rudimentary significance. It has a modelling effect on the Polish and international legal system, determining in a special way the standard of protection of rights of an individual and being an "essential element of the concept of rights, freedoms and responsibilities of man and citizen" [Masternak-Kubiak 2002, 119].

Semantic reconstructions of the principle of equality before the law, which is both an expression from the language of the law and from the language of the legal profession, take an important place in the Polish and international[1] literature on constitutional and international law, though there are also analyses that encode its meaning in an approach typical to

[1] See more in: Gowder 2013, 565-618; Acemoglu and Wolitzky 2021, 1429-465.

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individual branches of the law.[2] Therefore, the essence of this principle is conceptualized in relation to broadly understood human rights, reflecting their anthropocentric character, immanently coupled with underlying dignity that is inherent to everyone. Its most important legal consequence – as seen by K. Complak – is the imperative to take up and enforce the principle of equality in an absolute manner [Complak 2002, 73]. And despite the fact that it is not difficult to interpret the importance of this principle from the lexical manner of understanding the term equality,[3] capturing its normative content is undoubtedly an intellectually challenging task. This content cannot always be decoded from the laws in force, though equality *per se*, along with dignity and freedom, make up the "trinity" of legally protected values and a foundation of democratic countries. And although the literature does sometimes identify the paradox of heterogeneity (ambiguity) of the equality principle [Folak 2018, 25], the "idea of equality is a fundamental reference point of fairness and freedom" [Blicharz 2018, 59].

The aim of this study, whose material scope will be determined by the Polish (constitutional), international (human rights-related) and EU legal order, is not to present the different semantic contexts of the principle of equality before the law, but most of all to refer it to the subject matter of social exclusion.

The doubt whether this principle provides a normative anchoring for the protection of an individual against social exclusion and to what extent from the perspective of efficiency of this protection a possible reference to the principle of equality before the law is sufficient has been placed in the framework of a research hypothesis. The research hypothesis accommodates a doubt whether this principle provides a normative anchoring for the protection of an individual against social exclusion and a doubt of how sufficient, from the perspective of efficiency of this protection, a possible reference to the principle of equality before the law is. It is because if we recognize, *de lege lata*, that the formulation (identification) of the right to protection against social exclusion is premature, we must ask a question about programme guarantees of protection against exclusion, and in consequence, whether the principle of equality before the law plays the function of such a guarantor. The settlement of this question was made the research purpose of this study and the author uses the analytical method and the method of interpretation of the law in force in the course of her investigation.

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[2] See the example of this issue in administrative law in: Król 2018, 91.

[3] According to it equality means complete likeness, identity, sameness in relation to someone or something in terms of quantity, quality, value, or size, etc. Equality before the law means "a principle that involves identical treatment of all citizens who found themselves in a specific situation provided for by a legal standard" [Dubisz 2003b, 1079].

However, it needs to be reserved that the interest will not cover detailed semantic distinctions between the terms equality before the law and equality in the law because the research assumption adopted stipulates that it is the former that will be focused on. Given these ambiguities in the understanding of the term equality before the law, to put it simply, we must assume that it refers to a like treatment in the law application process [Cywiński 2014a, 414], thus to equal application of law towards all its addressees [Masternak-Kubiak 2002, 121]. The case is different for the category of equality in the law, which materializes in the process of making "such law that neither discriminates against, nor favours its addressees" [ibid.].

2. NORMATIVE SOURCES OF EQUALITY BEFORE THE LAW – AN OUTLINE

The instruction of Article 32 of the Polish Constitution of 2 April 1997[4] is fundamental here. Pursuant to this provision, all persons shall be equal before the law and all persons shall have the right to equal treatment by public authorities (Article 32(1)). Moreover, no one shall be discriminated against in political, social or economic life for any reason whatsoever (Article 32(2)). The equality principle formulated like this in Article 32(1) means – as noticed by M. Masternak-Kubiak – an imperative of the same treatment of entities under the law within a specified class (category) [Masternak-Kubiak 2002, 122].

These provisions are not the only rules that refer to the category of equality. Apart from the preamble to the Polish Constitution ("equal in rights and obligations towards the common good"), other examples for this are accommodated in Article 6 (which ensures equal access to products of culture), Article 11(1) (which provides for equality in affiliating in political parties) and Article 33 (which stipulates equal rights of men and women and an equal right to education, employment and promotion, to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations). The category of equality in the Polish Constitution was also quoted in the provisions of Article 64(1) (equal legal protection regarding ownership, other property rights and the right of succession), Article 68(2) (equal access to health care services, financed from public funds) or in Article 70(4) (equal access to education). Moreover, Article 96 (equality in elections to the Sejm), Article 127(1) (equality in elections of the President) and also Article 169(2) (equality in elections to constitutive organs of local government units) bring about equality in the context of electoral rights, leaving no doubt that this matter too is essential

[4] Journal of Laws of 1997, No. 78, item 483 as amended [hereinafter: Polish Constitution].

from the perspective of the constitutional guarantee of specific rights and freedoms of man and citizen.

References to the equality category are more than frequent in human rights-oriented acts of international law. Thus, the preamble to the Universal Declaration of Human Rights of 10 December 1948[5] talks about equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world and also about equal rights of men and women. Going further, the instruction of Article 1 explicitly refers to the equality principle, providing that all human beings are born free and equal in dignity and rights. A continuation of these provisions, especially important from the perspective discussed, is included in Article 7 of the Declaration, according to which all are equal before the law and are entitled without any discrimination to equal protection of the law. A special emphasis must also be given to putting the equality category together with access to in independent and impartial tribunal (Article 10) in terms of entering into marriage, during marriage and at its dissolution (Article 16(1)), with access to public service in one's country (Article 21(2)), with genuine elections (Article 21(3)), with equal pay for equal work (Article 23(2)) or finally, with access to higher education (Article 26(1)).

Going further, the preamble of the International Covenant on Civil and Political Rights signed at New York on 19 December 1966[6] includes content that is analogical to the provisions of the preamble of the Universal Declaration of Human Rights relating to equality. This is significant in as much as it does not only prove the systemic nature of the legal measures in place, but most of all the existence of a certain consistency of values which lay at the basis of the international system of human rights protection. Moreover, the Covenant provides for: an equal right to enjoy all civil and political rights (Article 3), equality of all persons before courts and tribunals (Article 14(1)), equality in terms of guarantees for persons charged with a criminal offence (Article 14(2)), equal rights and responsibilities of spouses (Article 23(4)) and also equality in the context of the right to vote and to be elected and access to public service (Article 25). Moreover, the provisions of the Covenant (Article 26) expressed the principle of equality before the law and the right, without any discrimination, to the equal protection of the law.

The question of regulation of equality in the provisions of the European Convention for the Protection of Human rights and Fundamental Freedoms, signed at Rome on 4 November 1950,[7] leaves us unsatisfied. The Convention

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[5] https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf

[6] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[7] Journal of Laws of 1993, No. 61, item 284.

does not refer to the category analysed either in general or in detail. However, in the European system, provisions of the Charter of Fundamental Rights of the European Union, adopted in its original wording on 7 December 2007,[8] are a certain compensation of this state of affairs. It was incorporated into the system of the European Union's primary legislation by the Treaty of Lisbon of 13 December 2007.[9] In the Charter, the category of equality was invoked as early as the Preamble as one of the values on which the European Union is built. And although pointing to equality as a foundation of a united Europe has an axiological justification, the fact that the term "equality" features in Tittle II of the Charter, i.e. Articles 20-26, is more important. The first of them already expresses explicitly the rule discussed providing that all are equal before the law. Equality of men and women was regulated in Article 23 of the Charter, according to which this equality must be ensured in all fields, including in terms of employment, work and remuneration. It was also noted, according to EU's broadly implemented equality policy, that the principle of equality is not an obstacle in maintaining or accepting measures that ensure specific benefits to people of a gender that is not represented sufficiently.

This review of legal regulations in force yields two-fold conclusions. First of all, under the Polish Constitution and international regulations, references to the category of equality are both general (by referring to the essence of the principle of equality before the law) and detailed (by juxtaposing the category analysed with specific institutions to which it applies). This means that the equality principle guaranteed constitutionally and internationally, is not suspended in a normative vacuum, but additionally it gains its in-depth meaning in connection with other provisions that refer to parity. Secondly, the principle of equality before the law is a normative guarantor of equality of all before the law. Therefore, it plays the role, as seen by M. Masternak-Kubiak, of not only a guideline in the process of creating and applying the law, but it has become a subjective right to equal treatment [Masternak-Kubiak 2002, 137].

3. ESSENCE OF SOCIAL EXCLUSION AND ITS NORMATIVE DETERMINANTS

The beginnings of the reflection on social exclusion go back to the 1960s, And the term itself, as seen by M. Piechowiak, emerged in the context of social policy in relation to the subject matter of hardship, poverty and deprivation [Piechowiak 2009, 128]. Therefore, exclusion has evolved from a strictly

[8] OJ C 83, 19.7.2008, p. 389-403 [hereinafter: Charter].

[9] Journal of Laws of 2009, No. 203, item 1569.

political and economic phenomenon to a sociological one, approached in the context of a breakdown of social bonds [Grotowska-Leder 2005, 25]. One of the first people to take up this subject matter was R. Lenoir who analysed *les exclus* for groups who were unable to find a place in the remuneration network and whose civil and social rights were so restricted [Lenoir 1974, Makarewicz-Marcinkiewicz 2015, 150]. It is this poverty that is most frequently quoted in the context of social exclusion, though homelessness, unemployment and disability are also discussed. Some authors, somewhat touching the extreme, also try to demonstrate an exclusive nature of the law [Kwaśniewski 2010, 189; Cywiński 2014b, 507].

In the lexical context, the term "exclusion" is assigned a negative meaning brought down to "exclusion, elimination, rejection" [Dubisz 2003a, 800].[10] From this perspective, the term social exclusion will also accommodate such a phenomenon, state or process, at the basis of which lies permanent exclusion (elimination, rejection) of a certain person or a certain group of persons from social life (so-called "pushing one to the periphery of society" [Szatur-Jaworska 2005, 64]). Therefore, exclusion cannot be temporary, it cannot be based on a passing cause. It is because not all transformations (changes) of a situation of a specific person will be classified as social exclusion, but only those that result in permanent impossibility of participation in community life as such.

Social exclusion was originally associated with poverty. However, relevant literature highlights that this term has a broader dimension that the concept of poverty and it covers an exclusion from institutions and a social exclusion. Poverty means a lack of or poor access to goods and services, while exclusion covers rejection from a place and relations in society. Social exclusion refers to a situation of unequal access to rights and institutions and to a drastic breakdown on social relations [Dziewięcka-Bokun 1998, 5]. If we were to make poverty a phenomenon that results in social exclusion and that demonstrates its essence and is a case study at the same time, then the focal point of the analysis must be shifted towards the permanence of this exclusion. If exclusion were only about a certain degree of hardship, poverty or misery, then we would not need to create a new semantic category that specifies social categories known and researched for years already. These comments apply also to the other phenomena described in the context of social exclusion.

The subject matter of social exclusion is increasingly taken up at the fora of international organizations which treat is as a social fact that the international community must face. The burden of activity in this regard is assumed mainly by the European Union and the Council of Europe who, in

[10] See Doroszewski 1960, 672.

the context of exclusion, highlight the objective impossibility of participation in community life.

The weight of this subject matter is demonstrated by the fact that primary legislation of the European Union often uses the term "social exclusion", though there are no provisions that would contain a legal definition of this concept. Therefore, pursuant to Article 9 of the Treaty on the Functioning of the European Union (which is part of the Treaty of Lisbon), in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. This guideline determines the direction of actions taken by the European Union, intended mostly to promote social policy as such. Without showing its significance, any initiatives and actions would be devoid of specific justification. Moreover, still in the context of social policy, Article 151 of the Treaty includes, i.a., a certain programme reference to another international agreement, that is the European Social Charter[11] signed at Turin on 18 October 1961, and to social rights included in it. In their context, the European Union and its Member States aim their activities to promote employment, to improve living and working conditions (to allow their equalization and at the same time to maintain progress), to ensure adequate social protection, dialogue between social partners, development of human resources that allows the improvement and maintenance of the employment level and, emphasis-worthily, preventing exclusion. On top of this, these assumptions were reinforced by means of a disposition of Article 153(1)(h) and (j), which regulate complementariness of actions of the European Union. According to it, the European Union supports and complements the actions of Member States in, i.a., integration of persons excluded from the labour market and in fighting social exclusion. The EU's secondary legislation, which is worth highlighting, also regulates these questions, referring to the very important improvement of understanding the issues of social exclusion and poverty, social protection policy and social integration.[12]

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[11] Council of Europe, European Social Charter, 18 October 1961, ETS No. 035.

[12] Decision No 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion (OJ L 170, 29.6.2002, p. 1); Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity (OJ L 315, 15.11.2006, p. 1-8); Decision No 283/2010/EU of the European Parliament and of the Council of 25 March 2010 establishing a European Progress Microfinance Facility for employment and social inclusion (OJ L 87, 7.4.2010, p. 1-5).

The European Social Charter invoked in the Treaty on the Functioning of the European Union, in its revised version opened for signature on 3 May 1996, regulates in its Article 30 the right to protection against poverty and social marginalisation. This means that the Council of Europe, which deals with protection of human rights, notices the weight of actions for the protection against social exclusion of these entities. Therefore, the agreement stipulates that in order to ensure effective exercise of the right to protection against poverty and social marginalisation, the states undertake, inter alia, to take measures as part of a general and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance.

This brief review of legal regulations shows that the acts of international law analysed use the category of social exclusion to juxtapose it with, as has been argued, universally known phenomena of poverty, unemployment or homelessness, etc. And although from the international law perspective (including the perspective of human rights) there are no grounds to formulate the right to protection against exclusion, the laws in force certainly create a certain standard of protection against it.

However, we must remember that without an effectively run social policy at the international (also European) level, we cannot create effective instruments to counteract social exclusion. A systemic approach to taking such measures is incredibly important in protection against them. As noted by M. Zdanowicz, exclusion is something that produces effects for an individual but is independent of this individual [Zdanowicz 2009, 183]. Thus, the direction of incorporation of international measures into national legal orders is valid in as much as the existence of a multi-layer system of protection against social exclusion is considered necessary and where such system runs from the international level, to the European layer, to the national dimension. Such multicentricity of protection is a guarantee of its effectiveness.

4. SUMMARY – ON THE RELATION OF SOCIAL EXCLUSION WITH THE PRINCIPLE OF EQUALITY BEFORE THE LAW

Summing up, we need to point out that the phenomenon of social exclusion seen holistically, which has become a subject of scholarly investigations relatively recently, is not accommodated under phenomena we know and have described. It is not only because the category of social exclusion is a collective category which is not self-reliant and by which we describe states, processes and phenomena that are considered to result in exclusion, but because social exclusion, as a certain intellectual abstract, cannot be examined without bringing it down to a specific phenomenon, state or process. Such

relativization of exclusion is, therefore, a necessary condition to investigate its essence in-depth. Relevant literature sometimes puts forward a hypothesis that "social exclusion is a new name for old, unresolved social problems, created and popularized to convince us that there has been a radical change in the structure of these problems [Makarewicz-Marcinkiewicz 2015, 149]. If we reject even extreme views, there is no doubt that the semantic polysemy that lies at the root of the category analysed, along with its independent nature and requirement to relativize it each time, greatly hampers its description. Also, they prejudge *de lege lata* that we cannot approach protection against social exclusion as a construct of a subjective right, as is the case of the subjective right to equal treatment. As much as equality before the law is one of those categories which in the Polish and international legal order take an important place thanks to being attributed the rank of a principle, the category of protection against social exclusion is still quite poorly developed in legal standards and legal commentary. And although it does feature in the language of the law, it is often replaced by other categories with a similar meaning (e.g. marginalisation).

As a result, as long as there is no normative specification of the concept of social exclusion and its forms (types), there will be no valid grounds to believe that protection against exclusion has a systemic nature. Guarantees of protection against social exclusion, which may be derived from principles or a common axiology of the European and national legal order (e.g. from the category of dignity or the principle of equality before the law) and relevant protective procedures, are a different issue altogether. These, however, mostly concern individual phenomena that are now qualified as subject of social exclusion (e.g. homelessness), not exclusion as such. Summing up the analysis so far, we must refer to the question from the introduction which is formulated in the form of a research hypothesis: does the principle of equality before the law provide a normative anchoring for the protection of an individual against social exclusion and to what degree a possible reference to the principle of equality before the law is sufficient from the perspective of efficiency of this protection?

There is no doubt that if we demonstrate the essence of exclusion (which results in social inequality), then we must refer to the principle of equality before the law. However, even though social exclusion is associated with violation of the principle of equality, it cannot be approached only in the context of this principle [Piechowiak 2009, 145]. It needs to be remembered, as is emphasised in views of legal scholars and commentators, that "violation of the principle of equality takes place only when a certain differentiation acquires the features of discrimination or privilege" [Masternak-Kubiak 2002, 122]. Social exclusion is not so much about discriminatory (unequal) treatment of people who are in a relatively similar position, but more about

"insufficient scope of protection that individual rights guarantee" [Tuleja 2009, 149].

Given that legislative acts use the category of social exclusion and frame it as a social and legal fact, guarantees of protection against social exclusion should be inscribed in the human rights protection system. Since no act of Polish or international law regulates *expressis verbis* the right to protection against social exclusion, a specific anchoring for this protection needs to be each time sought in the principle of equality before the law. This principle, being part of the law application process, will not only constitute a normative safeguard against social exclusion, but also a minimum requirement for the standard of protection against exclusion *in toto*. This means that this principle provides the minimum content of protection against social exclusion, though effectiveness of this protection must be secured by laws in force that regulate this issue in detail. There is no doubt that both the Polish and international legislator have quite a lot to do in this regard. As results from how the concept of social exclusion is understood, it is not enough that there are legal regulations in force that merely use this category; we need regulations that will ensure efficient protection against phenomena that result in exclusion. Its effective combating (limitation) requires certain work at the grassroots. P. Tuleja believes that not much will change without eliminating poverty, unemployment or homelessness [Tuleja 2009, 160]. We must remember that protection against exclusion requires systemic action. This is why the principle of equality before the law may provide a normative anchoring for the protection of an individual against social exclusion, though from the perspective of efficiency of this protection a possible reference to the principle of equality before the law is not sufficient.

The research hypothesis framed the research problem also into another, more practical, direction. A lack of a basis to refer to the right to protection against social exclusion does not release one from the obligation to search on a normative ground for instruments and tools of effective protection against exclusion. This is where we should seek the validity of the question whether the principle of equality before the law and the related measures (procedures) of protection of this principle may serve as such a tool. As has been pointed out, this principle may be used in the context of social exclusion where we are dealing with the act of the authorities' application of law because it may result in a discriminatory situation and thus violation of the equality principle discussed. However, we need to take into account that on the ground of the presented semantic rules relating to social exclusion it is mainly a certain social fact, which also allows a reversal of the thought process. Even though there are adequate instruments and legal procedures, a person suffering from exclusion may not use and enjoy them (for various reasons). Despite undesirable social effects of such a situation, there is no

legal obligation for one to use the tools of protection against social exclusion (sphere of freedom of every man). Thus, there is no violation of the principle of equality or any other unjustified differentiation of the legal position of such a person and the problem of exclusion remains unresolved. This confirms for the second time the correctness of the accepted course of reasoning which lay at the foundation of solving the research problem placed in the framework of the hypothesis. The principle of equality before the law may be a normative anchoring for the protection of individual against social exclusion, but it will not release states and international community from the task to create effective instruments of this protection.

REFERENCES

Acemoglu, Daron, and Alexander Wolitzky. 2021. "A Theory of Equality Before the Law." *The Economic Journal* 131 (636):1429-465.

Blicharz, Jolanta. 2018. "Związek między zasadą równości a zasadą sprawiedliwości społecznej w polskiej konstytucji i orzecznictwie trybunału konstytucyjnego. Próba spojrzenia ogólnego." In *Praworządność, decentralizacja, przedsiębiorczość. Księga jubileuszowa Profesora Leona Kieresa*, edited by Karol Kiczka, Tadeusz Kocowski, and Witold Małecki, 59-69. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Complak, Krystian. 2002. "O prawidłowe pojmowanie godności osoby ludzkiej w porządku RP." In *Prawa i wolności obywatelskie w konstytucji RP*, edited by Bogusław Banaszak and Artur Preisner, 63-79. Warszawa: C.H. Beck.

Cywiński, Zbigniew. 2014a. "Równość wobec prawa." In *Socjologia prawa. Główne problemy i postacie*, edited by Andrzej Kojder, and Zbigniew Cywiński, 414-16. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego.

Cywiński, Zbigniew. 2014b. "Wykluczenie prawne." In *Socjologia prawa. Główne problemy i postacie*, edited by Andrzej Kojder and Zbigniew Cywiński, 507-11. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego.

Dubisz, Stanisław, ed. 2003a. *Uniwersalny słownik języka polskiego*. Vol. 2. H-N. Warszawa: Wydawnictwo Naukowa PWN.

Dubisz, Stanisław, ed. 2003b. *Uniwersalny słownik języka polskiego*. Vol. 3. P-Ś. Warszawa: Wydawnictwo Naukowe PWN.

Doroszewski, Witold, ed. 1960. *Słownik języka polskiego*. Vol. 2. D-G. Warszawa: Państwowe Wydawnictwo "Wiedza Powszechna".

Dziewięcka-Bokun, Ludmiła. 1998. "Ekskluzja społeczna w Europie." *Polityka Społeczna* 10:5.

Folak, Łukasz. 2018. "Paradoksy dotyczące zasady równości." In *Równość w prawie administracyjnym*, edited by Jerzy Korczak, and Piotr Lisowski, 21-44. Warszawa: Wolters Kluwer.

Gowder, Paul. 2013. "The Rule of Law and Equality." *Law and Philosophy* 32 (5):565- 618.

Grotowska-Leder, Jolanta. 2005. "Ekskluzja społeczna – aspekty teoretyczne i metodologiczne." In *Ekskluzja i inkluzja społeczna. Diagnoza – uwarunkowania – kierunki*

działań, edited by Jolanta Grotowska-Leder, and Krystyna Faliszek, 25-44. Toruń: Wydawnictwo Akapit.

Kwaśniewski, Jerzy. 2010. "Wpływ norm prawnych na procesy wykluczenia społecznego." In *Prawo i wykluczenie. Studium empiryczne*, edited by Anna Turska, 189-206. Warszawa: C.H. Beck.

Lenoir, René. 1974. *Les exclus: un Francais sur dix*. Paris: Seuil.

Makarewicz-Marcinkiewicz, Agnieszka. 2015. "Ekskluzja społeczna – zjawisko społeczne czy 'temat zastępczy'?" *Wrocławskie Studia Politologiczne* 18:149-59.

Masternak-Kubiak, Małgorzata. 2002. "Prawo do równego traktowania." In *Prawa i wolności obywatelskie w konstytucji RP*, edited by Bogusław Banaszak, and Artur Preisner, 119-37. Warszawa: C.H. Beck.

Piechowiak, Marek. 2009. "Konstytucja wobec wykluczenia społecznego." In *Współczesne wyzwania wobec praw człowieka w* świetle *polskiego prawa konstytucyjnego*, edited by Zdzisław Kędzia, and Antoni Rost, 125-45. Poznań: Wydawnictwo Naukowe UAM.

Król, Paweł. 2018. "Autonomiczność zasady równości w prawie administracyjnym." In *Równość w prawie administracyjnym*, edited by Jerzy Korczak, and Piotr Lisowski, 91. Warszawa: Wolters Kluwer.

Szatur-Jaworska, Barbara. 2005. "Uwagi o ekskluzji i inkluzji na przykładzie polityki społecznej wobec ludzi starych." In *Ekskluzja i inkluzja społeczna. Diagnoza – uwarunkowania – kierunki działań*, edited by Jolanta Grotowska-Leder, and Krystyna Faliszek, 63-72. Toruń: Wydawnictwo Akapit.

Tuleja, Piotr. 2009. "Prawa jednostki do ochrony przed wykluczeniem a konstytucyjne zadania państwa." In *Współczesne wyzwania wobec praw człowieka w* świetle *polskiego prawa konstytucyjnego*, edited by Zdzisław Kędzia, and Antoni Rost, 147-63. Poznań: Wydawnictwo Naukowe UAM.

Zdanowicz, Mieczysława. 2009. "Ochrona uchodźców przed wykluczeniem społecznym." In *Współczesne wyzwania wobec praw człowieka w* świetle *polskiego prawa konstytucyjnego*, edited by Zdzisław Kędzia, and Antoni Rost, 183-97. Poznań: Wydawnictwo Naukowe UAM.

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COMPARATIVE ANALYSIS OF THE REQUIREMENTS FOR CANDIDATES FOR THE POSITION OF A JUDGE IN UKRAINE AND THE REPUBLIC OF POLAND

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Abstract. Qualification requirements for candidates for the position of judges are a system of requirements and conditions for admission to the position of a judge and a kind of guarantor of high-quality justice, high moral and professional level of holders of judicial power. Usually, the system of general requirements for candidates for the position of judge in different states is represented by the criteria of citizenship, higher legal education, minimum or maximum age requirements, practical work experience, high business and professional qualities. The system of special requirements differs in aspects of specialized judicial training or completion of the required internship. In the article, the authors conclude that today it is necessary to improve the system of selection of judicial personnel in Ukraine.

Keywords: justice; judiciary; judge; court of general jurisdiction; court of appeal; Supreme Court

INTRODUCTION

Professional judges are persons appointed and elected in accordance with the Constitution of Ukraine to administer justice on a professional basis. According to Article 52 of the Law of Ukraine "On the Judiciary and the Status of Judges" all judges in Ukraine have the same status, regardless of the location of the court in the system of courts of general jurisdiction or the administrative position held by the judge in the court. Judges are government officials who are constitutionally empowered to administer justice and professionally perform their duties in the judicial system of Ukraine.

In recent years, significant work has been carried out in Ukraine to improve the organization and activity of judicial review bodies, to optimize

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their structure and legal framework in accordance with the recommendations of the Council of Europe. To date, the procedure for selecting judges has been established, which is one of the guarantees of the independence of the judge, and therefore, the provision of every citizen's right to a fair trial in an independent and impartial court. This procedure provides, first of all, the introduction of a unified system for the selection of judges.

The generally recognized principles of staffing of the judicial corps are as follows: 1) impossibility of forming a corps of professional judges with any discrimination of self-expression of a person (the exception is belonging to the citizenship of the state); 2) the existence of a special body of state power that makes decisions on the selection of candidates for the position of judge, the majority of members of this body must be already working professional judges; 3) high level of legal culture, legal awareness of the candidate for the position of judge; 4) ensuring equal rights regardless of race, skin colour, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, language or other characteristics; 5) appropriate level of moral and personal qualities of candidates for the post of judge, etc.

The legal status of a judge is regulated by the current legislation of both Poland and Ukraine. In particular, in Poland, the Constitution of the Republic of Poland, the Law of the Republic of Poland "On the Organization of Courts of General Jurisdiction", the Law of the Republic of Poland "On the Supreme Court" act as the main legislative acts regarding the legal status of judges. In connection with the ongoing European integration processes in Ukraine, the question of comparing various institutions of civil society arises, in particular in the sphere of justice. Therefore, it is important to analyze the requirements for the position of a judge in Ukraine and the Republic of Poland.

1. COMPARATIVE ANALYSIS OF REQUIREMENTS FOR CANDIDATES FOR THE POSITION OF JUDGES OF THE FIRST INSTANCE

In accordance with Article 61 of the Law of the Republic of Poland "On the Organization of Courts of General Jurisdiction", a person who meets the following requirements may be appointed to the position of a judge of a district/district court in Poland: 1) has Polish citizenship and fully enjoys civil and public rights and has not been legally (lawfully) convicted of a mental crime, public harassment or intentional tax (fiscal) offense; 2) has an impeccable character; 3) obtained a higher legal education in the Republic of Poland and received a master's degree or received a foreign legal education recognized in the Republic of Poland; 4) is fit to perform the duties of a

judge in terms of health; 5) has reached the age of 29; 6) passed the judge's or prosecutor's exam; 7) held the position of an assessor, performed the duties of a judge for at least three years.

From this rule, the legislator provided certain exceptions in terms of passing the judge's or prosecutor's exam and occupying the position of *asesor sądowy* and performing the duties of a judge for at least three years.

In particular, this applies to cases when a person: 1) held the position of a judge of an administrative court or a military court; 2) held the position of prosecutor; 3) worked at a Polish university, the Polish Academy of Sciences, a research institute or other research institution and holds the academic title of professor, or holds a doctorate in law; 4) worked as a lawyer, legal consultant or notary for at least three years; 5) held the position of president, vice-president, advisor of the General Prosecutor's Office of Poland for at least three years.

According to Article 69 of the Law of Ukraine "On the Judiciary and the Status of Judges", a citizen of Ukraine, not younger than thirty and not older than sixty-five years of age, who has a higher legal education and professional experience in the field of law for at least five years, may be appointed to the position of judge. five years old, is competent, honest and speaks the state language in accordance with the level determined by the National Commission on State Language Standards.

A person who, according to the law, is prohibited from holding the relevant position and who was previously dismissed from the position of a judge for committing a significant disciplinary offense, gross or systematic neglect of duties, which is incompatible with the status of a judge or has shown his incompatibility, cannot apply for the position of judge. held position, violation of requirements regarding incompatibility, violation of the obligation to confirm the legality of the source of origin of the property or in connection with the entry into force of a guilty verdict against such a person, except in cases where the decision to dismiss on these grounds is recognized as illegal in a court of law or the court's guilty verdict is annulled. Also, in Ukraine, a person who was previously dismissed from the position of a judge based on the results of a qualification assessment cannot apply for the position of judge.

Comparing the requirements for the positions of judges of the first main branches of the judicial system in Ukraine and Poland, it can be seen that in Ukraine there are somewhat stricter requirements for an applicant for the position of a judge, namely: 1) the minimum age for holding the position of a judge in Ukraine has been increased by 1 year, compared to an applicant in the Republic of Poland; 2) experience of professional activity in Ukraine is at least 5 years (at that time in Poland, experience can be at least 3 years); 3) the Ukrainian applicant is obliged to speak the state language in

accordance with the level determined by the National Commission for State Language Standards (according to Article 9 of the Law of Ukraine "On Ensuring the Functioning of the Ukrainian Language as the State Language"); 4) but the judge's exam must be passed by all applicants without exception.

In our opinion, the Ukrainian legislator should take into account the provisions of the fifth paragraph of Article 61 of the Law of the Republic of Poland "On the Organization of Courts of General Jurisdiction", which states that a person may be appointed to the vacant position of a district court judge if he held one of the positions specified in § 2 clauses 2-4, within five years after the completion of the judge's mandate.

Analyzing the requirements for the post of courts of the next level in Ukraine and Poland, certain differences are also visible. Thus, in accordance with Article 63 of the Law of the Republic of Poland "On the Organization of Courts of General Jurisdiction", the following may be appointed to the position of regional/provincial court judge: 1) a judge of a district court or a military garrison court, who held the post for at least four years; 2) a judge of a district court or a military district or a prosecutor; 3) a person who held the position of prosecutor or judge for at least four years; 4) a person who has worked as a lawyer, legal consultant or notary for at least 6 years; 5) a person who held the position of president, vice-president, advisor of the General Prosecutor's Office of Poland for at least six years; 6) a person who worked at a Polish university, the Polish Academy of Sciences, a research institute or other scientific institution and has the academic title of professor, or has a doctorate in legal sciences; 7) the person was a judge of an administrative court or a military regional court.

2. COMPARATIVE ANALYSIS OF REQUIREMENTS FOR CANDIDATES FOR THE POSITION OF APPELLATE JUDGES

According to Article 28 of the Law of Ukraine "On the Judiciary and the Status of Judges", an appellate court judge can be a person who meets the requirements for candidates for the position of judge, who, based on the results of a qualification assessment, has confirmed the ability to administer justice in the appellate court, and also meets one of the following requirements: 1) has at least five years of experience as a judge; 2) has a scientific degree in the field of law and experience of scientific work in the field of law for at least seven years; 3) has at least seven years of professional experience as a lawyer, including representation in court and/or defense against criminal charges; 4) has a cumulative work experience (professional activity) in accordance with the requirements specified in clauses 1-3 of this part, at least seven years.

Analyzing the above-listed requirements for positions in Ukraine and Poland, it can be seen that the requirements for an applicant for the position of a judge in the Republic of Poland are somewhat stricter. In particular, this concerns the length of work experience (in Ukraine – 7 years, and in Poland – 10 years). At the same time, we note that the legislator has not established a certain length of service for researchers (professors and doctors of legal sciences).

Also, the Ukrainian legislator should take into account in the legislation the requirements regarding the fitness of a person to perform the duties of a judge.

In accordance with Article 64 of the Law of the Republic of Poland "On the Organization of Courts of General Jurisdiction", the following can apply for the position of judge of the Court of Appeal: 1) a person who worked as a judge of a court of general jurisdiction or a military court for at least 10 years, as a judge or prosecutor; 2) a person who has worked as a lawyer, legal adviser or notary for at least 10 years; 3) held the position of prosecutor for at least 10 years; 4) a person who has worked at a Polish university, the Polish Academy of Sciences, a research institute or other research institution and has the academic title of professor or a doctor of law degree; 5) a person who was a judge of an administrative court.

3. COMPARATIVE ANALYSIS OF REQUIREMENTS FOR CANDIDATES FOR THE POSITION OF JUDGES OF THE SUPREME COURT

A person who: 1) has Polish citizenship and fully enjoys civil and public rights; 2) has an impeccable reputation; 3) obtained a higher legal education in the Republic of Poland and received a master's degree or received a foreign legal education recognized in the Republic of Poland; 4) has a high level of knowledge in the field of law; 5) fit to perform the duties of a judge in terms of health; 6) has at least 10 years of work experience as a judge, prosecutor, president, vice president, adviser to the General Prosecutor's Office and has worked as a lawyer, legal adviser or notary.

At the same time, the above requirements do not apply to a person who worked at a Polish university, the Polish Academy of Sciences, a research institute or other scientific institution and has the academic title of professor or a doctor of legal sciences degree.

According to Article 38 of the Law of Ukraine "On the Judiciary and the Status of Judges", a person who meets the requirements for candidates for the position of judge, has confirmed the ability to administer justice in the Supreme Court based on the results of a qualification assessment, and

also meets one of the following requirements can be a judge of the Supreme Court: 1) has at least ten years of experience as a judge; 2) has a scientific degree in the field of law and experience of scientific work in the field of law for at least ten years; 3) has at least ten years of professional experience as a lawyer, including representation in court and/or defense against criminal charges; 4) has at least ten years of cumulative experience (experience) of work (professional activity) in accordance with the requirements specified in clauses 1-3 of this part.

Analyzing the above listed requirements for positions in Ukraine and Poland, it can be seen that the requirements for an applicant for the position of a judge of the Supreme Court in the Republic of Poland are similar in many respects.

We also consider it necessary for the Ukrainian legislator to take into account the requirements for an applicant for the position of judge of the Supreme Court in Ukraine: 1) a scientific degree in the field of law and experience of scientific work in the field of law for at least ten years; 2) fitness to perform the duties of a judge.

It is worth noting that in Ukraine the requirements for the position of a judge of the Supreme Court on Intellectual Property and the Supreme Anti-Corruption Court are established, in particular, in accordance with Article 33 of the Law of Ukraine "On the Judiciary and the Status of Judges", a judge of the Supreme Court on Intellectual Property can be a person who meets the requirements for candidates for the position of judge, based on the results of the qualification assessment, has confirmed the ability to administer justice in the Supreme Court on intellectual property issues, and also meets one of the following requirements: 1) has at least three years of experience as a judge; 2) has at least five years of professional experience as a representative in intellectual property matters (patent attorney); 3) has at least five years of professional experience as a lawyer in court representation in cases related to the protection of intellectual property rights; 4) has at least five years of cumulative experience (experience) of work (professional activity) in accordance with the requirements specified in clauses 1-3 of this part.

A judge of the High Anti-Corruption Court can be a person who meets the requirements for candidates for the position of judge, who, based on the results of a qualification assessment, has confirmed the ability to administer justice in the High Anti-Corruption Court, and also meets other requirements established by law.

Also, the Ukrainian legislator should take into account in the legislation the requirements regarding the fitness of a person to perform the duties of a judge.

4. CODE OF JUDICIAL ETHICS AS A STANDARD OF JUDICIAL BEHAVIOR

Separately, it is worth paying attention to the fact that the Code of Judicial Ethics was developed and is in force in Ukraine, approved by the 11th Regular Congress of Judges of Ukraine on February 22, 2013. It meets international standards of judicial behavior, ensures greater accountability of the judge, and its adoption was an important step to increase citizens' trust in the judicial branch of government in Ukraine. In the Code, attention is paid to such important issues as the regulation of the judge's behavior during the administration of justice, the prohibition of extra-procedural communication of the judge with the parties in the case, the declaration of financial interests of the judge and his family members, the recusal of the judge, relations with the media and the behavior of the judge outside of working hours. The ethical provisions specified in the Code play a twofold role: firstly, they enable judges to evaluate their actions in everyday life and during the administration of justice, to compare them with the requirements of the high prestige of their profession, and secondly, they should serve as a unified system criteria for evaluating various aspects of a judge's behavior by the authorized bodies in the case of contesting the judge's actions as violating the Oath.

No less important category of evaluation and selection of judges is "integrity" as one of the most controversial categories not only regarding judges. A. Kladchenko calls integrity "a strong and effective desire to act in accordance with the principles of correctness and humanity. People who have this quality choose or advise others only the right way out of the situation, having familiarized themselves with and considered all the priorities of the relevant issue. The basis of this philosophy is the ability to self-sacrifice, that is, a person can both sacrifice his interests to another person and recommend to act as he would do. There is no trace of a selfish motive, betrayal or any other negative phenomenon in this chain" [Kladchenko 2016, 9]. In addition, the legislator pays attention to the special training of candidates for the position of judge, including the strengthening of the connection between the systems of initial training and the appointment of judges.

According to T.V. Pustovoit: "an important factor contributing to ensuring the independence of judges is the existence of an optimal model for the formation of a corps of professional judges. In fact, the method of selection and appointment of judges, the specifics of the exercise of the judicial function significantly affect the independence of the judiciary. In this aspect, the researcher quite rightly observes that «the process of openness and collegiality in the consideration of future candidates for the post of judge is the only way to democratization and independence of the judiciary». The researcher

defines the key tasks of judges as preventing unscrupulous persons from conducting judicial proceedings and supporting competent specialists with fundamental virtues. Undoubtedly, in this context, the value-ethical component of building an effective judicial system in the state, which will meet the criteria of Article 1 of the Constitution of Ukraine" [Pustovoit 2016, 12].

Compared to our country, the demands placed on judges in foreign countries are quite high. The legislator of most states puts the professional qualities of the candidate and his moral and ethical characteristics in the same line. Thus, in Great Britain, a person who possesses impeccable moral qualities and has worked as a barrister for at least 7 years (for county courts) or 3-5 years (for magistrates) can be appointed to the position of judge. In some countries, exemplary behavior in everyday life is required (Article 4 of the US Code of Judicial Ethics) and an impeccable reputation (Article 6 of the Law on the Judiciary of the Republic of Romania). This emphasizes the special importance of the authority of the court for the effective administration of justice. In general, the study of the peculiarities of the formation of the corps of professional judges in France, Germany, Poland, Switzerland, Georgia, Italy, the Netherlands, Croatia, Japan, the USA and Great Britain revealed that there is no typical or standard procedure for the formation of the corps of professional judges. The methods of selection and appointment of judges vary depending on legal traditions and types of legal systems. They can also be different within the same legal family.

In foreign countries, the formation of the corps of professional judges is carried out mainly by appointment, but in some countries judges are elected (for example, in some US states and some cantons of Switzerland).

Therefore, a person who wishes to acquire the status of a candidate for the position of judge and plans a judicial career in the future, after the announcement by the Higher Qualification Commission of Judges of Ukraine about the selection of candidates for the position of judge, must apply to the Higher Qualification Commission of Judges of Ukraine with a corresponding application and provide documents that confirm the compliance of her candidacy with the requirements established by law.

After the expiration of the specified period for submitting the necessary documents, the Higher Qualification Commission of Judges of Ukraine carries out a special check of these persons regarding their compliance with the established requirements for a candidate for the position of judge. Persons who have successfully passed such a special check are allowed to take the exam, which is conducted in the form of anonymous testing and the purpose of which is to identify the level of general theoretical knowledge of the applicants.

Persons who have successfully passed the exam before the Higher Qualification Commission of Judges of Ukraine acquire the status of a candidate

for the position of judge and are sent to undergo a special training course. Special training is organized by the National School of Judges of Ukraine. Candidates who have successfully completed a special training course are sent to the Higher Qualification Commission of Judges of Ukraine to take a qualification exam – certification of a person who has undergone special training and expressed a desire to be recommended for appointment to the position of judge. It consists in identifying the appropriate theoretical knowledge and level of professional training of the candidate for the position of judge, the degree of his readiness to administer justice in matters of jurisdiction of the relevant court, as well as the personal and moral qualities of the candidate. The results of the qualification exam are valid for three years. A person who has not passed a qualifying exam may be allowed to take such an exam again no earlier than a year later. A person who has not passed the qualifying exam again may be admitted to the next exam no earlier than two years later.

CONCLUSION

The formation of a highly professional judicial corps is not only a problem of the national level, but also an issue that worries the international community and requires constant improvement. It is possible to state the existence of significant changes and positive results of reforms in this area in our country, which aims to approach generally recognized European standards. However, in this context, it must be recognized that the general process of reforming the judicial authorities of our country is rather complicated.

When developing the further course of judicial reform in Ukraine, it is necessary to consider the judiciary and the judicial system as an integral part of state power, which depends on structural and functional changes in the state mechanism, the direction of state development. The development of the concept of judicial reform should declare the parity of the judiciary and take into account domestic development processes and international trends. During the development of the action plan for its further reform, one should take into account not only the comments of the institutions of the Council of Europe, but also the advantages of modern European judicial systems and take into account the shortcomings, on the elimination of which the member states do not stop working.

The general characteristics of the qualification requirements for the position of a judge in Ukraine characterize it as a developing country. We believe that at the stage of appointing a judge to a position, the system and mechanisms for researching information about a candidate for the position of judge from the point of view of integrity and other qualities and reviewing

the requirements for age and professional experience for candidates for the position of judge should be strengthened.

It is necessary to update the system of appointing judges, to simplify it, and at the same time to increase the requirements for candidates' knowledge of procedural codes, legislation and judicial practice and the practice of the European Court of Human Rights. At the same time, strict specialization should be introduced in the courts and the influence of the subjective factor on the evaluation of the results of the judicial examination should be excluded.

REFERENCES

Kladchenko, Alisa O. 2016. "Pravovi zasady vprovadzhennya instytutu dobrochesnosti v Ukrayini." *Jurnalul Juridic National: Teorie si Practica* 6 (22):9-11.

Pustovoit, Tetyana V. 2016. "Konstytutsiyno-pravovi osnovy yednosti sudovoyi vlady Ukrayiny." Avtoreferat dysertatsiyi na zdobuttya naukovoho stupenya kandydata yurydychnykh nauk. Kharkiv. http://dspace.univd.edu.ua/xmlui/bitstream/handle/123456789/2540/aref_Pustovoyt_2016.pdf?sequence=2&isAllowed=y [accessed: 22.11.2022].

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THE ISSUE OF DOCUMENTING COMPLIANCE WITH THE CONDITIONS REQUIRED FROM ECONOMIC OPERATORS UNDER THE NEW APPROACH ADOPTED IN THE PUBLIC PROCUREMENT LAW

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Abstract. The objective of this paper is to discuss the issues related to documenting compliance with the conditions required from economic operators as part of public contract award procedures. The paper is also aimed to indirectly pay the readers' attention to warranting the observance of the equal treatment principle in respect of economic operators and the need to respect the fair competition principle.

Keywords: public contract; Public Procurement Law; fair competition principle

INTRODUCTION

The provision of documentary evidence confirming compliance with the conditions required from economic operators constitutes a vital component of verifying the reliability of economic operators applying for the award of a public contract. Therefore, the objective of this paper is to discuss the issues related to documenting compliance with the conditions required from economic operators as part of public contract award procedures. The paper is also aimed to indirectly pay the readers' attention to warranting the observance of the equal treatment principle in respect of economic operators and the need to respect the fair competition principle [Nowicki and Bazan 2015, 113-15]. First, it is worth indicating the historic aspects related to the role of a document, its evolution, and the nature of such evidence. This information should be used in the deliberations on documenting compliance with conditions required from economic operators, and, to be more precise, entity-related evidence and subject-matter evidence, as provided for in the Public Procurement Law. To provide a thorough inquiry into the issues being discussed, the author has used the doctrinal method, taking into account the analysis of legislation and case law.

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2. DOCUMENTING UNDER THE PUBLIC PROCUREMENT LAW

In the legal sense, a document is defined as "any deed, letter, written record or even an object which may be used as evidence [...] establishing or confirming a specific legal relationship, circumstances or facts of a given matter" [Kaczorowski 2004, 274]. In its narrower sense, "it is a letter drafted in a required form, which establishes, confirms or changes a given legal status, bearing certain means of authentication (e.g. a seal)."[1] Documents play various roles in legal transactions. Informational and evidential functions are the two most commonly indicated roles of documents. Taking into account the definition of information as any asset which minimises uncertainty, the informational function is mostly related to recording declarations of will or knowledge of the document issuer. Under Article 77 of the Civil Code, the legislators defined the notion in question as follows: "A document shall be a medium of information which allows the reading of its contents." Such broad definition arises from the principle of the freedom to choose the form of legal transactions applicable under Polish civil law. The term "document" is laid down in the provisions of the Civil Code as a form of legal transactions, at least in Articles 73 through 81. The freedom to choose the form of a legal transaction may be excluded on a statutory basis, hence in some cases certain legal transactions should be performed in a special form. Such special form requires a record of the legal transaction by preparing a document. From the legal point of view, a document gains a special significance as evidence in proceedings.[2] In line with the objective truth principle, anything which might contribute to the resolution of a case and which is not prohibited by law should be admitted as evidence.

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[1] See *Encyklopedia Popularna PWN*, Wydawnictwo Naukowe PWN, Warszawa 2022, p. 190.

[2] Judgement of Polish National Chamber of Appeal of 19 March 2015, ref. no. KIO 416/14; quote: "Official documents prepared in a required form by relevant public authorities within their powers constitute evidence of the official decision or statement which has been made. Any document which has been prepared in such a way is subject to the presumption of the truthfulness of information contained therein, and until the document is not amended, it cannot be interpreted otherwise. Therefore, if the contracting party had intended to contest the data indicated in the decision, it should have undertaken actions provided for in the Code of Administrative Procedure to amend or invalidate the decision in question. The right and obligation of any contracting party is to verify the submitted tender documents, and to treat them as evidence of compliance with participation conditions. Submitted documents which have been falsified or obtained illegally should be disqualified. However, if this is not the case, any details which are consistent with the factual circumstances must be treated as evidence of compliance with the requirement to have specified knowledge and experience, provided that it is not precluded by quantitative or value-related limitations related to a given service, product supply or construction works, as defined in the Terms of Reference."

In particular, documents may serve as evidence [...]. Given such definition of evidence, priority should be given to official documents, understood as documents prepared in a required form by relevant public authorities within their powers, whose contents constitute evidence of the official decision or statement which has been made.[3]

Discussing the issue of documenting proceedings and providing access to documents as part of such proceedings, it is necessary to note Article 18 of the PPL which sets out the rules for the open access to procedures, confidentiality of information, and disclosure of personal data. The rule of open access to public procurement procedures is mainly expressed in Article 71(1) of the PPL. It places an obligation on the contracting authority to document the course of their public contract award procedures, by way of preparing a procedure record, in conjunction with Article 74(1) of the PPL. Under the provisions of this Article, wide access is provided to information placed in procedure records, and in attached documents, including tenders, requests to participate in the procedure, and subject-matter and entity-related evidence. The preparation of such records demonstrates the observance of the rule of open access to proceedings and procedure transparency. The rule of open access, stipulated in Article 18 of the PPL, is aimed at ensuring the possibility for all interested parties to get acquainted with information about given procedures and any documents and statements attached to relevant records. The contracting authority is obliged to provide access to information and documents which refer to the procedure conducted by the contracting institution. As a rule, the record must reflect the course of every procedure from the moment of its instituting to closure. Taking into account the provisions of Article 7(18) of the PPL, procedures are instituted by sending or publishing a contract notice, sending an invitation to negotiations or

[3] Cf., in particular, judgement of Polish Supreme Court of 9 August 2019, ref. no. II CSK 341/18, according to which "the distinction between declarative and constitutive official documents is relevant in that the presumption of truthfulness of statements made in a document by an issuing authority, arising from the provisions of Article 244(1), in conjunction with Article 252 of the CAP, refers to declarative documents only (in the part in which an official document is of a descriptive nature); the criterion of truthfulness or falsehood refers to declarations of knowledge, not to declarations of will, and furthermore, it is vital to note that the said presumption, also applicable to declarative documents (insofar as an official document is of a descriptive nature) refers only to the contents of the declaration of knowledge of the issuer of such documents, and therefore it does not refer to the declarations of knowledge made by the parties appearing before the issuing authority which makes a record of them; hence an official document is evidence of the official statements made therein (Article 244(1) of the CAP), only insofar as it certifies a given status and only in respect of the issuer's declaration of knowledge contained in the certification, hence the rule of the burden of proof, as laid down in Article 252 of the CAP, is applicable only within the said boundaries in respect of the truthfulness of the issuer's declaration of knowledge."

an invitation to tender. The procedure should be conducted as an orderly sequence of activities which are based on the contract conditions specified by the contracting authority. It should result in the selection of the most advantageous tender or in the negotiation of contractual terms of a public contract, and should be concluded with the execution of a public contract or in rendering the procedure invalid. In this context, documents filed to confirm compliance with the conditions for participating in a public procurement procedure play a significant role.

3. CURRENTLY APPLICABLE SOLUTIONS GOVERNING DOCUMENTATION

In the new Public Procurement Law,[4] the existing solutions have been reordered, and a number of new ones have been introduced. An economic operator applying for a public contract should meet the conditions applicable to an entity participating in the procedure, and conditions applicable to the subject-matter, as set out in procurement documentation for given supplies, services or construction works. One of the key secondary legislation adopted under the PPL is the Regulation of the Minister of Development, Employment and Technology of 23 December 2020 on entity-related evidence, and other documents or statements which a contracting authority may request from an economic operator. This legislation replaces the Regulation of the Minister of Development of 26 July 2016 on the types of documents which a contracting authority may request from economic operators in the course of contract award procedures. Defining entity-related evidence, it is necessary to refer to Article 7(17) of the PPL, according to which it is an instrument to confirm the absence of grounds for exclusions, and compliance with the conditions of participation in the procedure and/or with selection criteria. A statement referred to in Article 125(1) of the new PPL, i.e. statement of no grounds for exclusion and of compliance with the conditions for participation in the procedure or with selection criteria in the scope indicated by the contracting authority is an exception here. Under Article 7(20) of the new PPL, subject-matter evidence is defined as instruments to confirm the compliance of the offered supplies, services or construction works with the requirements, properties or criteria specified in the description of the subject-matter of the contract or tender evaluation criteria, or requirements related to the performance of a given contract.[5] Subject-matter

[4] Journal of Laws of 2019, item 2019 as amended.

[5] Judgement of Polish National Chamber of Appeal of 6 August 2021, ref. no. KIO 1698/21; quote: "Under Article 7(20) of the PPL, subject-matter evidence is defined as instruments to confirm the compliance of the offered supplies, services or construction works with the requirements, properties or criteria specified in the description of the

evidence is governed by the provisions of Articles 104-107 of the PPL. They include statements and documents confirming that the supplies, services or construction works offered are compliant with the conditions set out by the contracting authority, as referred to in Article 25(1)(2) of the PPL. They may have the form of markings (they may be required in the case of contracts having special environmental, social or other properties, on terms laid down in Article 104. Where the economic operator, due to reasons beyond its control, is unable to obtain the labelling specified by the contracting authority or its equivalent, the contracting authority, within the time limit set at its discretion, shall accept other relevant subject-matter evidence, including, in particular: manufacturer's technical documentation, if a given economic operator proves that construction works, supplies or services to be performed meet the conditions required for obtaining a given labelling or specified requirements indicated by the contracting authority), certificates (issued by an entity authorised to assess compliance or test reports issued by such entity, or equivalent certificates. The contracting authority shall accept other evidence, e.g. manufacturer's technical documentation, where the economic operator does not have access to certificates or test reports, or any possibility to obtain the same within due time limit, whereas this availability cannot be attributable to a given economic operator, and provided that a

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subject-matter of the contract or tender evaluation criteria, or requirements related to the performance of a given contract. They may take the form of marking (labelling), certificates, documents or other instruments. The subject-matter evidence required in the course of the public contract award procedure should be indicated by the contracting authority in its contract notice or procurement documents (Article 106(1) of the PPL) and submitted by the economic operator together with its tender (Article 107(1) of the PPL). Moreover, it should be explained that subject-matter evidence being submitted as part of public contract award procedures has a double function. Pieces of such evidence may be used for assessing compliance of the product or service offered with the description of the subject-matter of contract, constituting grounds for the verification of the correctness of the tender in substantive terms, and for confirming the compliance of the supplies, services or construction works with the properties or criteria laid down in tender assessment criteria, which is expressly provided for in Article 105(1) of the PPL. It is commonly known that the contents published on websites, even if they are websites run by manufacturers of equipment or software, include general information which is often outdated or inaccurate. Websites may also be changed or modified after a tender has been submitted, which practically makes it impossible to restore original contents available under a given link. The information referring to the date of update is not accompanied by any details which would allow the identification of what has been changed/updated and to what extent. It is also vital to note that it is not possible to identify an entity which is responsible for uploading contents available under a given website link. It should be stressed that, while scoring a given tender as part of non-price assessment criteria, the contracting authority must be absolutely certain that the information which is the basis for providing a score is true and accurate, which is related to the principle of fair competition and equal treatment of economic operators.

given economic operator is able to prove the construction works, supplies or services meet the requirements, properties or criteria specified in the description of the subject-matter of contract or tender assessment criteria, or requirements related to contract performance), documents or other instruments. The PPL includes an open list of subject-matter evidence, although the contracting authority does not enjoy full independence as to demanding this type of documents. Under the PPL, such evidence must be proportional to the subject-matter of contract and related to it. Demands for subject-matter evidence cannot restrict fair competition or equal treatment of economic operators. At the same time, it should be borne in mind that the contracting authority must accept equivalent subject-matter evidence if it serves as confirmation that the supplies, services or construction works offered are compliant with the requirements, properties or criteria set by the contracting authority. The requests for subject-matter evidence are optional, and are related to the identification of such evidence in a contract notice or in procurement documents. It should be noted that the demand for subject-matter evidence is only legitimate where the contracting authority has defined the properties, demands and criteria which the evidence is to confirm. Failure to provide such information results in the fact that the claim for submission of specific pieces of evidence is unfounded.[6] Subject-matter evidence is related to the description of the subject-matter of contract, rather than to contracting authority's assessment criteria. Pieces of such evidence refer directly to the parameters of the subject-matter of contract, and thus it should be assumed that they are part of a tender understood as an economic operator's declaration of will confirming its undertaking to perform a given contract. Moreover, approaching the said issue from the perspective of declarations of will[7] within the meaning assigned under the civil law, which are an indispensable part of every legal transaction, while by making such declaration of will, a legal subject under civil law may create, change or terminate legal relationships. For declarations of will to be effective, they must regulate legal relationships with other legal subjects. They include both statements made as part of bilateral or multilateral transactions, and statements addressed to specified natural or legal persons [Radwański 2008, 145]. It is important to note that such declarations must be submitted to persons without whom the

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[6] Judgement of Polish National Chamber of Appeal of 27 February 2020, ref. no. KIO 295/20; quote: "The contracting authority's demand to submit documents in a situation where no requirements as to a given part of supplies, services or construction works, referred to in the requested documents, have not been listed in the Terms of Reference, is ineffective, as it does not have any legal or factual basis. Likewise, such demand must be deemed unfounded in a situation where a document which the contracting authority has demanded as a confirmation of compliance with specified requirements it not indispensable for the procedure to be effected."

[7] Act of 23 April 1964, the Civil Code, Journal of Laws No. 16, item 93.

said act would not become effective. These documents must be treated as a confirmation of compliance of the product or service offered with contracting authority's expectations set out in the Terms of Reference. Therefore, the failure to provide such confirmation also constitutes grounds for rejecting a given tender. What should also be stressed is the fact that the demand for subject-matter evidence is only possible if the contracting authority indicates the required piece of evidence in its contact notice or procurement documents. The contracting authority's demand is subject to the principles laid down in Article 106(2) of the PPL, i.e. "The contracting authority shall request subject-matter evidence which is proportional to the subject-matter of contract and related to the subject-matter of contract." [Mazurek, Grabowska-Szweicer, Michałowska, et al. 2011, 5-7]. The assessment of tenders should be conducted solely on the basis of documents, parameters and criteria expressly defined in procedure documents. The rejection of a tender based on documents other than the ones listed in the documentation prepared by the contracting authority constitutes a breach of essential rules of public procurement procedures.

Under the PPL, entity-related evidence includes instruments aimed at confirming that there are no grounds for exclusion, and that the conditions for participating in the procedure or the selection criteria have been met, except the statement referred to in Article 125(1) of the Act. On the one hand, pieces of such evidence refer to well known statements or documents filed by economic operators to confirm the aforementioned facts, on the other hand, other solutions which differ from the existing ones are also present. As part of a public contract award procedure, the contracting authority must request entity-related evidence to confirm that there are no grounds for exclusion, while the request for evidence to confirm that the conditions for participation in the procedure or selection criteria have been met is optional. It should be noted here that the determination of economic operator's capacity to apply for the award of contract is a key part of every public procurement procedure. As per the PPL, this is done on the basis of entity-related evidence submitted by economic operators.[8] The pieces of evidence were defined in Article 7(17) of the new PPL, as instruments confirming that there are no grounds for exclusion, and that the conditions for participation in the procedure or selection criteria have been met, whereas

[8] Judgement of Polish National Chamber of Appeal of 6 August 2013, ref. no. KIO 1787/13; quote: "The burden of proof in relation to a given statement – in line with the Roman maxim *ei incubit probatio qui dicit non qui negat* – first and most of all rests with the party or procedure participant which makes a statement about the occurrence of a given fact, not on the participant who denies such statement; however, in appeals procedures under the PPL, each of the participants (a party or acceding economic operator) should demonstrate initiative in respect of providing evidence for the purpose of legitimate defence or to confirm allegations."

a statement referred to in Article 125(1) is not such piece of evidence. It is the economic operator who is obliged to prove that it meets the conditions for participating in the procedure by submitting statements and documents specified by the contracting authority. There is no presumption of economic operator's compliance with the conditions for participation in the procedure. The submitted documents must clearly demonstrate that the economic operator concerned meets the said conditions. The demonstration of meeting the conditions must refer to the assessment of the correctness of these documents, while the interpretation of this provision of the PPL should take into account the circumstances provided for in the Act.[9] Therefore, the conviction that a given economic operator does not meet the conditions for participation constitutes grounds for excluding the said economic operator from the procedure.[10] It seems illegitimate to interpret the conditions for participation in the procedure in a manner which goes beyond their literal meaning, and consequently to limit the group of entities which may apply for the award of a contract, i.e., to the detriment of economic operators filing tenders in the course of the procedure, only by referring to the rationality of a given conditions in the light of the subject-matter of contract being requested, or the related intentions or interests of the contracting authority.

The conditions that must be fulfilled to take part in a given procedure, as elements of the procedure determining economic operators' participation in a vast extent, should be formulated in an accurate and explicit way, and their interpretation should not result in the imposition on economic operators of greater obligations than those resulting from the literal wording of the provisions which refer to a specified participation condition. Compliance with the set requirements should be assessed on the basis of the literal wording of the expectations expressed by the contracting authority. It is not permissible to apply extended and implied interpretation of the description of the methods to assess whether the condition for the participation in the procedure has been met, or to perform the assessment based on

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[9] Judgement of Polish National Chamber of Appeal of 27 January 2011, ref. no. KIO 86/11; quote: "A general statement of no grounds for exclusion filed by the economic operator may not be deemed as a full confirmation of no criminal or disciplinary record, despite the detailed statement of no criminal or disciplinary record. Letters of reference do not need to include the confirmation of meeting all conditions related to experience required by the contracting authority, yet the documents must be subject to clarification if their contents are inconsistent with, or contrary to, the contents of the list (in economic operator's statement)."

[10] Judgement of Polish National Chamber of Appeal of 8 May 2015, ref. no. KIO 815/15; quote: "It is the economic operator that is obliged to submit documents compliant with the legal status in force in a given contract award procedure, and neither the economic operators' ranking as part of given procedure not the stage of the said contract award procedure affect the requirement to meet the obligation in any way."

such interpretation. The Regulation of the Minister of Development, Employment and Technology, adopted on 23 December 2020 pursuant to Article 126(6) of the PPL, governs the list of entity-related evidence and other documents and statements which a contracting authority may request from economic operators [Jakubecki 2006, 361-63; Uliasz 2008, 4; Piasecki 2016, 97.] Sections 6-10 of the Regulation were devoted to the issue of confirming whether the conditions for participation in the procedure have been met. As per Section 6 of the Regulation, to confirm economic operator's compliance with the conditions for participation in the procedure in respect of the capacity to conduct economic activities, the contracting authority may demand from the economic operator who conducts business operations or professional activities a document confirming that they have been entered in one of the professional or trade registers maintained in the country where the economic operator has its registered office or his/her place of residence. Such documents must be issued at the latest 6 months prior to submission. The regulation expressly defines which documents must be produced to confirm circumstances related to a given condition for exclusion.[11] For instance, information from the Central Register of Beneficial Owners is to confirm that there are no grounds for exclusion under Article 108(2) of the PPL, while the economic operator's statement confirming that the information included in a statement referred to in Article 125(1) is up-to-date is to prove that there are no grounds for exclusion under Article 108(1)(3) of the PPL. Section 9 of the Regulation includes a list of pieces of evidence a contracting authority may request in respect of economic operators' technical or professional capabilities. These include:

1) a list of construction works performed no earlier than in the period of last 5 years, and where the period of conducting business activities is shorter – in the period concerned, together with details of the type, value, date and place of performance and entities for which the works were performed, with attached evidence specifying whether the construction works were duly performed, whereas the said evidence includes letters of reference or other documents prepared by the entity for which the

[11]Resolution of Polish National Chamber of Appeal of 11 February 2010, ref. no. KIO 11/10; quote: "Economic operators should have the possibility to evaluate the required conditions, and make a decision about possible participation in the procedure as early as at the stage of contract notice. The conditions for participation and the description of compliance assessment methods should be stated explicitly in the contents of the contract notice. The requirement of identical contents of notices, those published in the Official Journal of the European Union, in the Public Procurement Bulletin, on the contracting authority's website, and in its registered office, is indisputable. The contracting authority is obliged to indicate statements and documents it demands to confirm that the conditions of participation in the procedure have been met in the contract notice."

works were performed, and where the economic operator is not able to obtain such documents for reasons beyond its control – other relevant documents;

2) a list of performed supplies or services, or supplies or services being performed in the event of recurring or continuous orders, in the period of the last 3 years, and where the period and where the period of conducting business activities is shorter – in the period concerned, together with details of their value, subject-matter, dates of performance and the entities for which such supplies or services were performed, with attached evidence specifying whether the supplies or services were or are being duly performed, whereas the said evidence includes letters of reference or other documents prepared by the entity for which the supplies or services were performed, or, for recurring or continuous supplies or services, are being performed, and where the economic operator is not able to obtain such documents for reasons beyond its control – the economic operator's statement; as regards recurring or continuous supplies or services, the letters of reference or other documents should be issued within the period of the last 3 months;
3) a list of persons delegated by the economic operator to perform a public contract, in particular persons responsible for the provision of services, quality control or management of construction works, together with details of their professional qualifications, licences, experience and education required to perform the public contract, as well as the scope of the activities they are responsible for and information about the basis for these persons' availably to the economic operator;
4) description of technical devices and organisational and technical measures applied by the economic operator to assure high quality, and the description of the economic operator's research facilities;
5) list of supply chain management systems and supply chain tracking systems which the economic operator will able to use to perform the public contract;
6) declaration of consent for the inspection of the economic operator's production and technical capabilities, and where necessary, the inspection of research resources and quality control measures which the economic operator is due to use – where the subject-matter of contract includes complex products or services, or in justified cases, in respect of special-purpose products and services;
7) a statement about education and professional qualifications of the economic operator or the economic operator's managerial staff;
8) a list of environmental management measures which the economic operator will able to use to perform the public contract;

9) a statement on the amount of average annual employment at the economic operator's establishment, and the number of managerial staff members in the last 3 years, and where the period of conducting business activities is shorter – in the period concerned;
10) a list of tools, plant equipment and technical devices available to the economic operator to perform the public contract, including information on the basis for disposing of such resources;
11) as regards product supplies: a) samples, descriptions or photographs of the products to be supplied, the authenticity of which must be confirmed by the economic operator at the contracting authority's request; b) a certificate issued by an independent entity authorised to perform quality control, confirming the conformity of the supplied products to specified standards or technical specifications;
12) a certificate issued by an independent entity dealing with the certification of economic operator's conformity to specified quality management standards, including accessibility for persons with disabilities, if the contracting authority invokes quality management systems based on relevant European standard series and standards certified by accredited bodies;
13) a certificate issued by an independent entity dealing with the certification of economic operator's conformity to the requirements of specified environmental management systems and standards, if the contracting authority invokes the eco-management and audit scheme referred to in Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC (OJ EU L 342 of 22.12.2009, p. 1, as amended), or to other environmental management standards based on relevant European and international standards, and certified by accredited entities.

4. THE OBLIGATION TO PREPARE THE ESPD AND THE USE OF EVIDENCE

Discussing the issues at hand, it is worth remembering that contract award procedures instituted after 18 April 2018 are subject to the economic operator's obligation to submit a European Single Procurement Document (further in this paper referred to as the ESPD) in electronic form with a qualified electronic signature affixed on it [Radwański 2001, 1107-123]. The European Single Procurement Document is a statement on tan enterprise's

financial standing and its technical and professional abilities for the purpose of public contract award procedures. Thanks to this document, economic operators do not need to produce full documentary evidence and multiple forms, which means a simplified access to public procurement. The ESPD is governed by the provisions of Article 59(1-6) of Directive 2014/24/EU and Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document. The ESPD is also regulated under the Public Procurement Law (Article 125). The ESPD is a statement filed by economic operators in all types of public procurement procedures. The ESPD is an economic operator's statement of no grounds for exclusion, confirming compliance with the conditions for participation in the procedure and the verification of selection criteria. The documents must be filed by every economic operator applying for the award of contract, also if economic operators file a joint application, and subcontractors on whose capacities the economic operator relies to demonstrate their compliance with the conditions for participation in the procedure. In line with the provisions of the PPL, the European Single Procurement Document must be prepared in electronic form and signed with a qualified electronic signature in order to be valid. Under the provisions of the Civil Code, to maintain the electronic form of a legal transaction, it is sufficient to make a declaration of will in electronic form and sign it with a qualified electronic signature, and what is important, declarations of will filed in electronic form are equivalent to declaration of will submitted in paper format [Pietrzykowski 2020, 41-49]. Under the Act of 17 February 2005 on the computerisation of operations of entities performing public tasks, an electronic document is a data set which constitutes a distinct meaningful whole, arranged according to a specified internal structure and saved on a digital data storage medium. The term 'electronic document' is also defined in Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ EU L 2014 No. 257, p. 73), in short "eIDAS", where in Article 3(35) it has been indicated that an electronic document is any content stored in electronic form, in particular text or sound, visual or audiovisual recording. Moreover, as laid down in Article 77(3) of the Civil Code, a document is defined as a medium of information which allows the reading of its contents. Issuer's signature is not a prerequisite to consider a given instrument as a document. On the contrary, it has been assumed that a signature is not a decisive factor as regards the existence of a given document [Ambroziewicz 2001, 106]. The contents of a document may be transmitted by any means available. These may be graphic signs, sound, or image. In turn, the medium of a document may have

various forms, including both paper and electronic forms.[12] We should bear in mind that economic operators may be excluded from a procedure or be subject to penal liability if, by providing information in the ESPD, they are guilty of misrepresentation, withhold information or are unable to demonstrate evidence to confirm their compliance with participation conditions. Optional exclusion criteria set out in Article 109 of the Act seem important in this context.[13] Thus, the contracting authority may exclude from contract award procedures an economic operator who is in default of its obligations to pay taxes, charges or social and health insurance contributions, unless such economic operator, before the expiration of a respective time limit for submitting requests to participate in a procedure or for submitting tenders, has paid due taxes, charges or social and health insurance contributions together with interest or fines, or has made a binding arrangement to repay such liabilities. This also refers to economic operators who are in breach of their obligations in the sphere of environmental protection, social welfare law or labour law. Exclusion can also be applied to economic operators in respect of whom winding-up proceedings have been instituted, bankruptcy has been declared, to economic operators whose assets are administered by a liquidator or court, to economic operators who are in an arrangement with creditors, where their business activities are suspended or they are in any analogous situation arising from a similar procedure under national laws and regulations where the procedure has been instituted, and to economic operators who are guilty of grave professional misconduct, which renders their integrity questionable, in particular where such economic operator, as a result of wilful misconduct or gross negligence, has failed to perform or

[12] Judgement of the Polish Court of Appeal in Szczecin of 18 June 2019, ref. no. III AUa 55/19, quote: "The parties' intention to enter into a contract for a specific task, which, as a rule, does not constitute the basis for statutory social insurance coverage, or the intentional use of such title of a contract, are not decisive factors in determining the legal basis of employment, if the circumstances related to the performance of such contract demonstrate, in a significant extent, the properties of another legal relationship. The actual legal relationship between the parties is identified on the basis of the conditions in which work has been performed, rather than on the basis of the title of an agreement or the parties' intention, which is subject to limitations set out in article 353(1) of the Civil Code."

[13] Judgement of Polish National Chamber of Appeal of 26 July 2021, ref. no. KIO 1804/21; quote: "The grounds for economic operator's exclusion arising from the provisions of Article 109(1) of the PPL are optional exclusion criteria. The word «may» used by the legislator indicates the aforementioned property. The obligation to exclude an economic operator due to the existence of optional grounds for exclusion occurs only where the contracting authority decides to apply them in a given procedure. The way such decisions should be announced as part of a procurement procedure is stipulated in Article 109(2) of the PPL, according to which where a contracting authority intents to exclude economic operators pursuant to Section 1, it shall indicate such exclusion criteria in its contract notice or procurement documents."

unduly performed a contract, which the contracting authority can demonstrate by appropriate evidence. Economic operators may also be excluded from procedures in the event of a conflict of interest within the meaning of Article 56(2) of the PPL which cannot be effectively eliminated otherwise than through economic operator's exclusion, while exclusion may also apply to economic operators who, for reasons attributable to them, have failed to perform a contract or has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting authority or a prior concession contract which led to early termination of that prior contract, damages, vicarious performance due to default, or the exercise of rights arising from statutory warranty for defects.[14]

CONCLUSIONS

An economic operator who, as a result of wilful misconduct or gross negligence, has misled the contracting authority while providing information that it is not subject to exclusion, and that it meets the conditions for participation in the procedure or selection criteria, which could have a material impact on the decisions made by the contracting authority as part of a contract award procedure, or who has withheld information or is not able to submit evidence supporting its standing, must be excluded from the public contract award procedure.[15] It should be stressed here that a specific

[14] Judgement of Polish National Chamber of Appeal of 23 July 2021; ref. no. KIO 1482/21; quote: "Withdrawing from an agreement or charging contractual penalties are some of the components included in the structure of Article 109(1) (7) of the PPL, and they are secondary or consequential actions. It is crucial and necessary for the contracting authority to demonstrate that a given economic operator has failed to perform a contract or has shown significant or persistent deficiencies in the performance of a contract, in the civil-law meaning of the notions, that such non-performance or undue performance relates to a substantive requirement under a contract, and that such circumstances have occurred for reasons attributable to the economic operator. Although withdrawal from a contract is a declaration of will of a constitutive nature, this does not mean that it cannot be defective or invalid. As any declaration of will whose legal effect depends on the fulfilment of specified conditions, in the classical sense, it may be successfully contested by the addressee."

[15] Judgement of Polish National Chamber of Appeal of 18 June 2021, ref. no. KIO 1299/21; quote: "Only the fact that the contracting authority has not envisaged the exclusion criterion referred to in Article 109(1)(8) of the PPL (pertaining to an economic operator who, as a result of wilful misconduct or gross negligence, is guilty of misleading the economic operator by providing information that it meets the conditions for participation in the procedure, which could have a significant impact on contracting authority's decisions, or to an economic operator who has withheld such information) makes the examination of circumstances from the perspective of this exclusion criterion ineffective."

document may not be classified as entity-related and subject-matter evidence in the course of a single procedure. In my opinion, the classification of a given piece of evidence by the contracting authority as entity-related or subject-matter evidence depends on the purpose for which it is requested.[16] Consequently, as regards the level of types of evidence, the classification of a piece of evidence to the category of documents pertaining to a participating entity or to subject-matter must be conditional upon the role which the contracting authority wishes to assign to a document by requesting it. It is also vital to note that, in relation to the existing legal status, some pieces of evidence have been classified differently as entity-related evidence, while previously they belonged to the group of subject-matter evidence, which can bear some complications related to contracting authority's demands specified in procedure documents. Therefore, it should be asserted that entity-related evidence refers to facts which an entity needs to demonstrate as part of the contracting authority's procedure, whereas subject-matter evidence includes documents confirming compliance of the offered supplies, services or construction works with the requirements, properties or criteria specified in the description of the subject-matter of contract.

REFERENCES

Ambroziewicz, Albert. 2001. "Podpis elektroniczny - pojęcie i funkcje w obrocie." *Przegląd Sądowy* 1:106-15.

Encyklopedia Popularna PWN. 2022. Warszawa: Wydawnictwo Naukowe PWN.

Jakubecki, Andrzej. 2006. "Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego." In *Czterdziestolecie Kodeksu postępowania cywilnego. Zjazd Katedr Postępowania Cywilnego w Zakopanem (7-9.10.2005 r.)*. 361-68. Kraków: Zakamycze.

Kaczorowski, Bartłomiej (ed.). 2004. *Leksykon PWN*. Warszawa: Wydawnictwo Naukowe PWN.

Mazurek, Grzegorz, Eliza Grabowska-Szweicer, Magdalena Michałowska, et al. 2011. *Odrzucenie oferty wykonawcy*. Wrocław: PRESSCOM.

Nowicki, Józef E., and Aneta Bazan. 2015. *Prawo zamówień publicznych. Komentarz*, Warszawa: Wolters Kluwer.

Piasecki, Kazimierz. 2016. "Komentarz do art. 1-366." In *Kodeks postępowania cywilnego*, vol. 1, edited by Kazimierz Piasecki, and Andrzej Marciniak, 90-101. Warszawa: C.H. Beck.

[16] Judgement of Polish National Chamber of Appeal of 4 November 2011, ref. no. KIO 2273/11; quote: "The provisions of the PPL and related secondary legislation governing the documents required from economic operators must be interpreted taking into account the purpose for which they are submitted. An extract from the National Court Register (KRS) is to confirm the status of the entity in the context of applying for the award of contract."

Pietrzykowski, Krzysztof. 2020. *Kodeks cywilny. Komentarz*. Vol. l. Warszawa: C.H. Beck.

Radwański, Zbigniew. 2001. "Elektroniczna forma czynności prawnej." *Monitor Prawniczy* 22:1107-123.

Radwański, Zbigniew (ed.). 2008. *Prawo cywilne – część ogólna. System Prawa Prywatnego*. Vol. 2. Warszawa: C.H. Beck.

Uliasz, Marcin. 2008. "Art. 3." In *Kodeks postępowania cywilnego*, nb 4-7. Warszawa: C.H. Beck.

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WAYS OF REFORMING THE SYSTEM OF PUBLIC FINANCE IN POLAND AS AN IMPLICATION OF THE EFFECTS OF THE COVID-19 EPIDEMIC. FINANCIAL AND ECONOMIC APPROACH

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Abstract. Public finance management has a very global nature. Here decisions are made that determine everything related to collecting and allocating public means. However, the public finance system need to realize that this level is also highly entangled politically, with political transformations accompanying changes of governments and cooperating party coalitions. This accounts for the fact that some general recommendations are formed, specifying the ways of managing public means. The aim of the article is to identify ways to rationalize the reform of the public finance system in Poland. Induction was used as the main research method. It consists in drawing general conclusions or establishing regularities based on the analysis of empirically established phenomena and processes. The results of the presented content are proposals to optimize financing and management of the public sector in Poland. The main conclusion from the analyzes carried out assumes that the structure of public expenditure in Poland is characterized with high share of expenditure on social care, especially on allowances related to gaining and allowances for the family of a deceased person. Relatively high public expenditure is also allocated to education, mostly on higher education, and national defense. At the other end of the scale, categories which receive relatively little financing in Poland include: healthcare, with particularly low level of investment expenditure, and general state activity (public administration and interests on public debt).

Keywords: public finance; new public management; optimalizations; rationalization

INTRODUCTION

The recent wave of increased COVID-19 cases has caused economists to massively verify forecasts of economic growth in 2021. Economists predict that the Polish economy in the first and second quarter will remain in a

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fairly large negative area (around -3.3 percent on an annual basis). In their opinion, the entire year will end with a decline in GDP of -2.9 percent. (own calculations based on data from the Ministry of Finance). To mitigate the financial impact on citizens and the economy as a whole, the European Commission adopted an Action Plan providing a comprehensive economic response to the coronavirus pandemic, made full use of the flexibility of EU fiscal rules, revised existing state aid rules and launched a Coronavirus Response Investment Initiative, with a budget of 37 billion euros to provide liquidity to small businesses and the healthcare sector. The European Commission has proposed far-reaching measures to mobilize every euro from the EU budget to protect life and livelihoods. The Commission has launched a new initiative called SURE – Support to Reduce the Risk of Unemployment Due to an Emergency. This action is designed to help preserve jobs and support families. The Commission also proposed redirecting all available structural funds to actions in the context of the coronavirus. Support will also be given to farmers and fishermen, as well as those most in need. The € 3 billion EU Solidarity for Health initiative will meet the needs of Member States' health systems. Support primarily requires rationalization of public spending to reduce social spending and reduce tax burdens. Further savings should be sought through a wider introduction of NPM (new public management) to the public sector [Bogacki and Wołowiec 2021, 515-27].

The costs of the day-to-day operation of central institutions constitute 20% of the state budget. In 2020, the administration spent over PLN 88 billion on its functioning. 68% of this amount was wages. If we reduce the current savings only to a temporary cut in expenses, in a year public institutions will not have enough money for their current operations (own calculations based on the data of the Central Statistical Office). Public spending has been improving for several years. The increase in the share of current expenditure in 2020 resulted only from the reduction of the investment budget. Actions related to counteracting the effects of the crisis have shown that significant savings can be made in central administration units without significantly reducing their usefulness for citizens. Another necessary element on the way to rationalizing the management of public funds will be limiting current expenditure for investments.

Public means should be managed in a way ensuring their effective use, that is they should maximally contribute to the satisfaction of social needs of various social groups and layers. Reaching the above-mentioned areas of public finance management we need to point out the essence and characteristic features of this process within such basic institutions as state budget and budgets of self-government units on all levels. From this point of view it is necessary to indicate what management of state budget means should be based on.

Traditional budget, the main element of whose structure is budget classification, must evolve towards a "task-project oriented" budget, flexible and effective to manage. Here we can only add that at present we have strict framework of budget management on one side and a system of particular first-degree keepers on the other side, which significantly limit the possibility of rational management of public means. A very important area of managing public means is management of their surpluses or shortages. Since a shortage – in the shape of budget deficit transforming into public debt – is a common phenomenon, therefore we need to pay special attention to it. Here it is important to distinguish a flow nature of income and expenditure, which concerns a specific period of time, such as a calendar year, and the accumulating deficit, which leads to considerations devoted to problems connected with public debt [Wójtowicz 2014, 73].

Neither the phenomenon of budget deficit, or public debt can be treated as "action" phenomena (that is actions are taken aimed at, for example, reducing deficit). This requires a long-term approach and calls for long-term, not one-off management. That is why management of the above phenomena is so vital. It may turn out that from the rational and effective point of view it is necessary to use public means in a way that temporarily increases deficit. Such a decision must not be political; it should have economic and social foundations. This area of public means management is of fundamental importance and requires application of appropriate methods, that is methods tailored to the nature of the regulated phenomena. The above comments referred to the state budget can be applied in budgets of self-government units. However, in this case public means management refers not only to decision-making bodies, such as councils of relevant levels, but is supported institutionally in Regional Audit Chambers [Ziółkowska 2012, 50-52].

1. LITERATURE REVIEW

Containment measures to halt the spread of the 2019 coronavirus pandemic entail large short-term economic costs. This column attempts to quantify these effects using daily global data on real-time containment measures and daily indicators of economic activity. Over a 30-day period from implementation, containment measures have, on average, led to a loss of about 15% in industrial production [Baldwin and Weder di Mauro 2020, 2-20].

Macroeconomic policy measures have however mitigated some of these economic costs. Stay-at-home requirements and workplace closures are most effective in curbing both infections and deaths but are also associated with the largest economic costs [Baker, Bloom, Davis, et al. 2020]. Governments and central banks around the world have implemented unprecedented

economic measures in response to the COVID-19 pandemic. Using IMF Policy Tracker data on discretionary fiscal and monetary measures taken in response to COVID-19, we find that the measures were effective in mitigating some of the economic costs of containment. Containment measures have had a much larger adverse impact on economic activity in countries with relatively small fiscal packages – equivalent to a 22% decline in industrial production [Barro, Ursúa, and Weng 2020, 3-18]. Similarly, the adverse impact of containment measures was mitigated in countries with large cuts in policy rates [Martyniuk and Wołowiec 2021, 15-26].

An analysis of the short-term trade-offs between minimising health risks and economic losses is necessary to inform the discussion of how countries should open-up their economies as well as how best they can respond to any second wave of infections. We therefore analyse the effects on economic activity, infections, and deaths, of different containment measures [Coibion, Gorodnichenko, and Weber 2020, 1-19]. Economists find that among different types of containment measure, workplace closures and stay-at-home orders are the most effective in flattening COVID-19-related infections and deaths, but they are also the costliest in terms of their impact on economic activity. Less costly containment measures, such as school closures and restrictions on gathering size, are successful in reducing COVID-19 infections, but less effective in curbing fatalities [Eichenbaum, Rebelo, and Trabandt 2020, 1-27].[1]

Rationality of public finance is impossible without a clear model concept of the state, its role and consequent scope of public tasks realized. Unfortunately, due to the lack of an unambiguously accepted and consistently implemented vision of the state, both the socio-economic shifts and the attempts to reform the public finance sector throughout the transformation process in Poland have been characterized by a far-reaching lack of cohesion – governments and parliaments have changed, political doctrines have changed, individual manifestos have turned out to contain internal contradictions [Szołno-Koguc 2011, 384-95]. Rationality means basing actions on scientific motives or principles – a rational action is a wise, judicious action which is in accordance with the knowledge one possesses. From an economic point of view rationality is considered in the context of the realization of the defi ned goals of an action by the managing entity. Rationality of management means human activity consistent with the state of knowledge of the surrounding reality, enabling the best social and economic results to be achieved [Idem 2009, 17-20]. Rationality of management is inextricably linked with effectiveness. Effectiveness is a narrower concept, in the economic sense it takes into account the balance of efforts and results, and not all of these, and not

[1] World Bank, *The economy in the time of COVID-19*, LAC Semiannual Report, April 2020.

in every situation, can be measured and expressed in monetary terms. This is particularly important in the context of managing public funds – indeed, they are allocated not so much for a direct economic effect as for the public good (interest) [Wojciechowski and Wołowiec 2021, 101-11].

Rationality thus means not just effectiveness, but also the social justice aspect [Szołno-Koguc 2015, 87-90]. In the economic sense, two models of rationality can be differentiated – instrumental rationalization understood as striving to increase the extent of activity while simultaneously improving its effectiveness, and teleological rationality, which is expanded to cover the judicious shaping of goals [Musgrave and Musgrave 1976, 30-35]. The first model concerns the optimum breakdown of available funds for realizing a defined goal, in light of the subject's knowledge. The second model involves ensuring that actions are consistent with the existing regulations and recognized standards, which is crucial with regard to public finance [Stiglitz 2001, 2-15]. The supply of public money is, by definition, limited (there are limits to both taxation and public debt), so public spending must therefore also be limited. Rationality of public finance is thus not expressed exclusively in the size of public spending, as this parameter does not provide an adequate basis to assess activity financed from public funds, particularly in the context of the better adaptation of the extent and standard (quality) of this activity to the needs of a given community. This rationality is more likely to lead to an evaluation and choice of goals, and to the formation of a structure of public spending allocated to achieving those goals [Buchanan 1997, 12-24].

Poland needs more effective budget policy tools. Budget planning should go beyond the horizon of one year, which will contribute to the effective distribution of public funds in subsequent budget years (not covered by the Budget Act). It is also necessary to rebuild the processes of budget planning and execution, which are currently implemented in two systems (the so-called traditional and task (project)-oriented). This will contribute to increasing the efficiency of expenses and creating the space necessary to finance new public tasks. Further reforms mean further challenges taken up in search of rational public finance, a system of collecting and spending public money which is consistent with scientific principles and relevant to the conclusions drawn from practical experience in this and other countries. In addition, the changing social and economic reality entails changes to the approach, a redefinition of priorities, appropriate adaptation of structures, procedures and above all of the flow. An analysis of previous experience proves that it is fruitless to seek rationality in public finance, as its system will never fulfill its role properly without a clear and plainly defined vision of the state. It is the realization of that vision which is served by operations involving collection and spending of public funds [Buchanan and Musgrave 2005, 13-16].

2. GENERALIZATION OF THE MAIN STATEMENTS

The present shape of the contemporary public services in the world was greatly affected by the concept of New Public Management. It originated in Great Britain. In the 1980s the organization and management in British public services was subjected to the pressure of changes. New concepts of management in public sector were created, later to become an inspiration for many OECD countries to reform their public administration. It was visible that the fundamental change postulated by New Public Management was the way of financing and the style of management as well as clear expression of an organization's goals and their accomplishment. It was also clear that the model aimed at increasing steering ability of the system of public services. Over recent years the above assumptions have been modified and developed. As a result, organizational paradigms for reforming public institutions were created. Four concepts were developed, on which reforms were to be based, within the New Public Management [Wołowiec 2021a, 78-90]: Model NPM 1. Increasing effectiveness; Model NPM 2. Decentralization and "lean public sector"; Model NPM 3. In search of excellence; Model NPM 4. Public service orientation.

The recent decades have been characterized not only by significant development of the third sector, but also a growing participation of civic movements and non-profit organizations in planning public policies nationwide (as well as in the whole EU) and the growing importance of social activity in local development. This trend was noticed in the European Union, where the principles of subsidiarity, partnership and social dialogue postulate gradual increase in the scope of cooperation between public institutions and civic society organizations. Therefore the fundamental question is not "Should we cooperate?", but "How should we cooperate?" The state plays two, partially independent roles in the system of inter-sector cooperation.

First of all, the state is one of actors of this cooperation, having interactions with other actors (state – business sector, which is also defined as public-private partnership, and state – non-governmental sector, that is public-social partnership).

Secondly, the state – as the lawmaker – determines the principles in which the public sphere functions and the rules of cooperation between actors. This undoubtedly gives the state a privileged position, which, in a democratic system, is partly balanced (or at least it should be balanced) by the principle of the limited nature of the state power.

In Europe we can observe two major models of cooperation between public administration and non-governmental organizations in the area of public benefit (social benefit): the German model and the English model [Wołowiec and Bogacki 2021, 95-108].

The German model is characterized by (1) full implementation of the principle of the state subsidiarity, operationalized in the legal system as the principle of precedence of social entities as far as provision of social services financed with public means is concerned, and (2) corporation nature of the relationship between public administration and non-governmental organizations. The latter is reflected in the high level of federalization of the third sector and the actual establishment of structures compatible with public administration structures, able to negotiate terms of cooperation on each level of the administrative structure of the state.

The English model is characterized by (1) greater opening to competition among service providers, and subsequently greater role of market (or quasi-market) mechanisms in the system of public task commissioning, as well as (2) the resulting lack of preference for non-governmental organizations. It is no coincidence that in Great Britain they talk about cooperation between the state and "the independent sector", defined as all *for-profit* and *non-profit* entities interested in tenders for performing public tasks. What is more, the principles of inter-sector cooperation are shaped by public-private partnership rather than public-social partnership. Both models have their strengths and weaknesses, well diagnosed and analyzed in subject literature. It should be noted that standardization in the German model is directed at (1) maintaining high quality of social services and (2) ensuring continuity of their provision. The latter leads to developing a job security system for non-governmental organizations. In the English model, on the other hand, standardization mostly serves effectiveness, in practice boiled down to lowering costs of maintaining the system of services for the society (social services).

Both models use standardization of cooperation for professionalizing the third sector. However, this is a different type of professionalization. Non-governmental organizations in Germany professionalize and become similar to public institutions, adopting their standards and corporate culture. On the other hand, the English version of professionalization means that non-governmental organizations become similar to corporations, both in management (seeking profit or financial surplus) and working culture. The side effect of the German model is the above-mentioned job security system of social organizations, whereas in the English model – commercialization of the non-profit sector. In case of both states the currently implemented recovery program consists in attempting at popularizing the elements of the competitive model in their own model. Great Britain is introducing elements of negotiations, typical for the corporate approach (this is the already mentioned idea of a pact about), and Germany – elements of competition, opening one of the segments of social services market for business entities. When initiating work on standardizing social services it would be advisable to further pursue the development of compromise solutions,

combining elements of both models. Service standardization is a process of gradually developing answers to the question of what, in what quantity and on what level could be proposed within a particular service for specific individuals and groups, adequately to their identified needs and in accordance with the requirements of their rational satisfaction.

Standards are created because they perform a series of specific, useful functions, such as: 1) normative function – formally and organizationally standards determine the model subordination of the relations between technical-organizational and quality criteria for providing services and needs in this scope; 2) stimulating function – standards as a set of factors affecting the shape and principles in which the social services market operates; 3) economic function – through criteria of costs, including unit cost, standards determine rationality of the provided service; 4) social function – standards organize the relationship between the way in which social services infrastructure operates and the level of social services satisfaction (they determine the quality of life factor).

The standards can be described taking into account their basic, most characteristic features, including such standard characteristics as: a) minimal – recommended; b) static – dynamic; c) deductive – inductive; d) values – procedures; e) external – internal; f) ratio-based – mechanism-based; g) building corporate culture – providing specific services.

Basic methods of constructing standards include: a) inductive-negotiation method (standard built on the basis of an agreement with the buyer, providers, clients – model standard); b) internal regulations (acceptable self regulation of a given provider of a service or task); c) concession (administrative decision); d) quasi – market (standard is defined or depends on the client); e) administrative (on the side of an entity ordering a given service outside); f) statutory (for example – regulation).

The most important principles accompanying creation of standards are: a) adequacy – relative consistency between the needs of particular groups of clients and the offered scope and quality of services; b) flexibility – using methods, techniques and ways of satisfying needs depending on the situation, within the limits guaranteeing keeping original significance and goal of the performed task; c) framework – possibility of movement within the process of satisfying needs in a relevant, pre-defined range of norms and standards, allowing us, thanks to the possibility of choosing criteria, to act successfully for a particular client or group of clients; d) coherence – correlation of solutions adopted and applied on various levels of managing the social sphere.

The problem of creating standards of social services is an important aspect of the state policy towards the third sector as well as an important element determining the way non-governmental organizations function.

Problems related to standardization of social services comprise: (1) Diagnosing the needs of social groups and individuals: a) the problem lies in attachment of public administration units to obligatory tasks; b) the problem is "the privileged position" of the tasks which have good formal and legal structure and guaranteed financing every year; c) the chance for a new diagnosis lies in applications submitted by non-governmental organizations for open tenders. (2) Formulating goals and priority tasks: a) most frequently, without any diagnostic basis, tasks are chosen for financing if they were lobbed by organized groups of interest (organizations, political parties, clients); b) there is no diagnosis or determined mechanisms to set priorities; c) the problem might also be in widening the list of priorities *ad libitum*, which makes prioritization pointless. (3) Building social strategies and programs: a) lack of strategy in social sphere while there are many strategies of economic development; b) lack of mechanisms of socialized strategy building in social sphere, both long-term and short-term ones; c) lack of strategies and programs concerning priority goals.[2]

The potential for further growth is significant. As we can see from *McKinsey* analyses, if, in terms of productivity, Poland managed to reach the level of EU-15, the economy could double in size, that is reach the size of the present Italian economy. Today, value added produced by Polish economy equals EUR 705 billion according to purchasing power parity. Reaching the productivity level of EU-15, it could grow by EUR 607 billion, thus exceeding EUR 1300 billion. A significant increase in productivity in Poland might be necessary to keep economic growth, especially due to the situation on the labor market and negative macro-economic trends, further aggravated by demographic problems. Assuming the extreme scenario, in which productivity does not change compared to the present level, for Poland to develop by 3% annually till 2030, the labor market would have to be joined by 7.2 million employees.[3] This number does not reflect the predicted decline of the population in production n age by nearly 2.1 people. In order to satisfy the demand for workers, all Poles aged 15-64 would have to be professionally active. In *McKinsey Global Institute* analyses two main sources of economy development are mentioned: increasing number of workers and productivity. Productivity, on the other hand, has three sources of growth: investment in tangible capital, human capital and total factor productivity (TFP). Analyzing the Polish economy growth in 2004-2020 by the above-mentioned factors, we can see that apart from the growing number of workers, growing TFP also played a significant role here (TFP contribution to total growth accounted for a quarter of this growth). This may indicate that companies are using their resources more and more effectively – in

[2] Public finance management, the Chancellery of the Prime Minister, 2014.

[3] Eurostat, Global Innovation Index 2018.

Poland these are usually international corporations investing in intangible capital. However, according to the model of growth proposed by *McKinsey Global Institute*, in the future the quality of the human capital will be more important. Over 40% of the whole economy growth in 2018-2030 may come from this source. Greater share of workers with higher education degrees, qualifications and experience will translate into greater productivity.[4]

It is worth emphasizing that productivity growth is related to competitiveness of the economy and is a key factor positively affecting the welfare.

Firstly, productivity growth and employment growth are often positively correlated. This is clearly visible in Poland, where for the past 5 years both productivity and employment have been growing steadily.[5]

Secondly, in the macroeconomic scale, in many sectors productivity growth comes from higher value of manufactured goods and growing income of companies.[6]

Thirdly, in the microeconomic scale, productivity growth in a company translates into bigger profits (thanks to higher value of manufactured goods and lower cost of their production), which affects clients (lower prices), employees (higher salaries), owners (bigger profits), thus generating economic growth thanks to bigger demand, investments and employment potential (McKinsey & Company, 2017).

The Ministry of Finance estimates that in 2020 Poland's GDP will fall by approximately 3.4%, the sector deficit will account for 8.4% of GDP, public debt calculated with the EU methodology will reach 55.2% of GDP and inflation CPI will reach the level of 2.8% - this data can be found in the latest Convergence Program Update (CPU) adopted by the government on Tuesday.[7]

In the presented macroeconomic scenario, the basic assumption is that limitations comprising society-wide quarantine that are essential for the economic operation will be gradually eliminated, which is coherent with the assumptions of the European Commission (Global Innovation Index 2018). The decline of economic activity in the 2nd quarter of 2020. The Ministry of Finance predicts that in the 3rd and 4th quarter of 2020 the decline of economic activity (quarter-to-quarter) in nearly all sectors of the economy, with the most steep ones, inter alia, in hospitality and catering sectors, activities related to culture, entertainment and recreation, transport

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[4] International Monetary Fund: Republic of Poland – selected issues, 2019.

[5] European Semester: Country Report – Poland, 2019.

[6] Analysis on the basis of data of Central Statistical office and McKinsey Global Institute, Outperformers: High-Growth Emerging Economies and the Companies that Propel Them, 2018, 121.

[7] Convergence program. 2020 Update, Ministry of Finance, 2020.

(especially passenger transport), real estate services and in trade. As a result, in 2020 GDP will decline by 3.4%, for the first time since the beginning of the 1990s. Private consumption will fall in spite of maintaining the growth of disposable income, which will result in further growth of savings held by households (Strategy for Responsible Development until 2020, Ministry of Finance, 2020). Also investment activity will decrease, especially outside the sector of government and self-government institutions. Strong decline of foreign demand for goods and services will negatively affect exports. It was assumed that GDP in the EU countries, that is on major export markets for Poland, will fall by 5.1%.

The dynamics of investment in the sector of government and self-government institutions. The Ministry of Finance predicts that the dynamics of investment in the sector of government and self-government institutions in 2020 will be 4.3%. It is estimated that investments of the sector of government and self-government institutions, after a slight nominal decrease in 2019 (by 2.0% year-to-year) will remain on a similar level in relation to GDP in 2020, that is they will reach 4.3%, and will support the economy in return to the economic growth path after the epidemic threat is eliminated.

The worsening situation on the labor market. The Ministry of Finance did not provide any forecast for the unemployment rate in its CPU. It was only pointed out that visibly weaker economic activity will further worsen the situation on the labor market. The number of the employed will fall, the dynamics of nominal remunerations will drop, the unemployment will grow. It was also assumed that companies will try to keep employment at the cost of lowering the salary dynamics. Preservation of jobs will be aided by the activities proposed by the government within the Anti-Crisis Shield.

The growth of deficit in the sector of government and self-government institutions. The Ministry of Finance forecasts the growth of deficit in the sector of government and self-government institutions from 0.7% of GDP in 2019 to 8.4% of GDP in 2020. The situation of the sector of government and self-government institutions in 2020-2021 will be determined by the forecasted macroeconomic situation and the consequences of decisions taken in order to counteract the spread of the COVID-19 pandemic. The lockdown of some sectors of economy has a significant negative influence on the flow of income in the sector in 2020, whereas activities introduced under the anti-crisis shield, directed mostly at financially supporting enterprises, security of employees, supporting the healthcare system and public investment, will result in abrupt expenditure increase. The size of the public finance imbalance in 2021 will depend on the length of the period in which the economy will operate under limitations, the speed of eliminating such limitations, and the final size of activities undertaken in connection with the pandemic [White 2013, 15-53].

The share of tax income in GDP will decrease**.** The Ministry of Finance predicts that after the decreased tax income in GDP in 2020, in 2021 the situation should improve. Such strong and sudden worsening of the economic environment forces us to adopt a conservative assumption concerning the size of additional income from activities aimed at tightening the tax system. However, it is assumed that the changes tightening the budget that were introduced in previous years will limit potential threats of abuse in this area. The anticipated acceleration of economic activity in 2021 should positively affect the level of tax income. We can expect that whereas in 2020 the share of tax income in the GDP will decrease, in 2021, thanks to the already-mentioned mechanism of pro-cyclicality this share should improve. The authors of CPU pointed out that the forecast of the sector income in 2020 did not take into consideration one-off income from OFE (Open Pension Fund) transition fees due to the fact that the reform was moved in time. Moreover, in the forecast of income, due to the movement of the retirement system reform, consisting in transforming Open Pension Funds (OFE) into Individual Retirement Accounts, one-off income from the transition fee was not reflected. The influence of these actions on Social Insurance Fund was not reflected, either [Walczak 2019, 5-15]. As we can see in the estimates of the Ministry of Finance, the debt in the sector of government and self-government institutions in 2020 will account for 55.2% of GDP. Public debt management in 2020 will take place in conditions of high deficit of the sector of government and self-government institutions, expected uncertainty on financial markets resulting most of all from the macroeconomic environment, the effects of the fight against the COVID-19 epidemic, and the monetary policy of the National Bank of Poland and the major central banks, including the European Central Bank and Fed. With the adopted assumptions concerning the budget activities taken in order to limit the effects of the epidemic, the debt of the sector of government and self-government institutions in 2020 will account for 55.2% of GDP. Changes in the debt-GDP relation in 2020-2021 will, most of all, be the consequence of the state borrowing needs and the pace of GDP growth. Debt levels will mostly result from changes in the debt of central subsector. Annual Convergence Program Update is an element of the process of budget supervision in the EU and an obligation for all member states of the European Union which do not belong to the euro zone. The program has been prepared in line with the guidelines concerning programs of stability and convergence of the EU member states [Wołowiec 2019, 467-502].

Changes in the system of financing self-government units. The package of protective solutions for self-government stipulated, inter alia, doubling the share of districts in income from the management of the Treasury real estate since 1st April 2020. It also introduced the possibility of imbalance

in the current side of the self-government unit's budget, reflecting the value of the actual loss of tax income, inter alia, from PIT, CIT, local taxes: property, agriculture, forest. It also stipulated the introduction of the possibility of passing the installments of the education, compensatory, balance and regional parts of the general subvention earlier, which is to improve the liquidity of self-government units. Another solution consists in making the expenditure of the means from the so-called 'bottle-cap fund' more flexible in 2020. The money from this fund can be allocated to counteracting and cushioning the effects of COVID-19.

The payments received by the state budget from self-government units whose tax income exceeds income indicators, the so-called "Robin Hood fund", are passed to the specific reserve of the state budget, financing the general subvention. Their amounts are calculated on the basis of tax income of a given unit from the period two years before the current budget year. According to Article 29 of the Act on Territorial Self-Government Units' Income, municipalities in which the tax income indicator per 1 inhabitant exceeds 150% of the indicator determined analogically for all municipalities in the country, make payments to the state budget for the balancing part of the general subvention for municipalities (in case of districts this threshold is set at 110% of the indicator determined for all districts, whereas in provinces – 125% of the indicator determined for all provinces). The means from this fund are then passed – as the balancing part of the general subvention – most of all to self-government units which are financially weaker. The authorities of those self-governments which have to pay particularly large amounts of money have been criticizing the method of calculating for a long time and they alarm the government that they pass too large amounts. Since in 2020 income fell significantly and there was a need to allocate large amounts to fight the corona virus, self-governments began to intervene, pressurizing the government to compensate for the loss of income. One of the main proposals was to exempt them temporarily from the "Robin Hood fund". In the Act on counteracting the effects of the COVID-19 epidemic, covering the support for self-government, the government proposed only postponement of the obligation to pay April and May installments to the second half of the year. According to the position of the Association of Polish Cities, the current regulations concerning this fund require significant changes. The Association, in its opinion on the above-mentioned draft of the Act, proposes the following provision: in 2020, beginning from 1st April, and in 2021, self-government units shall not make payments to the state budget specified in Article 7 section 2 of the Act of 13th November 2003 on income of self-government units[8] [Wołowiec 2018, 129-40].

[8] Journal of Laws of 2020, item 23 as amended.

CONCUSIONS

First of all, smoothing away the difference in productivity of the Polish economy to reach the average EU-15 level. The productivity of the Polish economy is, on average, 50% lower than productivity of Western Europe economies (EU-15). The growing significance of productivity in Poland may be necessary if we want to preserve the economic growth, especially due to the challenges on the labor market and unfavorable demographic trends. In order to achieve this goal it is worth focusing on improving the position of Polish enterprises in the value chain, which means concentration on more complicated processes which generate higher value added, such as production of advanced components instead of only assembling them, for example in cars or household equipment. Another requirement is to develop exports, which already account for over half of the Polish GDP. It is worth concentrating on goods in which we have already gain competitive edge. An example here could be our exports of cosmetics, which have increased nearly fivefold over the past 15 years, or production of yachts, where Polish boats accounted for over 70% of the total value of yacht exports in the EU.[9] Productivity will also be improved by increased automation, for example in the industrial sector – the application of machine learning and Internet of Things in predictive maintenance of appliances and machines may increase productivity by as much as 20%. In the macroeconomic scale the goal should be to invest mainly in high productivity sectors, therefore also preparing workers and supporting them in finding jobs in more productive sectors of the economy, for example thanks to trainings, information campaigns or financial incentives.[10]

Investment growth and capital provision. The share of investments in the GDP fell from 20.1% in 2015 to 18.2% in 2019 (Ministry of Digital Affairs, 2019, GUS, 2019, World Bank: Doing Business, 2019). The 18% of GDP level of investments gives Poland only the 24th place in the European Union. A relatively low level of private and public investment limits the growth rate. According to *McKinsey* estimates in 2030 we might have a shortage of means for investment in the amount of EUR 75 billion.[11] The growth of domestic deposits should be supported by tax incentives, which will encourage companies and households to invest and/or save. The interest of households in investment may also be increased thanks to information campaigns on capital markets and offering investment options with various risk levels.[12]

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[9] Comtrade Database Digital McKinsey, Smartening up with Articial Intelligence (AI) – What's in it for Germany and its Industrial Sector? UN, 2017.

[10] McKinsey analysis on the basis of Eurostat data; Eurostat, data for 2018 and 2019.

[11] Poland 2030 – A chance to jump into the economic league, McKinsey & Company, 2019.

[12] State of self-government units finance. Report for the Joint Committee of the Government

On the other hand, in order to ensure a higher level of direct foreign investments, we need to concentrate, inter alia, on providing effective information on favorable investment conditions in Poland [Samuelson and Nordhaus 2004, 52-56]. The opening of large infrastructural investments to foreign capital and encouragement to co-invest (for example in the form of public-private partnership and other forms of investment cooperation), as well as streamlining the administration responsible for servicing investments, especially coordination of activities of government institutions, may result in the growing interest of foreign investors [Stiglitz 2001]. Capital can be encouraged to invest in the domestic market through partnerships with global financial institutions, as a supplement to activities of local administration and business "diplomacy" [Rutkowski 2015, 277-85; Sawicka 2010, 60-62].

Increasing innovativeness. Expenditure on research and development as percentage of the GDP has not increased significantly since Poland's accession to the EU. In 2004 it accounted for 0.6% of the GDP, and since 2018 it has been only 1.8%. In the EU the average level of such expenditure is twice as much. Low level of expenditure on research and development in Poland results in low level of economy innovativeness [Sawulski 2016, 15]. In the Global Innovation Index Poland occupies the 24th place in the EU. In order to stimulate innovativeness it is worth supporting the creation of innovative enterprises, using for example business incubators. On the other hand, promotion of Poland as location for research and development centers of large corporations may provide, through access to capital and trained staff or provision of financial incentives, inter alia financing of part of research costs.[13]

Investment in human capital. The number of people who are professionally active fell by 200 thousand in total in 2015-2018. Investment in human capital will allow us both to increase productivity in sectors and to achieve free flow of human capital to more productive industries. Another vital area is the fight with negative demographic trends in the labor market. Their effects can be counteracted, inter alia, by increasing the professional activity ratio among women. Another solution may be to increase employment flexibility and to relieve people of caring activities, which are mostly performed by women, by offering better access to crèches, kindergartens or retirement homes.

Business support, state of public services. The quality of public services or the ease of doing business have not changed significantly over the past years. In the "Doing Business 2019" ranking Poland still occupies a place

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and Self-Government for the session on 17th July 2019, supplemented after the debate at the meetings of the Committee and Team, developed by A. Porawski and J. Czajkowski, Związek Miast Polskich, Poznań 2019.

[13] World Bank, Doing Business, 2019.

in the fourth ten among 190 countries. Keeping the fast rate of growth depends on many factors, such as easy of doing business, an effective tax system or modern transport, energy and telecommunication infrastructure. In these areas Poland has much to improve. In order to support development of business it is worth simplifying and shortening administration and court procedures, including, inter alia, simplification of the tax system, provision of legislative stability or a guarantee of construing ambiguous tax regulations to the taxpayer's advantage. Also investments in energy solutions limiting our energy demand and in renewable energy sources will be of vital importance. The factors that contribute to the improvement of the living standards of inhabitants also contribute to the economic development of the country. Therefore projects directly related to nature protection, such as supporting sustainable (circular) economy or developing strategies for environment protection and reflecting them in government programs may become a top priority. This also concerns ensuring appropriate level of expenditure on health, its effective use, better coordination of healthcare and prevention, taking into account promotion of a healthy lifestyle.

Financial problems of the self-government sector [Wołowiec and Bogacki 2019, 7-27]. The Act on Self-Government Income, passed in 2003 and still valid, assumed increasing the amount of own income, including share in income from PIT and CIT taxes, while decreasing the scope of subsidies and eliminating the road part of the general subvention. It was assumed that it would result in increasing financial independence of self-government units and stronger ties between their financial situation and the economic cycle of the country. The Polish self-government reform set a number of tasks for local and regional communities, the most important ones being local and regional development. This is manifested in the following data – investment expenditure of decentralized budgets reached over PLN 535 billion (cumulatively) in the period from 2004 to 2020, thus exceeding considerably investment expenditure of the central budget. Self-governments' own investment potential (gross operational surplus) in this period was PLN 232.8 billion, which means that 56% of investment expenditure of self-government units were financed with the means obtained from other sources, including repayable instruments (mostly loans) [Wołowiec 2021b, 7-20].

Most of the contracted obligations (PLN 113 billion) has already been paid back, which accounts for the fact that net operational surplus over the past 15 years was only PLN 109.7 billion. There is still around PLN 65.1 billion to be repaid. The summary of data provided below shows that self-government units obtained over PLN 170 billion for investments from other sources (mainly from the EU funds). Taking these proportions into account it must be emphasized that each decrease of the operational surplus of the self-government sub-sector will result in over 2.5-fold decrease of the

investment level in this sector (less funds for own share and lower creditworthiness). This will also lead to the decline in the tax income for the state (especially VAT tax).

Recently new factors have emerged which account for the growing current costs of self-government sub-sector. These are: prices of energy, construction materials and consumables, prices of services, fees for using water resources, etc. This translates not only into current expenditure of local authorities, but also affects the level of prices of local public services. An additional problem concerning current expenditure of local authorities lies in forcing self-government units (districts, cities with district rights and provinces) to take over debts and losses of hospitals. Self-governments were called "founding organs" of hospitals, which they had never founded and over whose operations they have little influence: they do not allocate any means for this purpose, do not have any influence on salaries in healthcare or on the scope and valuation of services included in the so-called health insurance. Burdening them with hospital debts is an insult to the principles of social justice. As a result the extra payment from local authorities own means to the subvention increased by other current income of education was PLN 8.31 billion (33.1% of the subvention). The subvention covered 98% of salary expenses. The low dynamics of the education part of the general subvention in the next years, especially its underestimation in 2017-2019 and insufficient financing of the costs of the education reform resulted in the financial deficit of education in the amount of PLN 24.5 billion in 2019 (that is extra payment from own means accounted for 55.% of the received school subvention). The subvention was enough only to cover 85% of salary expenses, over which local authorities have no influence. This financial deficit is strongly differentiated in various categories of self-government units (data for 2018): in districts it is 12%, in provinces – 33%, in rural municipalities – 48%, in rural and town municipalities – 62%, in town municipalities – 76% and in cities with district status – nearly 64%. It should be added that in 2017-2019 the property expenditure in education, not covered with the subvention and the above graph nearly doubled (in total by nearly PLN 7.5 billion). They were caused by the necessity to adjust schools, especially primary ones, to the reform requirements. The situation of education is increasingly influencing the general state of the self-government finance, limiting not only the possibilities of financing local development, but also lowering the quality of public services [Wołowiec 2020a, 58-72; Idem 2020b, 49-68].

REFERENCES

Baldwin, Richard, and Beatrice di Mauro Weder. 2020. *Mitigating the COVID economic crisis: Act fast and do whatever it takes.* London: CEPR Press.

Baker, Scott, Nicholas Bloom, Steven Davis, et al. 2020. "COVID-induced economic uncertainty and its consequences." *NBER Working Papers* 26983:2-20.

Barro, Robert, Jose Ursúa, and Joanna Weng. 2020. "The coronavirus and the Great Influenza Pandemic: Lessons from the 'Spanish Flu' for the coronavirus's potential effects on mortality and economic activity." *NBER Working Paper* 26866:3-18.

Bogacki, Sylwester, and Tomasz Wołowiec. 2021. "Financial regulation of individual debt ratio of local government units." *Biuletyn Stowarzyszenia Absolwentów i Przyjaciół Wydziału Prawa Katolickiego Uniwersytetu Lubelskiego* 18, no. 1:515-27.

Buchanan, James. 1997. *Finanse publiczne w warunkach demokracji*. Warszawa: PWN.

Buchanan, James, and Richard Musgrave. 2005. *Finanse publiczne a wybór publiczny. Dwie odmienne wizje państwa*. Warszawa: Wydawnictwo Sejmowe.

Coibion, Olivier, Yuiriy Gorodnichenko, and Michael Weber. 2020. "The cost of the COVID-19 crisis: Lockdowns, macroeconomic expectations, and consumer spending." *NBER Working Paper* 27141:1-19.

Eichenbaum, Martin, Sergio Rebelo, and Mathias Trabandt. 2020. "The macroeconomics of epidemics". *NBER Working Paper* 26882:1-27.

Martyniuk, Volodymyr, and Tomasz Wołowiec. 2021. "Economic relations of indebtedness of territorial self-government units in Poland in the context of the construction of an individual debt ratio." *International Journal of New Economics and Social Sciences* 1 (13):15-26.

Musgrave, Richard, and Peggy Musgrave. 1976. *Public Finance in Theory and Practice*. New York: McGraw-Hill Book Co.

Rutkowski, Jerzy. 2015. "Sytuacja finansowa samorządów w Polsce a nowe zasady limitowania zadłużenia – spojrzenia makroekonomiczne." *Zeszyty Naukowe Uniwersytetu Szczecińskiego* 77:277-85.

Samuelson, Paul, and William Nordhaus. 2004. *Ekonomia*. Vol. 2. Warszawa: PWN.

Sawicka, Krystyna. 2010. *Ustawa o finansach publicznych*. Warszawa: C.H. Beck.

Sawulski, Jakub. 2016. "Finanse publiczne w Polsce – diagnoza na tle innych krajowe." *IBS Policy Paper* 4:15.

Stiglitz, Joseph. 2001. *Ekonomia sektora publicznego.* Warszawa: PWN.

Szołno-Koguc, Jolanta. 2015. "Dyscyplina finansów publicznych – refleksje w świetle dotychczasowych doświadczeń." *Biuletyn orzecznictwa o naruszenie dyscypliny finansów publicznych (Bulletin of jurisprudence on violation of public finance discipline*) 1:87-90.

Szołno-Koguc, Jolanta. 2011. "Istota i zakres reorganizacja sektora finansów publicznych w świetle nowej regulacji ustawowej." In *Nowe zarządzanie finansami publicznymi w warunkach kryzysu*, edited by Stanisław Owsiak, 384-95. Warszawa: PWE.

Szołno-Koguc, Jolanta. 2009. "Od czego zacząć reformę finansów publicznych – struktur, procedur czy strumieni?" In *W poszukiwaniu efektywności finansów publicznych*, edited by Stanisław Wieteska, 17-20. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Walczak, Piotr. 2019. *Zmiany w finansach publicznych*. Warszawa: C.H. Beck.

White, William. 2013. "Policy Debate: How Do You Make Growth More Inclusive?" In *Promoting Inclusive Growth: Challenges and Policies*, edited by *Luiz de Mello, and Mark Dutz. Paris: OECD Publishing.*

Wojciechowski, Łukasz, and Tomasz Wołowiec. 2021. "Shortcomings of commonly used methods of measuring the economic activity of the country." *International Journal of New Economics and Social Sciences* 13 (1):101-11.

Wołowiec, Tomasz. 2018. "Pozabankowe finansowanie inwestycji gminnych." *International Journal of Legal Studies* 2:129-40.

Wołowiec, Tomasz. 2019. "Legal conditions for the financing of local government units investments by parabanking financial instruments in Poland." *International Journal of New Economics and Social Sciences* 1:467-502.

Wołowiec, Tomasz, and Sylwester Bogacki. 2019. "Finansowanie inwestycji jednostek samorządu terytorialnego poprzez parabankowe instytucje finansowe." *Samorząd Terytorialny* 11:7-27.

Wołowiec, Tomasz. 2020a. "Ulgi i zwolnienia w podatku od nieruchomości w kontekście celów polityki podatkowej gminy." *Finanse Komunalne* 1:58-72.

Wołowiec, Tomasz. 2020b. "Wysokość stawek i ulgi podatkowe w podatkach lokalnych a zachowania podatników prowadzących działalność gospodarczą." *Samorząd Terytorialny* 1-2:49-68.

Wołowiec, Tomasz. 2021a. *New Public Management.* Lublin: Innovatio Press WSEI.

Wołowiec, Tomasz. 2021b. *Finanse publiczne. Podręcznik. Studia przypadków*. Lublin: Innovatio Press.

Wołowiec, Tomasz, and Sylwester Bogacki. 2021. "Human resource management & resource planning in a public organization." *International Journal of New Economics and Social Sciences* 2 (10):95-108.

Wójtowicz, Wanda. 2014. "Zasady publicznej gospodarki finansowej." In *Zarys finansów publicznych i prawa finansowego*, edited by Wanda Wójtowicz, 15-28. Warszawa: Wolters Kluwer.

Ziółkowska, Wiesława. 2012. *Finanse publiczne. Teoria i zastosowanie*. Poznań: UAM.

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THE EFFECTS OF THE ACTION OF CHROMIUM, ALUMINUM, NICKEL AND IRON ON HUMAN FIBROBLAST AND STEM CELL CULTURES

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Abstract: This review is a collection of general information about chromium, aluminum, nickel and iron. We tried to include not only the data about absorption, metabolism, interactions with other elements and the importance of those microelements in the human body but also their toxic and mutagenic effects. Moreover, we examined their effect on human fibroblast and stem cell cultures which may be important due to abuse of supplementation in the population nowadays.

Keywords: chromium; aluminum; nickel; iron; fibroblast; stem cell

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1. CR – CHROMIUM

Chromium most often occurs in two main oxidation states – trivalent and hexavalent. Chromium in the trivalent form is a trace element necessary for the proper functioning of the body, and is present in food. The hexavalent form is used in industry and is considered as a carcinogen [Pechova and Pavlata 2007, Czarnek and Siwicki 2021a]. Although chromium (III) is considered much safer than chromium (VI), both of these forms, after getting into the body, can change their oxidation levels, and thus affect the oxidative/antioxidant balance in the body and induce oxidative stress (OS) [Sugden and Stearns 2000]. Until recently, trivalent chromium was considered a micronutrient necessary for the proper course of many metabolic pathways in the body, as its trivalent form acts as a cofactor and/or modulator of many enzymatic reactions. Due to the body's low demand for chromium, deficiencies of this element are very rare. The daily, recommended dietary allowances (RDA) of chromium are 50-200 μg. The adequate daily intake (AI) of this element is defined as 25 μg for women and 35 μg for men.

Chromium (VI) is much more easily absorbed than chromium (III). Significant differences in the bioavailability of orally administered organic and inorganic chromium (III) salts have also been demonstrated. Data found in literature shows that the absorption of chromium (III) salts is low, ranging from 0.4 to 2.5%. The presence of other nutrients also affects the bioavailability of chromium. Absorption is increased, for example, by zinc chelating compounds (vitamin C, niacin, amino acids, oxalates. Moreover, iron, manganese, zinc and titanium ions inhibit the absorption of this bio-element. Also, eating foods with a high content of simple sugars and a diet rich in fat contribute to the loss of this element from the body and additionally reduce its absorption [Lukaski et al. 2007]. After being absorbed in the intestines, chromium (III) passes into the blood, where it combines with plasma proteins that transport it to the liver and other organs. However, the mechanism of Cr (III) transport into the body's cells has not been fully understood. Two protein complexes are responsible for chromium binding in vivo: transferrin and oligopeptide – chromodulin. Binding of chromium with transferrin can interact with iron by disturbing its metabolism and storage. Despite the fact that at low concentrations, these metals prefer other binding sites to the transport protein, at higher concentrations they act competitively, which may result in reduced transferrin saturation with iron ions, and in extreme cases anemia [Piotrowska et al. 2018]. Chromium is stored in various organs – in the largest amounts in the kidneys, spleen and testes, and in trace ones – in the heart, lungs, pancreas and brain. The storage capacity of this element does not change significantly with age, but it has been observed that as

a result of the aging of the organism it may decrease and the risk of cardiovascular diseases and type 2 diabetes increases [Costello et al. 2016].

It is known that chromium (III) is necessary for the proper functioning of the body, because it is a component of some enzymes (e.g. trypsin) and has properties that stimulate their action. It is also present in RNA and is responsible for the stabilization of its structure. There are also studies stating that supplementation with chromium (III) compounds has a positive effect on lipid metabolism [Czarnek and Siwicki 2021b], and Cr (III) can be used in the prevention of the development of atherosclerosis and heart disease because it is believed to have the ability to lower the concentration of total cholesterol, LDL cholesterol and triglycerides [Clodfelder et al. 2005]. Due to the properties that sensitize cells to insulin, resulting in accelerated weight loss, Cr (III) has been used as a component of dietary supplements supporting weight loss [Otag et al. 2014]. It is believed that supplementation with chromium (III) may be protective and prevent the development of neurodegenerative diseases [Leszek et al. 2019].

In general, supplementation with chromium (III) is considered safe. However high doses of chromium (III) are likely to limit the absorption of iron and zinc ions, and also affect the metabolism of calcium ions in bone. In recent years, information about the carcinogenic effect of chromium (III) has also appeared. In Poland, two values of the maximum permissible concentration (NDS) have been established for chromium and its compounds: 0.5 mg/m3 for metallic chromium, chromium (II) compounds and chromium (III) compounds converted to chromium, and 0.1 mg/m3 for chromates (VI) and dichromates (VI) converted to chromium (VI). The highest instantaneous concentration (STEL) for these compounds is 0.3 mg/m3.

2. AL – ALUMINUM

Aluminum is one of the most common metals on the planet. In the free state, this metal does not exist, it is very reactive, and its compounds are present in almost all rocks, surface waters and living organisms. The complex chemical properties of aluminum, regulating its mobility and the transition from solid to water phase, determine its important role in the environment. Under natural conditions, aluminum can be found in the form of sparingly soluble minerals – silicates and aluminosilicates. They are not harmful to humans, but different forms of aluminum speciation may have different properties. Some of them may be necessary for the proper functioning of living organisms, while others may show toxic properties. The lower the pH, the higher the aluminum concentration. Acidification of the soil below pH = 4.8 and the release of mobile aluminum into the soil solution results in the release of ionic aluminum into surface waters. The basic

forms of aluminum in waters are hydroxide, fluoride, sulfate and organic complexes. The water pH varies in the range of pH = 5-9, and at such a concentration of hydrogen ions, aluminum compounds are characterized by low solubility. In reservoirs with such a reaction, the aluminum concentration in most cases does not exceed 300 μg/l, and in river waters it does not exceed 64 μg/l on average [Widłak 2011]. Aluminum is also contained in plants, and its main source is soil, atmospheric dust and rainfall. From a dietary and medical point of view, it is important to test and control the content of this element. Plants grown on acidic soils can be characterized by very high concentrations of aluminum. An example of such a plant is tea, which accumulates 500-20,000 ppm of aluminum in its leaves, and spices such as marjoram, thyme and cumin. In animal organisms, aluminum is present in trace amounts. The highest content of this element is noticeable in the hard tissues of marine organisms (70-4500 ppm). The concentration of aluminum in animal organisms depends on its content in feed, water and other foods eaten by animals, and on the ability of tissues to accumulate aluminum [Gromysz-Kałkowska and Szubartowska 1999].

In the body of a healthy adult person, 50 to 150 mg of aluminum is present, 50% of which is in the skeleton, 25% in the lungs, and the rest is contained in soft tissues. The concentration of aluminum in the lungs increases with age. This is due to the deposition of solid and insoluble aluminum compounds that have entered the respiratory system. The amount of aluminum in brain tissue ranges from 0.5 mg/kg of brain weight and is twice as high in gray matter as in white matter. The content of Al3 + (as in the case of plants) increases with age – from 0.2 mg/kg in infants to 0.6-0.7 mg/kg in the elderly. The similarity of the Al3 + ion radius to the biologically active Fe3 + and Mg2 + ions is the reason for their substitution by aluminum and accumulation of this element in the human body. Aluminum metabolism is due to the physical and chemical similarities of iron and aluminum ions. After crossing the mucosal barrier, aluminum competes with iron for a binding site to transferrin – a protein that transports Fe3 + ions. Transferrin regulates the concentration of iron ions in blood plasma and transports them to the tissues. Saturated with iron ions, it binds to the transferrin receptor and through endocytosis, this complex is absorbed into the cell, where iron is released, and free transferrin returns to the cell membrane and to the bloodstream. In the same way, aluminum is transported to various tissues of the body, e.g. brain, liver, spleen, lungs, kidneys, bones. After the aluminum ion passes into the cytoplasm, it forms in the cytosol the so-called labile pool associated with citrates and other chelating agents. The degree of accumulation depends on the chemical form of aluminum, dose, time and type of exposure. Accumulation of aluminum in tissues is accompanied by the occurrence of changes in the concentration of bioelements, ie Ca, Fe, Mg,

Zn, Cu, which may interact with aluminum of a very different nature. The inability to reduce aluminum to a divalent ion prevents it from combining and storing with ferritin and penetrating into the mitochondria. Aluminum ions, on the other hand, can bind to molecules showing a stronger affinity for this metal than the cytosolic pool of chelates, e.g. ATP, GTP, phosphate anions, phosphate groups of cell membranes phospholipids, phosphorized proteins. The effects of these processes may cause disturbances in intracellular transmission, metabolism, secretory functions and cell growth [Fiejka, Długaszek, Alfreda, et al. 2001].

The influence of aluminum on the human body can be clearly described as toxic. Al3 + has been documented to be contributory in the pathogenesis of many diseases in dialysis patients. Donnan diaphragms used in dialysis machines do not eliminate aluminum as effectively as the kidneys, which is a problem for nephrologic patients. Movement coordination disorders, tremors, involuntary movements, myoclonus, dysarthria, and dysphasia are some of the direct symptoms of post-dialysis encephalopathy. The long-term symptom of this disorder is dementia, which has appeared as soon as 15 months after starting dialysis. Significantly elevated levels of aluminum have been found in the brain, muscles and bones of those who died as a result of this disease. The occurrence of sub-dialysis encephalopathy is influenced by the quality of the water used in dialysates and the damage to the blood-brain barrier. Already in the 1980s it was found that aluminum ions from water can diffuse into the blood plasma causing damage to the nervous system, and the penetration of ions through the blood-brain barrier depends on the degree of ionization of the compound, its lipid solubility and particle size. Subsequent studies have shown the great importance of the dynamics of aluminum penetration on brain and kidney function. The half-life of aluminum in blood serum is about 30 minutes, so its accumulation depends on the capacity of the kidneys. The described encephalopathy syndrome may also occur as a result of taking drugs containing aluminum, e.g. anti-acid agents containing Al (OH) 3. As a result of numerous studies and attempts to eliminate aluminum from drugs and dialysates, cases of encephalopathy are relatively rare [Gromysz-Kałkowska and Szubartowska 1999]. Amyotrophic lateral sclerosis and parkinsonism associated with senile dementia are other diseases that are largely considered to be caused by aluminum. The common feature of these diseases is neuronal atrophy, degeneration of neurofibrils, lymphopenia, and T lymphocyte dysfunction. Magnetic resonance imaging studies indicate aluminum accumulation within the hippocampus [Zabłocka 2006]. It is likely that aluminum is also an etiological factor in classical Parkinson's disease. Proponents of this theory argue, *inter alia*, that 30-50% of Parkinsonism sufferers concurrently suffer from Alzheimer's disease, and extrapyramidal disorders occur in 60% of patients with Alzheimer's

dementia. The role of aluminum in Alzheimer's disease has been the subject of much research. It is believed that aluminum may act as an environmental factor in accelerating disease progression. Histological examinations of the brains of people who died as a result of neurodegenerative processes show a higher level of aluminum in places affected by degenerative changes.

3. NI – NICKEL

Nickel is another of the basic elements found as part of the Earth's crust, at an average concentration of about 75 μg/g. It is a metallic element with high electrical and thermal conductivity, resistant to corrosion at ambient temperatures ranging from -20° C to + 30° C, therefore it is often electroplated as a protective coating [Chau and Cordeiro 1995]. Although it has an oxidation state of -1, 0, +1, +2, +3 and +4, it exists mainly in the divalent state (Ni2 +) and is an environmentally stable form. Nickel is an essential element in the organisms of animals, microorganisms, plants, and is an important component of enzymes and proteins. In acetogenic bacteria, the reduction of carbon monoxide to acetate depends on nickel, which is needed for the activation and synthesis of carbon monoxide dehydrogenase [Drake 1982]. Nickel is essential for the active synthesis of urease in plant cells.

High nickel concentrations inhibited the formation of IAA, tryptophan and at the same time promoted the formation of phenolic and terpenoid inhibitors [Tikhomirov, Kuznetsova, and Magina 1987]. S.U. Khan and A. Moheman reported that nickel interacts with iron in hemoglobin and helps in oxygen transport and stimulates metabolism [Khan and Moheman 2006]. Nickel is involved in the transmission of the genetic code (DNA, RNA) and is also present in some enzyme systems that metabolize sugars. Nickel can replace calcium in the process of excitation and binding to membrane ligands such as phospholipid phosphate groups in the process of nerve transmission and muscle contraction [Howard 2003]. Nickel exists in human and rabbit sera in three forms, namely ultrafiltrable ligand-bound nickel, albumin-bound nickel, and macroglobulin-bound nickel. Albumin is the major nickel transport protein in human, rat and bovine serum. A metalloprotein called nickeloplasmin was isolated from the sera of rabbits (α-2 macroglobulin) and humans (α-glycoprotein).[1] Ultrafiltrable nickel-binding ligands play an important role in extracellular transport and in the elimination of nickel in the urine. L-histidine has been identified as a low molecular weight nickel binding component in human serum that has a greater affinity for nickel than serum albumin. The L-histidine-nickel complex was found to be

[1] U. S. Public Health Service (USPHS), Toxicological profile for nickel, U.S. Public health service, Agency for toxic substances and disease registry, Atlanta, Georgia 1993, p. 158.

smaller in molecular size than the albumin-nickel complex which mediates transport across a biological membrane due to the balance between the two nickel molecules. Nickel exchange and transfer between L-histidine and albumin appears to be mediated by the nickel albumin ternary complex L-histidine [Sigel and Sigel 1988]. Nickel is also an essential element for humans [Wintz, Fox, and Vulpe 2002]. H.A. Schnegg and M. Kirchgessner reported that nickel deficiency in rats led to a decrease in organ iron, a decrease in hemoglobin and hematocrit, and anemia [Schnegg and Kirchgessner 1980]. M.M. King, K.K. Lynn, and C.Y. Huang suggested that nickel may serve as a cofactor for the activation of calcineurin, the calmodulin-dependent phosphoprotein phosphatase [King, Lynn, and Huang 1985]. Nickel plays an important role in the action or formation of cGMP, a signaling factor that regulates various physiological processes such as blood pressure control, sperm physiology, sodium metabolism, and cardiovascular health. Nickel is permanently present in RNA and binds to several biological substances such as proteins (keratin, insulin), amino acids and serum albumin. It also activates enzymes such as arginase, trypsin, acetyl coenzyme A, carboxylase, and synthetase [Yokoi, Uthus, and Nielson 2002]. Nickel is an element that occurs naturally in soil, water, air and biological materials. It is a natural component of the earth's crust and is found in igneous rocks [Chauhan, Thakur, and Sharma 2008]. Natural sources of nickel are ashes from volcanic emissions and the weathering of rocks and soils. Inorganic fertilizers, in particular phosphorus fertilizers, are characterized by a variable level of nickel depending on their resources. Some of the atmospheric nickel entering the environment comes from meteorite dust, smoke particles from forest fires, volcanic ash and soil dust [Ross 1994].

Although nickel is ubiquitous and essential for the functioning of many organisms, its concentrations in some areas, due to both anthropogenic release and its naturally varying levels, can be toxic to living organisms [Czarnek, Terpiłowska, and Siwicki 2019]. Wastewater discharged from electroplating, electronics and metal cleaning industries often contains high concentrations of nickel ions and causes various types of acute and chronic environmental disturbances [Akhtar et al. 2004]. In humans, nickel is known to damage the liver, kidneys, spleen, brain and tissues.[2] Nickel causes embryotoxic and nephrotoxic effects, allergic reactions and contact dermatitis.[3] Nickel sensitization also occurs in the general population through exposure to coins, jewelry, watches and clothing. It causes conjunctivitis, eosinophilic pneumonia, asthma, and local or systemic reactions to nickel-containing joint prostheses [Hostynek and Maibach 2002]. Nickel compounds are

[2] International Programme on Chemical Safety (IPCS), Environmental Health Criteria, Nickel, World Health Organization, Geneva 1992, p. 108.

[3] EPA, Nickel and nickel compound. Poll. Prevent. Fact Sheet, 96 (2002), p. 1-2.

carcinogenic to humans.[4] M.M. Matlock, B.S. Howerton, and D.A. Atwood observed the transformation of neoplastic cells, which includes DNA damage resulting from mutations induced by the hydroxyl radical or other oxidizing species [Matlock, Howerton, and Atwood 2002]. Acute exposure of human lungs to nickel causes pathological changes in the lungs, hemorrhages, edema, degeneration of the bronchial epithelium, and pulmonary fibrosis. Nickel compounds have been found to cross the mammalian placental barrier and affect the fetus [Sunderman, Sullivan, and Krieger 2001]. Nickel is a potent animal teratogen. Inhalation of and exposure to nickel carbonyl compounds in rats and hamsters have been found to result in fetal death, reduced weight gain, and eye malformations [Sevin 1980]. In Poland according to the Regulation of the Minister of Agriculture and Rural Development of March 21, 2002, the permissible nickel concentration in light soil is 30 mg/kg dry weight, in medium-heavy soil 50 mg/kg dry weight, and in heavy soil 75 mg/kg dry weight. For drinking water, the standard is 20 μg/l for nickel and it is defined in Council Directive 98/83/EC. The WHO established the Tolerable Daily Intake (TDI) of 11 μg nickel/kg body weight and based on this derived an indicative value of nickel content for drinking water of 70 μg nickel/l. The EFSA Scientific Panel on Dietetic Products, Nutrition and Allergies concluded that it is not possible to establish a tolerable upper limit for the intake of nickel from food.

4. FE − IRON

Iron is the fourth most abundant element that comprises the Earth's crust. Iron, which constitutes less than 0.01% of the total human body weight (about 4 g in an adult male) is an element without which a human being could not live [Ganz and Nemeth 2012]. This metal participates in many biochemical and physiological processes, thanks to which it is possible, among others, to such processes as: oxygen transport, DNA synthesis and electron transport. Iron is a component and is necessary for the synthesis of many proteins involved in these processes. Hemoglobin and myoglobin are proteins involved in the transport and storage of oxygen. They contain a prosthetic heme group, which forms a complex with centrally located iron that can bind or release oxygen. Oxygen transport seems to be one of the most important processes in which iron plays an important regulatory role. However, it is not the only important process in which it participates. Iron is essential for the proper neurological development of infants and

[4] National Academy of Sciences (NAS), Medical and biological effects of environmental pollutants, Nickel, National Research Council, National Academy of Sciences, Washington 1975, p. 277.

children. This element is needed in the processes of myelination of neurons, neurogenesis and differentiation of brain cells, which can affect sensory systems, learning, memory and behavior. In addition, iron is also a cofactor of enzymes that synthesize neurotransmitters in the brain [Iannotti, Tielsch, Black, et al 2006; Beard 2008, Baker, Greer, and The Committee on Nutrition 2010]. Maintaining the correct range of values of stored iron in the body is necessary to maintain the proper functioning of all tissues. For example, both a deficiency and an excess of iron adversely affect the function of the body's immune system. Both innate immunity cells (granulocytes, monocytes, macrophages) and acquired immunity cells (T and B lymphocytes) need adequate iron availability to function properly. Under conditions of deficiency, these processes are impaired and the response to pathogens weakened [Ward, Crichton, Taylor, et al. 2011]. On the other hand, iron is an excellent medium for pathogenic microorganisms, necessary for their multiplication and the development of infection. Therefore, the excess of this element is unfavorable in the fight against the disease [Ganz 2018].

Taking into account the functions described above, iron should be considered as an element favorable to human physiology. The face of iron, however, is ambiguous. Iron excess and its unbound form (ferric ion, Fe2 +) is toxic to many tissues because due to its wide range of redox potentials, it has the ability to form a hydroxyl radical and many others, which in turn can damage proteins, DNA and lipids [Chifman, Laubenbacher, and Torti 2014]. Due to the fact that iron is necessary, and at the same time can be toxic to humans, our body has mechanisms that allow for very strict control of the level of this element. The concentration of iron in the body is subject to very complex and precise regulatory processes, which, unfortunately, sometimes fail, often due to our own fault. Currently, there are two levels of regulation of iron metabolism: at the systemic and intracellular levels. In a well-nourished adult, the iron level in the body fluctuates around 3-5 g, which is about 45 mg Fe/kg body weight in women and 55 mg Fe/kg body weight in men [Milto, Suhodolo, Prokopieva, et al. 2016]. The largest part of the iron (60%) is in the blood bound to hemoglobin – in red blood cells and bone marrow, while 10% is the iron bound to myoglobin in the muscle. The rest of it is concentrated mainly in hepatocytes and macrophages [Chifman, Laubenbacher, and Torti 2014]. The daily iron requirement of man is 20-25 mg. Iron is obtained by humans in two ways: exogenous, through the absorption of dietary iron, and endogenous, as a result of iron reutilization. For example, the process of iron recovery from macrophage phagocytic erythrocytes allows an adult to recover 20-30 mg of iron. This amount is sufficient to ensure the daily needs of the body for the process of erythropoiesis and others [Muckenthaler, Rivella, Hentze, et al. 2017]. Absorbing iron from the diet is not such an efficient process. The diet provides about

10-20 mg of iron daily, of which only about 10% is absorbed. Such a small amount, however, is sufficient to provide a person's daily iron requirement, which compensates for the iron that is lost from the body through sweat, blood, and exfoliating intestinal epithelium. The restriction of excess iron absorption is a very important process, because apart from a small amount of iron that is excreted from the body with sweat or exfoliating epithelium and with blood, in mammals there is no physiological way to remove excess iron from the body. Therefore, disturbances in its metabolism and excessive supply of dietary iron lead to its accumulation and toxicity. The daily recommended dietary allowances (RDA) of iron for all age groups of men and postmenopausal women is 8 mg/day; The RDA for premenopausal women is 18 mg/day.

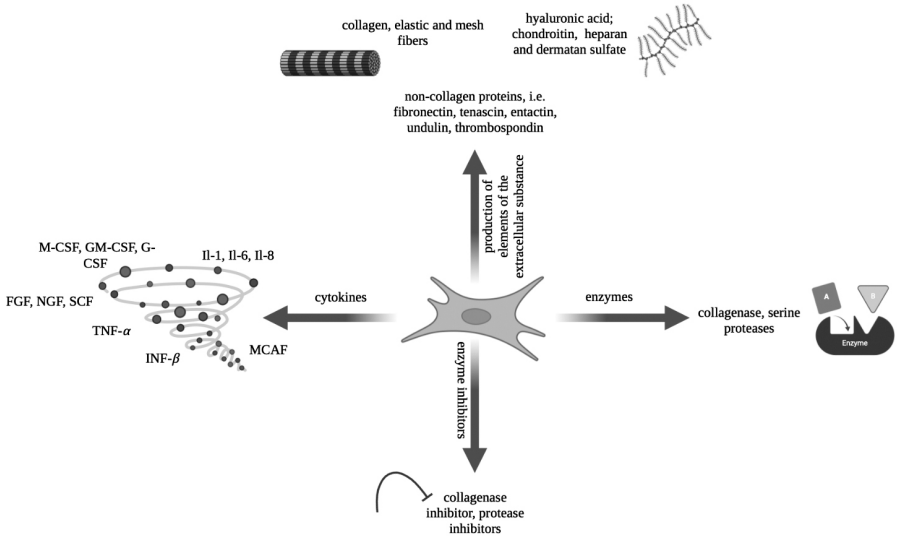
5. THE INFLUENCE OF THE ELEMENTS CR, NI, AL, AND FE ON HUMAN FIBROBLASTS

Fibroblasts are animal cells that originate in the mesoderm i.e., the middle layer of calls in the embryo. They are the most numerous groups of connective tissue cells. They have a round cell nucleus with a well-defined nucleolus. Two forms of fibroblasts can be distinguished: active – the presence of a rough cellular reticulum, and inactive (fibrocytes) – smaller, with a reduced cellular reticulum [Brzezińska-Błaszczyk and Zalewska 1997]. The diversity of fibroblasts is related to a particular organ, but they can also be found within a specific anatomical space. The types and short characteristics of fibroblasts are shown in the Table 1 below.

Tab. 1. Characteristics of different types of human fibroblasts.

Type of fibroblasts	Characteristics	Ref.
Myofibroblasts	Cells arising from mesenchyme; modified fibroblasts having the characteristics of smooth muscle cells (ability to contract); numerous actin filaments are present in the cytoplasm.	[Gabbiani 1992; Hinz et al. 2007]
Fibrocytes	Reduced form of fibroblast with reduced metabolic activity; they have elongated call nuclei and eosinophilic cytoplasm. Fibrocytes are circulating mesenchymal progenitor cells that participate in tissue responses to injury and invasion.	[Sawicki 2008, Herzog and Bucala 2010]
Melanophores	A variety of fibroblasts filled with melanin grains by endocytosis; contain melanin pigment produced by melanocytes of the epidermis.	[Sawicki 2008; Logan et al. 2006; Sugden et al. 2004]

Ryc. 1. Graphic illustration of substances produced by fibroblasts [Brzezińska-Błaszczyk and Zalewska 1997; Marklund 1992; Daghigh et al. 2002; Asp et al. 2011].



Chromium is one of the most debatable transition metals, and its role in the human body is constantly being replenished [Vincent 2010]. Recent publications oscillate around the functions concerning Cr (III) however, it can be regarded as an essential micronutrient, and its action should be largely considered as a pharmacological effect [Piotrowska et al. 2018]. Chromium (III) can cause DNA damage and inhibit the DNA relaxation activity of topoisomerases in bacteria [Fathima and Rao 2018]. However, chromium also exists in another valence state i.e., Cr (VI) which is widely used in various industries [Wang et al. 2017]. Cr (III) salts are used as dietary supplements and are believed to be about 100 times less toxic compared to Cr (VI) [Kumar and Gangwar 2012].

The cytotoxicity of chromium complexes varies by ion and ligand environment. Sharivastava et al. in their study on dermis fibroblasts confirmed that [Cr(en)3]3+, a triple-charged cation inhibits cell proliferation, causes morphological changes (damage to the cell nucleus), and TEM (Transmission Electron Microscopy) analysis showed intracellular damage to fibroblasts in terms of formation of apoptotic bodies and chromatin condensation which is directly related to cell death [Shrivastava et al. 2005]. In an *in vitro* study by Bidermann et al., it was reported that Cr (III) induced anchorage-independent growth in a dose-dependent manner in cultured diploid human fibroblasts [Biedermann and Landolph 1990]. Although it was found that Cr (VI) compounds were significantly more cytotoxic and mutagenic than Cr (III) compounds tested.

Nickel is a transition metal that is characterized by incomplete filling of electro shells. It follows from the above that nickel has catalytic properties i.e., it accelerates certain chemical reactions without being part of the newly formed compound and is additionally able to form complex compounds [Śpiewak and Piętowska 2006]. In addition, nickel is the central atom of ureases (enzymes found in plants, bacteria, mycoplasmas, fungi, yeast), as well as bacterial enzymes such as hydrogenases, coenzyme M methyl reductase involved in methane biogenesis, and carbon monoxide dehydrogenase involved in the formation of the acetate group ibid.].

Studies attempting to determine the effect of nickel on fibroblasts rely heavily on nickel-titanium (NiTi) alloy. This alloy, used in implants, has been studied since the 1980s [Ponsonnet et al. 2002]. It is currently used in orthopedics and orthodontics. More than a dozen in vitro studies of the response of fibroblasts to NiTi application have been conducted. A study by Castleman and Motzkin suggest that NiTi significantly reduces cell growth in human fetal fibroblasts and modifies cell morphology [Castleman and Motzkin 1981]. Another study by Putters et al. contradicts Castelman and Motzkin's reports, as no inhibition of human fibroblast motility by NiTi was observed [Putters, Kaulesar Sukul, de Zeeuw, et al. 1992]. In another study to investigate the effects of nickel and chromium dental alloys on viability and morphology in cultured human gingival fibroblast cell, it was found that metal ions released from all metal alloys (nickel-based alloys, high and low chromium alloys with and without beryllium) completely inhibited G-6-PDH (Glucose-6-phosphate dehydrogenase) activity and reduced ATP levels in cultured cells. The results obtained confirmed the hypothesis that metal ions released from dental nickel-based alloys interfere with cellular energy metabolism [Bumgardner, Doeller, and Lucas 1995]. Exposure to nickel which was associated with changes in fibroblast activation was also investigated. Nickel has been linked to H2S, a compound involved in numerous cellular signal transduction and pathophysiological responses. The above study showed that a lower dose of nickel (200um) induced activation of human fibroblasts, as evidenced by increased cell growth, migration and higher expression of smooth muscle actin and fibronectin. In contrast, a high dose of nickel (1nM) inhibited cell viability [Racine et al. 2018]. In general, nickel decreased intracellular thiol content and stimulated oxidative stress, and inhibited mRNA and cystathionine gamma-lyse protein expression.

Aluminum is one of the most prevalent elements, accounting for about 8% of the total elemental mass [Widłak 2011]. In the human body it usually occurs in trace amounts (50-150 mg), accumulating to the greatest extent in the bones and lungs. The accumulation of aluminum in the human body is low, as it is removed 90% with urine. Nevertheless, it can interfere with metabolic processes i.e., it blocks enzymes activated by calcium and magnesium

ions, hinders cell division, and degrades nerve fibers [Zuziak and Jakubowska 2016].

The concentrations of aluminum (1-25 g/l) found in most sources of drinking water available for human consumption are sufficient to induce up to a significant level of accumulation of this element depending on the level of exposure [Anane and Creppy 2001]. In a study conducted by Anane et al. showed that skin exposure to low doses of aluminum chloride for 18 weeks leads to aluminum accumulation in the brain [Anane et al. 1995]. It was important to study the impact of analyzing biological responses induced in human fibroblasts. In a study conducted by Nowakowska et al. injectable hemostatic agents based on aluminum chloride, aluminum sulfate and iron sulfate on human gingival fibroblasts (HGF), no reduction in fibroblast viability or proliferation or significant cytoskeletal reorganization was observed. Moreover, the injected hemostatic agents showed biocompatibility with HGF suggesting their potential clinical utility in gingival margin retraction [Nowakowska et al. 2021].

Iron is a common element in the environment. In living organism, it occurs mainly in bound form. The main reservoir of iron (4g of iron in the adult body) are erythrocytes i.e., 75% of the mentioned amount in the form of hemoglobin [Górska and Piech 2018]. In addition, iron supports the immune and nervous systems and has antioxidant effects. However, the most important role of iron is to enable heme molecules to bind oxygen and transport it to all cells in the body [Konturek 2000]. As a trace element and transition metal it is essential in many anabolic processes of cell proliferation and differentiation, protein synthesis and post-translational modifications of procollagen necessary to stabilize collagen molecules [Wlaschek et al. 2019].

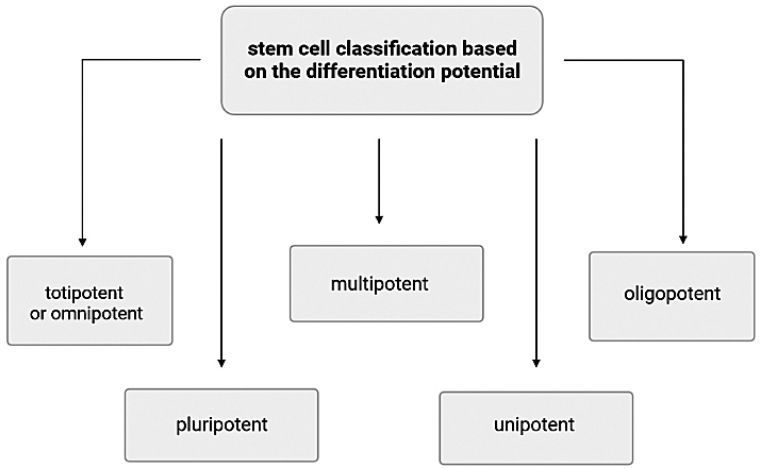
Iron accumulates age-dependently in tissues in vivo and is associated with the pathology of many age-related diseases. The molecular basis of this change may be related to the loss of iron homeostasis at the cellular level. Accordingly, changes in iron content in primary human fibroblasts were studied in vitro as a model of cellular aging. The results shown indicate that iron accumulation occurs during physiological cellular aging in vitro and may contribute to increased oxidative stress and dysfunction in aging cells [Killilea et al. 2003]. Another study examined mouse fibroblasts treated with a pulse of 100 m H2O2 for 1 hour, which proved that the above parameters are sufficient to alter the critical parameters of iron in a time-dependent manner. The applied stimulus inhibits ferritin synthesis for about 8 hours, leading to a decrease in ferritin activity in cells by about 50%. Additionally, treatment with H2O2 induces an increase in mRNA levels, which is associated with a significant increase in cell surface TfR expression, increased

binding to fluorescein-labeled transferritin, and stimulation of iron via transferrin into cells [Caltagirone et al. 2001].

6. THE INFLUENCE OF THE ELEMENTS CR, NI, AL, AND FE ON HUMAN STEM CELLS

Stem cells are defined as undifferentiated cells that are characterized by self-renewal, clonality, and potency. However, these properties may vary between different stem cells [Kolios and Moodley 2013]. As they are able to renew their populations and differentiate into multiple cell lineages, they take part in organ and tissue systems development and regeneration [Weissman 2000]. Based on their differentiation potential, stem cells may be categorized into 5 types which are presented in the graph below [Smith 2006].

Ryc. 2. Graphic illustration of stem cell classification based on their differentiation potential [Smith 2006].



While totipotent or omnipotent cells can differentiate into embryonic and extraembryonic tissues, pluripotent cells can differentiate into any of the three germ layers. In addition, both multipotent and oligopotent stem cells can differentiate only in a closely related family of cells or cell types. Unipotent stem cells may differentiate only into one cell type [Ilic and Polak 2011].

As it comes to their origin, they can be divided into embryonic stem cells (ESCs), fetal and adult stem cells, and induced pluripotent stem cells (iPSCs) [Ilic and Polak 2011; Bongso and Richards 2004]. While ESCs and iPSCs are pluripotent, adult stem cells are usually oligo- or unipotent [Ilic and Polak 2011].

Hexavalent chromium [Cr(VI)], which is the most toxic form, was shown to be cytotoxic and impaired the physiological functions of mouse spermatogonial stem cells (SSCs) and male somatic cells. Due to oxidative stress and subsequent mitochondrial damage, Cr(VI) induced the mitochondria-dependent apoptosis in above-mentioned cells. In addition, disruption in the differentiation and self-renewal mechanisms of SSCs was also observed [Das, Kang, Kim, et al. 2015].

Tet family dioxygenases (Tet1, Tet2, and Tet3) are key enzymes that are responsible for mammalian DNA demethylation [Shen, Song, He, et al. 2014]. Yin et al. showed that nickel(ii) may inhibit the oxidation of DNA 5-methylcytosine (5mC) by 2-oxoglutarate-dependent Tet dioxygenases in somatic cell lines and mouse embryonic stem cells. This inhibition was observed due to the significant decrease in 5-hydroxymethylcytosine which is a critical intermediate that resulted from the 5mC oxidation. In addition, it was suggested that nickel exposure may result in DNA demethylation reduction and cause changes in the methylation status of specific genes [Yin, Mo, Dai, et al. 2018]. Previous studies demonstrated that ascorbic acid enhanced the catalytic activity of Tet dioxygenases for the 5mC oxidation thus promoting DNA demethylation in mammals. Furthermore, its combination with 2i (PD 0325901 and CHIR 99021) appeared to stimulate mouse embryonic stem cells to stay in a naïve or ground pluripotency state [Yin, Mao, Zhao, et al. 2013]. Interestingly, Yin et al. results from 2018 suggested that nickel(II) ions inhibit AA-induced DNA demethylation in these cells [Yin, Mo, Dai, et al. 2018].

Octamer binding protein 4 (OCT4) is a transcription factor responsible for reprogramming somatic cells into pluripotent stem cells [Zhao, Sun, Young, et al. 2013; Takahashi and Yamanaka 2006]. It is also a master regulator of proliferation and self-renewal of embryonic stem cells [Niwa, Miyazaki, and Smith 2000]. Yao et al. examined the nickel effect on the expression of OCT4 cell factor in embryonic Tera-1 cells and stem cells. It was suggested that Ni(II) exposure was associated with the increase in the OCT4 expression due to protein stabilization. Moreover, it was shown that the exposure resulted in ROS production which led to OCT4 stabilization mediated by post-translational modifications [Yao, Lu, Chen, et al. 2014].

Nam et al. investigated aluminum effects on neural stem cells, proliferating cells, differentiating neuroblasts, and mature neurons in the hippocampal dentate gyrus of mice. It was suggested that aluminum plays an inhibitory role in neural stem cells, cell proliferation, and neuroblast differentiation via oxidative stress. However, aluminum exposure did not cause any changes to mature neurons [Nam, Kim, Yoo, et al. 2016].

In addition, aluminum oxide nanoparticles (ANPs) showed dose-dependent cellular toxicity in human mesenchymal stem cells (hMSCs). It

was also mediated through an increase in oxidative stress through the ROS generation. Moreover, ANPs exposure was shown to upregulate stress-related genes expression and downregulate the expression of several antioxidant enzymes. As a result, the enhancement in the production of free radicals in hMSCs was obtained [Alshatwi, Subbarayan, Ramesh, et al. 2013].

Iron-loaded conditions may cause an increase in the generation of reactive oxygen species (ROS) resulting in the intracellular redox homeostasis dysregulation [Mehta, Farnaud and Sharp 2019]. These changes can stimulate signalling pathways leading to mesenchymal stem cells (MSCs) cycle arrest in G0/G1 phase, apoptosis and reduced proliferation of the cells [Zhang, Zhai, Zhao, et al. 2015]. The use of exogenously administered iron chelators and antioxidant protected the iron-loaded MSCs and reversed the negative effects caused by iron excess [ibid.]. Interestingly, iron accumulation was shown to decrease the mineral density of bone due to MSC quantity inhibition in the bone marrow. However, the iron chelator, deferoxamine, rescued the iron-induced suppression of bone marrow MSCs [Yuan, Xu, Cao, et al. 2019].

REFERENCES

Akhtar, Nasreen, et al. 2004. "Removal and recovery of nickel(II) from aqueous solution by loofa sponge-immobilized biomass of Chlorella sorokiniana: characterization studies." *Journal of hazardous materials* 108, no. 1-2:85-94. Doi: 10.1016/j.jhazmat.2004.01.002

Alshatwi, Ali A., Periasamy V. Subbarayan, E. Ramesh, et al. 2013. "Aluminium oxide nanoparticles induce mitochondrial-mediated oxidative stress and alter the expression of antioxidant enzymes in human mesenchymal stem cells." *Food Addit Contam Part A Chem Anal Control Expo Risk Assess*. 30, no. 1:1-10. Doi:10.1080/19440049.2012.729160

Anane, Rachid, et al. 1995. "Bioaccumulation of water-soluble aluminum chloride in the hippocampus after transdermal uptake in mice." *Arch Toxicol*. 69, no. 8:568-71. Doi: 10.1007/s002040050214

Anane, Rachid, and E. E. Creppy. 2001. "Lipid peroxidation as pathway of aluminum cytotoxicity in human skin fibroblast cultures: Prevention by superoxide dismutase+-catalase and vitamins E and C." *Human & Experimental Toxicology* 20:477-81.

Asp, Linnea, et al. 2011. "Effect of pro-inflammatory cytokines on expression of kynurenine pathway enzymes in human dermal fibroblasts." *Journal of Inflammation* 8, no. 25. Doi: 10.1186/1476-9255-8-25

Baker, R. D., F. R. Greer, and The Committee on Nutrition. 2010. "Diagnosis and prevention of iron deficiency and iron-deficiency anemia in infants and young children (0-3 years of age)." *Pediatrics* 126:1040-1050.

Beard, John L. 2008. "Why iron deficiency is important in infant development." *J. Nutr.* 138:2534-536.

Biedermann, K. A. and J. R. Landolph. 1990. "Role of valence state and solubility of chromium compounds on induction of cytotoxicity, mutagenesis, and anchorage independence in diploid human fibroblasts." *Cancer Res.* 50, no. 24:7835-842. PMID: 2253225.

Bongso, Ariff, and Mark Richards. 2004. "History and perspective of stem cell research." *Best Pract Res Clin Obstet Gynaecol.*18, no. 6:827-42. Doi: 10.1016/j.bpobgyn.2004.09.002

Brzezińska-Błaszczyk, Ewa and Anna Zalewska. 1997. "Mastocyty i fibroblasty – obojętni sąsiedzi czy przyjaźni partnerzy?" *Postępy Biologii Komórki* 24, no. 2:127-43.

Bumgardner, J., and J. Doeller, and L. C. Lucas. 1995. "Effect of nickel-based dental casting alloys on fibroblast metabolism and ultrastructural organization." *Journal of Biomedical Materials Research* 29, no. 5:611-17. Doi: 10.1002/jbm.8202900508

Caltagirone, Annie, et al. 2001. "Modulation of cellular iron metabolism by hydrogen peroxide effects of H2O2 in the expression and function of iron – responsive element-containing mRNAs in B6 fibroblasts." *Metabolism and Bioenergetics* 276, no. 23:P19738-19745. Doi: 10.1074/jbc.M100245200

Castleman, L, and S. Motzkin. 1981. *Biocompatibility of clinical implants materials*. Boca Raton, FL: CRC press.

Chau, Y. K. and O. T. R. K. Cordeiro. 1995. „Occurrence of nickel in the Canadian environment." *Environ. Rev.* 3:95-120.

Chauhan, S. S., R. Thakur, and G. D. Sharma. 2008. „Nickel: its availability and reactions in soil." *J. Indl. Polln. Ctrl.* 24, no. 1:57-62.

Chifman J., R. Laubenbacher, and S. V. Torti. 2014. "A systems biology approach to iron metabolism." *Adv. Exp. Med. Biol.* 844:201-25.

Clodfelder, Buffie J., et al. 2005. "Oral administration of the biomimetic [Cr3O(O2C-CH2CH3)6(H2O)3]+ increases insulin sensitivity and improves blood plasma variables in healthy and type 2 diabetic rats." *Journal of biological inorganic chemistry: JBIC: a publication of the Society of Biological Inorganic Chemistry* 10, no. 2:119-30. Doi:10.1007/s00775-004-0618-0

Costello, Rebecca B., et al. 2016. "Chromium supplements for glycemic control in type 2 diabetes: limited evidence of effectiveness." *Nutrition Reviews* 74, no. 7:455-68. Doi:10.1093/nutrit/nuw011

Czarnek, Katarzyna, and Andrzej K. Siwicki. 2021a. "Influence of chromium (III), cobalt (II) and their mixtures on cell metabolic activity." *Current Issues in Pharmacy and Medical Sciences* 34, no. 2:87-93. Doi: 10.2478/cipms-2021-0019

Czarnek, Katarzyna, and Andrzej K. Siwicki. 2021b. "Genotoxicity of chromium (III) and cobalt (II) and interactions between them." *Current Issues in Pharmacy and Medical Sciences* 34, no. 3:142-48. Doi: 10.2478/cipms-2021-0021

Czarnek Katarzyna, Sylwia Terpiłowska, and Andrzej K. Siwicki. 2019. "Genotoxicity and mutagenicity of nickel(II) and iron(III) and interactions between these microelements." *Trace Elements and Electrolytes* 36:17-24. Doi: 10.5414/TEX01545

Daghigh, Farzaneh, et al. 2002. "Human gingival fibroblasts produce nitric oxide in response to proinflammatory cytokines." *Journal of Periodontology* 73, no. 4:392-400. Doi: 10.1902/jop.2002.73.4.392

Das, J., M. H. Kang, E. Kim, et al. 2015. "Hexavalent chromium induces apoptosis in male somatic and spermatogonial stem cells via redox imbalance." *Sci Rep*. 5:13921. Doi:10.1038/srep13921

Drake, Harold L. 1982. "Occurrence of nickel in carbonmonoxide dehydrogenase from Clostridium pasteurianum and Clostridium thermoaceticum." *Journal of Bacteriology* 149, no. 2:561-66.

Fathima, Aafreen, and Jonnalagadda R. Rao. 2018. "Is Cr (III) toxic to bacteria: Toxicity studies using Bacillus subtilis and Escherichia coli as model organism." *Archives of Microbiology* 200:453-62. Doi: 10.1007/s00203-017-1444-4

Fiejka, M, M. Długaszek, G. Alfreda, et al. 2001. *Med. Dośw. Mikrobiol.* 53:102-106.

Gabbiani, Giulio. 1992. "The biology of the myofibroblast." *Kidney International* 41, no. 3:530-32. Doi: 10.1038/ki.1992.75

Ganz, T., and E. Nemeth. 2012. "Iron metabolism: in- teractions with normal and disordered erythro- poiesis." *Cold Spring Harb. Perspect. Med.* 2. Doi: 10.1101/cshperspect.a011668

Ganz, T. 2018. "Iron and infection." *Int. J. Hema- tol.* 107:7-15.

Górska, Anna, and Robert Piech. 2018. "Właściwości i znaczenie żelaza oraz metody jego oznaczania." *Analit* 6:2-9.

Gromysz-Kałkowska, Kazimiera, and Ewa Szubartowska. 1999. *Glin – występowanie w przyrodzie oraz wpływ na organizmy roślin, zwierząt i człowieka*. Lublin: Wydawnictwo UMCS.

Herzog, Erica, and Richard Bucala. 2010. "Fibrocytes in health and disease." *Experimental Hematology* 38, no. 7:548-56. Doi: 10.1016/j.exphem.2010.03.004

Hinz, Boris, et al. 2007. "The myofibroblasts: One function, multiple organs." *The American Journal of Pathology* 170, no. 6:1807-816. Doi: 10.2353/ajpath.2007.070112

Hostynek, J. J., and H. I. Maibach. 2002. *Nickel and the skin*. Boca Raton: CRC Press.

Howard, H. 2003. *The environment and human health*. Ed. Michael Mc. Cually, MIT Press.

Iannotti, L. L., J. M. Tielsch J. M., M. M. Black, et al., 2006. "Iron supplementation in early childhood: health benefits and risks." *Am. J. Clin. Nutr.* 84:1261-276.

Ilic, D., and J.M. Polak. 2011. "Stem cells in regenerative medicine: introduction." *Br Med Bull.* 98:117-26. Doi:10.1093/bmb/ldr012

Khan, Safi U., and Abdul Moheman. 2006. "Effect of heavy metals (cadmium and nickel) on the seed germination, growth and metals uptake by chilli (Capsicum frutescens) and sunflower plants (Helianthus annus)." *Pollution Research* 25, no. 1:99-104.

Killilea, David, et al. 2003. "Iron accumulation during cellular senescence in human fibroblasts in vitro." *Antioxidants and Redox Signaling* 5.5: 507-16.

King, M. M., K.K. Lynn, and C. Y. Huang. 1985. In *Progress in Nickel Toxicology*, edited by S. S. Brown, and F. W. Sunderman Jr., 117-20. Oxford: Blackwell.

Matlock, M.M., B.S. Howerton, and D. A. Atwood, 2002. "Chemical precipitation of heavy metals from acid mine drainage." *Water Res.* 36:4757-764.

Kolios, George, and Yuben Moodley. 2013. "Introduction to stem cells and regenerative medicine." *Respiration*. 85 (1):3-10. doi: 10.1159/000345615

Konturek, Stanisław. 2000. *Fizjologia człowieka, układ trawienny i wydzielanie wewnętrzne*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Kumar, Dharmendra, and Satya P. Gangwar. 2012. "Role of antioxidants in detoxification of Cr (VI) toxicity in laboratory rats." *J. Environ Sci Eng.* 54 (3):441-46. PMID: 24749208.

Leszek, Jerzy, et al. 2017. "Type 3 Diabetes Mellitus: A Novel Implication of Alzheimers Disease." *Current topics in medicinal chemistry* 17, no. 12:1331-335. Doi: 10.2174/1568026617666170103163403

Logan, Darren, et al. 2006. "Regulation of pigmentation in zebrafish melanophores." *Pigment Cell Research* 19 (3):206-13. Doi: 10.1111/j.1600-0749.2006.00307.x

Lukaski, Henry C., et al. 2007. "Chromium picolinate supplementation in women: effects on body weight, composition, and iron status." *Nutrition (Burbank, Los Angeles County, Calif.)* 23, no. 3:187-95. Doi: 10.1016/j.nut.2006.12.001

Marklund, Stefan. 1992. "Regulation by cytokines of extracellular superoxide dismutase and other superoxide dismutase isoenzymes in fibroblasts." *Journal of Biological Chemistry* 267 (10):6696-701. Doi: 10.1016/S0021-9258(19)50482-3

Mehta, K.J., S. J. Farnaud, and P. A. Sharp. 2019. "Iron and liver fibrosis: Mechanistic and clinical aspects." *World J Gastroenterol.* 25 (5):521-38. Doi: 10.3748/wjg.v25.i5.521

Milto I. V., I. V. Suhodolo, V. D. Prokopieva, et al. 2016. "Molecular and Cellular Bases of Iron Metabolism in Humans." *Biochemistry* 81:549-64.

Muckenthaler M. U, S. Rivella, M. W. Hentze, et al. 2017. "A Red Carpet for Iron Metabolism." *Cell.* 168 (3):344-61. Doi: 10.1016/j.cell.2016.12.034

Nam, S.M., J. W. Kim, D. Y. Yoo, et al. 2016. "Effects of aluminum on the reduction of neural stem cells, proliferating cells, and differentiating neuroblasts in the dentate gyrus of D-galactose-treated mice via increasing oxidative stress." *J Vet Sci.* 17 (2):127-36. Doi: 10.4142/jvs.2016.17.2.127

Niwa, H., J. Miyazaki, and A. G. Smith. 2000 ."Quantitative expression of Oct-3/4 defines differentiation, dedifferentiation or self-renewal of ES cells." *Nat Genet*. 24 (4):372-76. Doi: 10.1038/74199

Nowakowska, Danuta, et al. 2021. "Biological response induced in primary human gingival fibroblasts upon exposure to various types of injectable astringent retraction agents." *Materials* 14 (8):2081. Doi: 10.3390/ma14082081

Otag, Aynur, et al. 2014. "Responses of trace elements to aerobic maximal exercise in elite sportsmen." *Global journal of health science* 6, no. 3:90-96. Doi: 10.5539/gjhs.v6n3p90

Pechova Alena, and Leos Pavlata. 2007. "Chromium as an essential nutrient: A review." *Veterinarni Medicina* 52(1):1-18. Doi: 10.17221/2010-VETMED

Piotrowska, Anna, et al. 2018. "Biologiczne znaczenie chromu III." *Medycyna Pracy* 69, no. 2:211-23. Doi: 10.13075/mp.5893.00625

Ponsonnet, L, et al. 2002. "Effect of surface topography and chemistry on adhesion, orientation, and growth of fibroblasts on nickel-titanium substrates." *Materials Science and Engineering: C* 21 (1-2):157-65. Doi: 10.1016/S0928-4931(02)00097-8

Putters, J, D. Kaulesar Sukul, G. de Zeeuw, et al. 1992. "Comparative cell culture effects of shape memory metal (Nitinol), Nickel and Titanium: A biocompatibility estimation." *Eur. Surg. Res*. 24:378-82.

Racine, Melanie, et al. 2018. "Reversal of Sp1 transactivation ang TGFb1/SMAD1 signaling by H2S prevent nickel-induced fibroblast activation." *Toxicology and Applied Pharmacology* 356:25-35. Doi: 10.1016/j.taap.2018.07.029

Ross, S. M. 1994. "Sources and forms of potentially toxic metals in soil – plant systems." In *Toxic metals in soil – plant systems*, edited by S M. Ross, 3-25. New York: Wiley and Sons.

Sawicki, Wojciech. 2008. "Tkanka łączna właściwa." In *Histologia*. Warszawa: Wydawnictwo Lekarskie PZWL.

Schnegg, H. A., and M. Kirchgessner. 1980. "Toxic effects of trace elements on the reproduction of mice and rats." *Arch. Environ. Hlth*. 23:102-106.

Sevin, I. F. 1980. *Nickel, Metals in the environment*. London: Academic Press.

Shrivastava, Yamini, et al. 2005. "Cytotoxicity studies of chromium (III) complexes on human dermal fibroblasts." *Free Radic Biol Med.* 38 (1):58-69. Doi: 10.1016/j.freeradbiomed.2004.09.029

Shen, L., C. X. Song, C. He, et al. 2014. "Mechanism and function of oxidative reversal of DNA and RNA methylation." *Annu Rev Biochem*. 83:585-614. Doi: 10.1146/annurev-biochem-060713-035513

Sigel, Helmut, and Astrid Sigel. 1988. *Nickel and its role in biology. Metal ions in biological systems*. New York: Marcel Dekker.

Smith, A. 2006. "A glossary for stem-cell biology." *Nature* 441:1060. Doi: 10.1038/nature04954

Sugden, David, et al. 2004. "Melatonin, melatonin receptors and melanophores: A moving story." *Pigment Cell Research* 17 (5):454-60. Doi: 10.1111/j.1600-0749.2004.00185.x

Sugden, K. D., and D. M. Stearns. 2000. "The role of chromium(V) in the mechanism of chromate-induced oxidative DNA damage and cancer." *Journal of environmental pathology, toxicology and oncology: Official organ of the International Society for Environmental Toxicology and Cancer* 19 (3):215-30. Doi: 10.1016/j.tiv.2004.03.001

Sunderman, F. W., J. B. Sullivan, and G. R. Krieger. 2001. *Nickel in clinical environmental health and toxic exposures*. Baltimore: Williams and Wilkins.

Śpiewak, Radosław, and Justyna Piętowska.. 2006. "Nikiel – alergen wyjątkowy. Od struktury atomu do regulacji prawnych." *Alergologia Immunologia* 3, no. 3-4:58-62.

Takahashi, K., and S. Yamanaka. 2006. "Induction of pluripotent stem cells from mouse embryonic and adult fibroblast cultures by defined factors." *Cell*. 126 (4):663-76. Doi: 10.1016/j.cell.2006.07.024

Tikhomirov, F. A., N. N. Kuznetsova, and L. G. Magina. 1987. "Effect of nickel on plants in a sod-podzolic soil." *Agrokhimiya* 8:74-80.

Vincent, John. 2010. "Chromium: Celebrating 50 yers as an essential element?" *Dalton Trans* 39 (16):3787-794. Doi: 10.1039/b920480f

Wang, Yafei, et al. 2017. "Carcinogenicity of chromium and chemoprevention: A brief update." *Onco Targets Ther*. 10:4065-4079. Doi: 10.2147/OTT.S139262

Ward, R. J., R. R. Crichton, D. L. Taylor, et al. 2011. "Iron and the immune system." *J. Neural Transm.* 118:315-28.

Weissman, I. L. 2000. "Stem cells: units of development, units of regeneration, and units in evolution." *Cell*. 100 (1):157-68. Doi: 10.1016/s0092-8674(00)81692-x

Widłak, Małgorzata. 2011. "Toksyczność glinu wyzwaniem środowiskowym (przegląd literatury)." *Rocznik Świętokrzyski. Ser. B – Nauki Przyr*. 32:131-40.

Wintz, M., T. Fox, and C. Vulpe. 2002. "Functional genomics and gene regulation in biometal research." *Bull. Environ. Contam. Toxicol.* 30:765-68.

Wlaschek, Meinhard, et al. 2019. "Iron and iron-dependent reactive oxygen species in the regulation of macrophages and fibroblasts in non-healing chronic wounds." *Free Radical Biology and Medicine* 133:262-75. Doi: 10.1016/j.freeradbiomed.2018.09.036

Yao, Y., Y. Lu, W. C. Chen, et al. 2014. "Cobalt and nickel stabilize stem cell transcription factor OCT4 through modulating its sumoylation and ubiquitination." *PLoS One*. 9 (1):e86620. Doi: 10.1371/journal.pone.0086620

Yin, R., S. Q. Mao, B. Zhao, et al. 2013. "Ascorbic acid enhances Tet-mediated 5-methylcytosine oxidation and promotes DNA demethylation in mammals." *J Am Chem Soc*. 135 (28):10396-10403. Doi: 10.1021/ja4028346

Yin, R., J. Mo, J. Dai, et al. 2018. "Nickel(ii) inhibits the oxidation of DNA 5-methylcytosine in mammalian somatic cells and embryonic stem cells." *Metallomics*. 10 (3):504-12. Doi: 10.1039/c7mt00346c

Yokoi, K., E. O. Uthus, and F. H. Nielson. 2002. "The essential use of nickel affects physiological functions regulated by the cyclic – GMP signal transduction system." Proceedings of the 7th international symposium on metal ions in biology and medicine, St. Petersburg, Russia, 5-9.

Yuan, Ye, Fei Xu, Yan Cao, et al. 2019. "Iron Accumulation Leads to Bone Loss by Inducing Mesenchymal Stem Cell Apoptosis Through the Activation of Caspase3." *Biological Trace Element Research* 187, no. 2:434-41. Doi: 10.1007/s12011-018-1388-9

Zabłocka, Agnieszka. 2006. *Postępy Higieny i Medycyny Doświadczalnej* 60:209-16.

Zhang, Y., W. Zhai, M. Zhao, et al. 2015. "Effects of iron overload on the bone marrow microenvironment in mice." *PLoS One*. 10(3):e0120219. Doi:10.1371/journal.pone.0120219

Zhao, H., N. Sun, S. R. Young, et al. 2013. "Induced pluripotency of human prostatic epithelial cells." *PLoS One*. 8 (5):e64503. Doi:10.1371/journal.pone.0064503

Zuziak, Justyna, and Małgorzata Jakubowska. 2016. "Glin w otoczeniu i jego wpływ na organizmy żywe." *Analit* 2:110-20.

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AN EXPERT IN DISCIPLINARY PROCEEDINGS IN THE POLICE IN POLAND

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Abstract Disciplinary proceedings in the Police is a crucial issue given the size of this formation. For this reason, the number of relevant proceedings is also adequate. I will begin this discussion with a presentation of selected issues of disciplinary proceedings in the Police that shed light on this subject matter. The core interest of this study is evidentiary proceedings carried out as part of disciplinary proceedings, and to be more precise, the possibility of taking evidence from an expert witness's opinion. This issue is largely regulated under the Code of Criminal Procedure. Naturally, there are some problems, e.g. when we talk about the system of verification of expert witnesses' competences, but this is not subject of the discussion here. The legislator, in the act that regulates the procedure in a disciplinary offence committed by a police officer, did not include a regulation concerning an expert witness and did not refer to the application of another relevant provision either. This is why we are left with a question of what to do if special information must be obtained in the case. Another element of the discussion, after answering the first question, addresses the possibility of suspending the disciplinary proceedings if an opinion of an expert witness is being awaited. Moreover, I also include comments on the possibility of asking the opinion of an expert witness specializing in Polish law. The discussion carried out in this study is only an outline of problems that appear in the practice of conducting disciplinary proceedings.

Keywords: opinion of an expert; disciplinary liability; suspension of proceedings; uniformed services

INTRODUCTION

An expert witness, as an individual with advanced knowledge in a strictly specified field, is often a foundation for issuing a correct judgment in the case in which he acts. Experts, with their professional expertise, appear in any proceedings where special information needs to be used and which the expert has. Therefore, it may be any civil, criminal or disciplinary proceedings, but I would like to focus on the latter here. The special characteristics of disciplinary proceedings means that existing procedures that have been functioning in the criminal process may not always be reflected in this type of proceedings because the legislator does not always prescribe a norm that allows appropriate application of regulations. Disciplinary proceedings of

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police officers refer to respective application of provisions of the Code of Criminal Procedure,[1] yet the are limited – by identifying specific measures that may be applied. The subject matter of this study presents a discussion on the possibility of appointing an expert in disciplinary proceedings for Police officers, despite the lack of a clear regulation of these issues in the Police Act.[2] I will present concepts associated with the possibility of presenting evidence from an opinion of an expert lawyer and a discussion associated with time limits of evidentiary proceedings as well as the limitation period. The last issue to investigate will be an attempt to answer the question: is waiting for an opinion of an expert a basis to suspend disciplinary proceedings?

1. DISCIPLINARY PROCEEDINGS FOR POLICE OFFICERS – SELECTED ISSUES

This discussion must begin with a general presentation of the basis of disciplinary liability of police officers. Pursuant to the Article 132(1-3) PA, a police officer is liable for committing a disciplinary offence that involves violation of professional discipline or non-observance of the principles of professional ethics. The legislator specifies that infringement of service discipline means an act of a police officer that involves culpable contravention of his powers or failure to discharge duties imposed by legislation in force or by orders or instructions given by his/her superiors authorised to do so pursuant to this legislation. Then the legislator lists behaviour that qualifies as infringement of service discipline. However, it is an open catalogue, as proven by the use of the expression: "in particular". Moving on to the second possibility to hold a police officer disciplinarily liable, that is for failure to observe service ethics laid down in the Ordinance of the Police Commander in Chief,[3] it needs to be stated that such violation results in the initiation of the same procedure like in the case of violation of service discipline. The framework of this study does not allow for a broader discussion of the subject matter of the basis of initiation of disciplinary proceedings, however, it is reasonable to at least signal this issue.

When there is a reasonable suspicion that a police officer has committed an act that may be qualified as a disciplinary offence, a disciplinary superior initiates proceedings (Article 135i(1) PA), appoints a disciplinary commissioner to conduct these proceedings (Article 135a PA), who also collects

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1 Act of 6 June 1997, the Code of Criminal Procedure, Journal of Laws of 2022, item 1375 [hereinafter: CCrP].

2 Act of 6 April 1990, the Police Act, Journal of Laws of 2021, item 1882 [hereinafter: PA].

3 Ordinance no. 805 of the Police Commander in Chief of 31 December 2003, Official Journal of the Chief Police Headquarters of 2004, no. 1, item 3.

evidence and takes steps necessary to explain the case (Article 135e(1) PA). Therefore, it seems that proceedings may only be initiated where there is a "reasonable suspicion", which *de facto* may be equalled with a "reasonable suspicion of committing a crime", which must occur for the initiation of investigation or inquiry under criminal proceedings [Adamczak 2012, 57]. Thus, the disciplinary superior must be convinced that the facts he knows allow for the creation of at least one version which points to a police officer's committing a disciplinary offence [Przygodzki 2011, 130]. Where the disciplinary superior has doubts about what he has found out in the question of committing a disciplinary offence or of the legal qualification or identity of the perpetrator, he orders the disciplinary commissioner to conduct an investigation intended to collect material necessary to determine the validity of initiation of disciplinary proceedings. Documenting actions during the investigation is less formalized because writing a service note is sufficient here. Upon confirming the suspicion about the commission of the disciplinary offence, the material gathered in the proceedings should be annexed to the disciplinary proceedings [Baj and Bober 2013, 11].

Such proceedings must pursue objectives imposed by the legislator, whereby the investigator must: 1) establish whether the alleged act was committed and whether the accused has committed it; 2) explain causes and circumstances of committing the act; and 3) collect and record evidence in the case (Article 135i(5) PA). To meet these goals, it is necessary to conduct disciplinary proceedings effectively. As has already been signalled, the disciplinary commissioner collects evidentiary material and takes steps necessary to explain the case. The legislator lists examples of such steps, and they include - interrogation of witnesses, hearing the statement of the accused persons, of the victim, carrying out an inspection, confrontation, presentation or reconstruction of events or their fragments that are being examined. The disciplinary commissioner may also commission the performance of relevant examinations (Article 135e(1) PA). Evidentiary proceedings are the most important part of this procedure as they allow an answer to the question of what the commitment of a disciplinary offence looked like, who did it, in what circumstances, whether it was intentional or whether there are circumstances that mitigate liability. However, in order to answer such questions correctly, it is necessary to reconstruct the course of the event by means of the evidence taken. Declaring that the police officer did commit the disciplinary offence should be done with respect to the principle of objective truth, which, along with the principle of official action is valid in disciplinary proceedings. The disciplinary superior has the obligation to collect the evidence and take steps necessary to solve the case. It is an indispensable condition to correctly carry out this process and thus, also to settle the

case correctly. Attribution of guilt, therefore, requires a clear determination of the facts of the case and their correct legal assessment.[4]

Conducting explanatory proceedings as well as disciplinary proceedings is limited by deadlines stipulated in the act. The former should be finished within 30 days. The legislator allows for it to be extended to the maximum of 60 days in particular cases due to the character of the case and upon permission from the disciplinary superior (Article 134i(4) PA). In the case of disciplinary proceedings, the legislator points out that evidentiary steps should be finished within a month from the date of initiation of these proceedings. They may be extended by a decision of the High Disciplinary Superior for a fixed term of up to 3 months. Extension of this period may be granted by the Police Commander in Chief (Article 135h(1) and (2) PA). Due to the specific nature of disciplinary proceedings as well as basic requirements that must be met by any proceedings, it should be quick, efficient and effective and actions in them should be thoroughly planned to minimise their burdensomeness on participants of the proceedings [Kotowski 2021]. From this point of view, it is also important to observe the deadlines associated with the possibility to initiate proceedings and time limits of punishing offences. Pursuant to statutory regulations, disciplinary proceedings cannot be initiated after the lapse of 90 days from the disciplinary superior learning about the disciplinary offence, whereas the possibility to punish the disciplinary offence expires after 2 years from the date of its commission. Stay of disciplinary proceedings shall restrain this period (Article 135(3) and (4) PA). This time limit is extended where the disciplinary offence bears the marks of a (fiscal) crime or (fiscal) misdemeanour – according to rules adopted in the criminal code, fiscal criminal code and the code of minor offences.

2. EVIDENCE FROM THE OPINION OF AN EXPERT − ITS USE IN CRIMINAL PROCEEDINGS AND ITS USE IN DISCIPLINARY PROCEEDINGS.

Pursuant to the Code of Criminal Procedure (Article 193(1) CCrP), if recognition of circumstances that are crucial to solving the case requires special information, then the opinion of an expert or experts is sought. The legislator uses the term expert in this provision, but there is no mention of what needs to be understood under this term, therefore it is reasonable to refer to the dictionary definition of this concept. There are two definitions of an expert in the dictionary of the Polish language: 1) a specialist in a given field and 2) someone with great skill and experience in a given field; the

[4] See judgement of the Provincial Administrative Court in Poznań of 14 February 2018, ref. no. IV SA/Wr 1103/17, Lex no. 2448737.

dictionary also specifies the concept of a judicial expert, which should be understood as: "a person appointed by the court to issue an opinion relating to this person's professional knowledge."[5] It must be clearly stated that an expert should be a person considered an authority in their field and someone who enjoys respect as well as trust of other experts in a given discipline.

An expert should have special information which in the relevant literature is defined as information that goes beyond average practical skills of an adult with relevant life experience, education and general knowledge and a normal, publically available knowledge about science, art, technology or craft[6] [Drajewicz 2014, 76]. What is important, the procedural authority, even where it itself has the knowledge considered special information, is obliged to take such evidence.[7]

In chapter 22 of the CCrP the legislator has regulated issues associated with a decision to allow evidence from an opinion of an expert witness, inclusion of an expert, the possibility for the expert to access the case files, the expert's secrecy or elements that an opinion of an expert must have. The Police Act, in turn, does not have stipulate regulations that refer to an expert.

Each piece of evidence in criminal proceedings is treated equally, we cannot make a division into better and worse evidence and there is no doubt that opinions of experts, due to the fact that they come from independent persons who do not have an interest in the resolution of the case, are important for the procedural authorities [Flaga-Gieruszyńska, Gołaczyński, Klich, et al. 2017, 179]. From the point of view of criminal proceedings, an opinion of an expert may be valued higher than, e.g. witness testimony, because it must meet statutorily specified criteria (Article 201 CCrP), it must be complete, clear and consistent, but still it is necessary that it is each time objectively assessed by the authority that orders it, according to the principles of free evaluation of evidence. An opinion of an expert may be questioned in a situation where it has no clear argument and its conclusions are illogical and imprecise and one cannot derive the expert's belief from the opinion. Conclusions must always be based on the research conducted [Ładoś 2016, 69]. On the other hand, an opinion of an expert is not disqualified if it is not explicit in a situation where it is objectively not possible to give a clear answer to the question, which is not down to the expert not having suitable qualifications or to his undue preparation of the opinion, but which is the result of state of the art, lack of suitable research methods

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5 See https://sjp.pwn.pl/sjp/szukaj/bieg%C5%82y [accessed: 20.09.2022].

6 Cf. judgement of the Supreme Court of 15 April 1976, ref. no. II KR 48/76, OSNKW 1976, no. 10-11, item 133.

7 Cf. judgement of the Supreme Court of 1 April 1988, ref. no. IV KR 281/87, OSNKW 1988, no. 9-10, item 69.

or modest research material which can in no way be complemented [Tomaszewski 2000, 119-20].

Referring this discussion on an expert witness appointed in criminal proceedings, we must think whether these principles and procedures, that function in the criminal process may be applied under the Police Act to disciplinary proceedings and whether provisions that regulate disciplinary liability in the Police at all allow the appointment of an expert in disciplinary cases. I will try to answer these questions after I present the subject matter of relevant application of provisions of the Code of Criminal Procedure to disciplinary proceedings of police officers.

3. RELEVANT APPLICATION OF PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE TO DISCIPLINARY PROCEEDINGS OF POLICE OFFICERS

The Police Act does not comprehensively regulate the question of conducting disciplinary proceedings, which is why the legislator uses the measure of respective application of the Code of Criminal Procedure, but it limits the extent in which it may be used to provisions concerning procedural steps, save for Article 117 and Article 117a, summons, dates, service and witnesses, but ruling out the possibility to impose order-related penalties, or confrontations, presentations, inspections and experiments (Article 135p(1) PA). In this study I will focus primarily on the possibility of appointing an expert to disciplinary proceedings, because according to a regulation included in the Police Act, there is no direct possibility to appoint an expert, the act does not regulate it independently nor does it allow for the application of measures related to experts described in the CCrP, referred to earlier. The authority of the disciplinary commissioner to appoint an expert may only be derived indirectly from the provision that regulates the course of disciplinary proceedings, which lays down that: "the disciplinary commissioner may also commission the performance of relevant examinations." Nevertheless, there are no special laws for this. Pursuant to the judgement of the Voivodship Administrative Court in Kraków: "appropriate application of provisions of the Code of Criminal Procedure" means that it does not accommodate all cases not regulated in the 1990 Police Act, but only concerns those issues that were specified by the legislator.[8] However, this conclusion does not correspond with general features of disciplinary proceedings referred to above and whose implementation depends on the most precise reconstruction of the facts, which may be done by taking necessary evidence. If in disciplinary

[8] See judgement of the Voivodship Administrative Court in Cracow of 4 June 2019, ref. no. III SA/Kr 200/19, Lex no. 2689531.

proceedings it is necessary to only take evidence from witness testimony, then this problem does not occur because the legislator regulates this procedure comprehensively. The problem appears when an expert must be appointed. Then, as rightly pointed out in legal commentary, it is legitimate to use *analogia legis*, which is not limited only to cases of referring clauses, but allows the regulation of questions not regulated by the legislator at all, therefore it solves the problem of a real lacunae [Janusz-Pohl 2017, 23]. In this place it is reasonable to invoke the position of the Constitutional Tribunal, which points out that disciplinary proceedings are special proceedings, therefore, application of relevant provisions of the code of criminal procedure intends to ensure rights and guarantees to the accused person which serve to safeguard their interests in disciplinary proceedings, not to give the procedure itself a criminal law character.[9] Undoubtedly, ensuring the possibility to appoint an expert in a disciplinary case which requires special information is a demonstration of guarantees of rights of the accused person. It is especially true in a situation where all regulations, e.g. related to the right to exclude the expert or to verify his opinion by the accused's submitting a request to appoint another expert, constitute implementation of the principle of reliability.

The above clearly shows that the possibility to appoint experts in disciplinary proceedings of police officers results from the provision of Article 135e PA, where the legislator allows the disciplinary commissioner to order a suitable examination, which in my opinion may be applied to an examination that should be carried out by the expert and I do not only mean here an examination of the mental health of the accused person; this issue is intentionally omitted in this study. On the other hand, when it comes to guarantees of the expert's independence, his adequate competences and the possibility to dismiss him as well as elements of an opinion he is obliged to produce, we must use, by *analogia legis*, provisions of the CCrP that regulate this subject matter, because this is consistent with principles and objectives of disciplinary proceedings. Some authors go further and allow the taking of evidence from an opinion of an expert lawyer if a complicated legal issue appears in the case [Jóźwiak 2011, 37]. In my opinion it is a too far-reaching step. We must not forget that disciplinary organs accommodate authorities that should have extensive knowledge, competences and professional experience. The specific characteristics of the work of the Police means that police officers have frequent contact with provisions of the law and apply them to citizens, thus they must have relevant knowledge. Therefore, it is not legitimate to appoint an expert lawyer who is to deal with an issue related to the Polish legal order. Otherwise, if we were to assume that a relevant expert

[9] Judgement of the Polish Constitutional Tribunal of 27 February 2001, ref. no. K 22/00, ZU 2001, no. 3, item 48.

may be appointed always when there is a legal issue that goes beyond the capabilities of disciplinary authorities, then this possibility would surely be abused and disciplinary authorities would rarely take decisions contrary to an expert's belief. Abuses here would be severe because disciplinary authorities would shed the burden of liability for the result of the proceedings, shifting it onto the expert or his opinion. In such a case, we should think whether the panel of the broadly understood disciplinary judiciary should not be composed of only police officers with a legal education. Such a solution would have its pros, but it would not always be doable given the lack of persons with such qualifications in appropriate positions.

4. STAY OF DISCIPLINARY PROCEEDINGS

Disciplinary proceedings may be stayed by a decision of a disciplinary superior if there is a long-term obstacle that disallows the performance of proceedings. Also, they must be stayed where the accused police officer changes the place of his service (Article 135h(3) and (3a) PA). The discussion will only cover the first case that lays down the optional possibility of staying the proceedings. It needs to be pointed out that such a stay boils down to a temporary refraining from taking actions due to circumstances that paralyse the continuation of the procedure [Rodzoch 2017, 60]. The premise described in the Police Act is similar to the regulation described in the CCrP, with the proviso that in the CCrP the legislator pointed out, as an example, what may constitute the long-term obstacle, while such an example in not provided in the Police Act. In an attempt to define the concept of a long-term obstacle, it is reasonable to look at its linguistic understanding. Thus, long-term means something that "lasts for a long time; that is protracted" [Kubisa-Ślipko 2006, 91], while an obstacle means "something that hinders or makes it impossible to achieve something."[10] The premise of staying the proceedings has a passing nature, thus it will not lead to a definite ending of proceedings [Kosonoga 2017]. A stay of proceedings is legitimate if the obstacle is long-term and at the same time it makes it impossible to conduct the process. These elements must be conjoined. At that, it is not about the circumstances that make it difficult to carry out the process but about those make it impossible to do it.[11]

The literature points out that waiting for an opinion of an expert may be a long-term obstacle when the time necessary to issue an opinion (and

[10] See https://sjp.pwn.pl/szukaj/przeszkoda.html [accessed: 20.09.2022].

[11] See decision of the Supreme Court of 13 January 1973, ref. no. II KZ 171/73, OSNKW 1973, no. 10, item 127; decision of the Administrative Court in Rzeszów of 3 March 1992, ref. no. II AKZ 12/92, OSA 1993, no. 10, item 60.

proceedings to issue an opinion) exceeds basic time limits. An important determinant here is the necessity to determine that this obstacle makes it impossible to continue the proceedings [Kurowski 2022]. Therefore, a question arises whether the wait for the opinion of an expert in a disciplinary case validates the staying of proceedings and whether it would be legitimate. The answer to this question is not unequivocal because, as has been concluded above, the stay is possible if there is a long-term obstacle that makes it impossible to continue the proceedings. Meeting the first requirement is possible without a doubt, but the problem arises with the simultaneous implementation of the premise of disallowing the continuation if ordering an expert to issue an opinion does not prevent the authority from conducting further evidentiary proceedings in the same time. However, if we analyse this problem from a different perspective, the perspective of time limits, especially for punishing a disciplinary offence (2 years from the commission of a given offence that is subject only to disciplinary liability – the act is not a crime/misdemeanour), then it would be worth thinking about allowing the possibility to stay disciplinary proceedings due to having to wait long for the expert's opinion and where the results of such an opinion will directly affect the decision of the procedural authority. Therefore, pursuant to the principle of objective truth we should allow the possibility to stay proceedings for this reason. However, this issue is not clear because we must remember about the directive to recognize the case within a reasonable time, whereby a too broad interpretation of the concept of a long-term obstacle may become a source of excessive length of proceedings, to the detriment of the accused person. Therefore, as a rule, evidence difficulties per se should not be a basis to stay the proceedings [Kmiecik 1985, 52]. Legal scholars and commentators and the established body of judicial decisions are in line with the above-mentioned view which was based on the discussion concerning the stay of criminal proceedings. Due to an analogical formulation of the premises of a stay in the Police Act we me be tempted to apply them analogically in disciplinary proceedings in the Police. However, because there are differences between criminal and disciplinary procedures, it would be worth thinking about the possibility of allowing this premise as a basis for staying the disciplinary proceedings by reference to relevant time limits. We must also remember that only a legal stay of proceedings stops the course of this time limit.[12]

[12] See judgement of the Voivodship Administrative Court in Rzeszów of 2 March 2017, ref. no. II SA/Kr 1093/16, Lex no. 2260521.

CONCLUSIONS

Concluding this discussion, it must be clearly stated that an opinion of an expert may be sought in disciplinary proceedings of police officers if there are circumstances in the case that require special information and that are crucial to resolving it. The legislator's silence in this regard cannot be interpreted as intentional elimination of this evidence from disciplinary proceedings as it could affect the shape of these proceedings. Evidence from an opinion of an expert is often key and contributes to a fair resolution of the case. Not being allowed to rely on it would mean having to apply the rule according to which unavoidable doubts must be resolved to the advantage of the accused person. We could not adopt a position that worsens the situation of the accused person since the evidence material would not be complete and the authority could not supplement it with an opinion of an expert. We must conclude that regulations concerning an expert described in the Code of Criminal Procedure in chapter 22 should be applicable to disciplinary proceedings, therefore, the provision of Article 135p PA should be supplemented with respective application of provisions on experts, which would eliminate interpretation problems.

Knowing that we may appoint experts in disciplinary proceedings of police officers, we must answer a question whether we may appoint an expert to solve a legal issue that appears in such proceedings despite the fact that it is commonly assumed that it is inadmissible in a criminal procedure, save for an expert in foreign law. I believe too that an expert cannot be appointed in such a situation because it would be contrary to the general rule that states that organs that apply the law know this law. Admittedly, disciplinary authorities are not usually composed of lawyers, but the specific characteristics of these proceedings do not require so. On the other hand, when it comes to persons that hold disciplinary functions, there should be high criteria, including knowledge of the law and of disciplinary procedures. The emerging legal problems may be discussed with legal departments that operate at police units, therefore appointing a lawyer seems unnecessary. We may perhaps postulate that the disciplinary judiciary should be composed of officers with a legal education and there is no shortage of such persons in the Police. Naturally, it should not be the only condition for the choice of disciplinary authorities, but if there were a few candidates, this should be the decisive requirement.

Disciplinary proceedings, as a special kind of liability, have their time limits which result directly from the Police Act and in the case of crimes, fiscal crimes, misdemeanours and fiscal misdemeanours from the Criminal Code, the Fiscal Criminal Code and the Code of Minor Offences where time limits of punishing offences have been laid down. In the case of an act

that meets the requirements of only a disciplinary trespass, this time limit is relatively short - it is only 2 years from the commission of the act. Thus, the authority has limited time to issue a ruling, which is to the advantage of the accused person. A stay of proceedings is a measure that may stop the course of this time limit. The question that I asked in the introduction of this study concerned the possibility of staying the proceedings due to the wait for an opinion of an expert. Arguments concerning the stay of disciplinary proceedings did not yield a clear answer. Therefore, it was necessary to rely on solutions proposed in legal commentary that referred to the stay of criminal proceedings. Views of legal scholars and commentators there are consistent as they agree that waiting for evidence may not be the basis to stay the proceedings. However, due to the specific characteristics of disciplinary proceedings and their time limits, I believe that we must not definitely prohibit the staying of proceedings due to the fact that an opinion must be issued by an expert. It should be each time evaluated individually and it is the conducting authority that should take a decision in this matter, especially if the opinion is to concern questions that are the main theme of proceedings and there is no other basis to issue a decision.

REFERENCES

Adamczak, Ireneusz 2012. "Wszczęcie postępowania dyscyplinarnego w Policji." In *Węzłowe problemy prawa dyscyplinarnego w służbach mundurowych*, edited by Piotr Jóźwiak, and Krzysztof Opaliński, 57-66. Piła: Wydawnictwo Szkoły Policji w Pile.

Baj, Dariusz, and Dariusz Bober. 2013. *Odpowiedzialność dyscyplinarna policjanta*. Legionowo: Wydawnictwo Centrum Szkolenia Policji w Legionowie.

Drajewicz, Dariusz 2014. "Ocena opinii biegłego w postępowaniu karnym." *Przegląd Sądowy* 6:76-87.

Flaga-Gieruszyńska, Kinga, Jacek Gołaczyński, Aleksandra Klich, et. al. 2017. *Biegły w postępowaniu cywilnym i karnym. Komentarz praktyczny z orzecznictwem. Wzory pism procesowych i orzeczeń*. Warszawa: C.H. Beck.

Janusz-Pohl, Barbara 2017. "Analogia legis na gruncie ustawy o Policji – zagadnienia wybrane." In *Odpowiednie stosowanie przepisów innych ustaw w sprawach dyscyplinarnych w służbach mundurowych*, edited by Piotr Jóźwiak, Wiesław Kozielewicz, and Krzysztof Opaliński, 21-28. Piła: Wydawnictwo Szkoły Policji w Pile.

Jóźwiak, Piotr. 2011. "Stosowanie prawa karnego materialnego i procesowego w postępowaniu dyscyplinarnym policjantów." In *Odpowiedzialność dyscyplinarna w Policji*, edited by Piotr Jóźwiak, and Witold Majchrowicz, 17-42. Piła: Wydawnictwo Szkoły Policji w Pile.

Kmiecik, Romuald. 1985. "Przeszkody dowodowe a zawieszenie postępowania karnego (artykuł dyskusyjny)." *Palestra* 2:52-55.

Kosonoga, Jacek. 2017. "Komentarz do art. 22." In *Kodeks postępowania karnego.* Vol. I: *Komentarz do art. 1-166*, edited by Ryszard A. Stefański, and Stanisław Zabłocki. Warszawa: Wolters Kluwer. Lex el.

Kotowski, Wojciech 2021. "Komentarz do art. 135h." In *Ustawa o Policji. Komentarz.* Warszawa: Wolters Kluwer. Lex el.

Kubisa-Ślipko, Anna. 2006. "Długotrwały." In *Słownik języka polskiego.* Wałbrzych: Wydawnictwo Językowe Aneks.

Kurowski, Michał. 2022. "Komentarz do art. 22." In *Kodeks postępowania karnego.* Vol. I: *Komentarz aktualizowany*, edited by Dariusz Świecki, Barbara Augustyniak, and Krzysztof Eichstaedt. Warszawa: Lex el.

Ładoś, Sebastian 2016. "Ocena opinii biegłego psychologa w postępowaniu karnym." In *Pozycja biegłego w polskim systemie prawnym*, edited by Bartosz Lewandowski, 62-71. Warszawa: Instytut na rzecz Kultury Prawnej Ordo Iuris.

Przygodzki, Jacek. 2011. "Odpowiedzialność dyscyplinarna policjanta za czyny będące przejawem nieprzestrzegania zasad etyki zawodowej. Problem kwalifikacji zachowania policjanta jako czynu nieetycznego." In *Odpowiedzialność dyscyplinarna w Policji*, edited by Piotr Jóźwiak, and Witold Majchrowicz, 127-37. Piła: Wydawnictwo Szkoły Policji w Pile.

Rodzoch, Inka. 2017. "Kodeksowe podstawy zawieszenia postępowania karnego." *Veritas Iuris* 1:60-75.

Tomaszewski, Tadeusz. 2000. *Dowód z opinii biegłego.* Kraków: Wydawnictwo Instytutu Ekspertyz Sądowych.

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CONFLICT OF VALUES IN THE LICENSING PROCEDURE FOR BROADCASTING RADIO AND TELEVISION PROGRAMMES IN POLAND*

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Abstract. The issue of the conflict of values in the licensing procedure for broadcasting radio and television programmes is a special case of such a clash in public economic law. The study entitled "Conflict of values in the licensing procedure for broadcasting radio and television programmes in Poland" aimed to conduct analyses to identify the values underlying licensing proceedings for broadcasting radio and television programmes in Poland, examine their potential for conflict and identify ways of resolving disputes arising in this area. The main issue of the article is formulated in the following question: "can the values determining the licensing procedure for broadcasting of radio and television programmes give rise to axiological conflicts, and if so, how should the conflicts be resolved?" The analyses conducted as part of the study led to the conclusion that the Polish broadcasting licensing procedure is determined by a number of values that may clash with one another. The entities responsible for resolving conflicts in practice and specific cases include the National Broadcasting Council and its President at the level of the administrative proceedings and the administrative courts at the level of administrative court proceedings. The settlement is based on the law, which, however, contains a number of general clauses. In order to interpret them correctly and, consequently, fairly resolve the conflict, it is crucial to refer to the fundamental source of all human rights and freedoms, including economic freedom and freedom of expression, paramount in this process – human dignity.

Keywords: economic freedom; freedom of expression; public administration; values; media law; media governance

INTRODUCTION

The issue of the conflict of values in the licensing procedure for broadcasting radio and television programmes[1] is a special case of the conflict of

* Legal status as of 30 May 2022. List of licences and decisions issued by the National Broadcasting Council: http://www.archiwum.krrit.gov.pl/dla-nadawcow-i-operatorow/koncesje/wykaz-koncesji-i-decyzji/ [accessed: 13.10.2022].

[1] The licensing procedure for the transmission of radio and television programmes is conducted in three types of matters: granting a licence, extending a licence and revoking a

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values in the public economic law. The subject matter formulated in that way assumes, firstly, the existence of values in that space, and secondly, a conflict of values in certain circumstances.[2] Jan Zimmermann reminds that "in the background of every legal institution, assuming a rational legislator, there is always a set of values" [Zimmermann 2015, 13]. The analyses performed for this study should lead to the identification of values in the space under discussion, the recognition of possible areas of their conflict, and the determination of methods of resolving the conflicts that arise in the licensing procedure for broadcasting of radio and television programmes. The starting point for the considerations is the position that puts the analysed issue into the axiological perspective, according to which "administrative law (and therefore also public economic law – the author) is to serve the good of every man, which can be considered its fundamental, in fact, the only purpose and sense of existence. Everything else – administrative structures, correlations between those structures, competence, forms of action, any type of regulating [...] serves that sole purpose" [Idem 2013, 77]. Therefore, law should serve the common good, and this criterion should be considered crucial for the adoption of a specific axiological system of law [Ruczkowski 2021, 98]. All analyses carried out for the study should be considered in the context of an axiom formulated in such a way that it cannot fail to refer to the source of human and civil freedom and rights adopted in the Constitution of the Republic of Poland, that is, human dignity.[3] It is both the foundation and the lens that bring together all other values, in the perspective of which those values should be identified.

The purpose of this study is to identify the values underlying the licensing procedure for broadcasting radio and television programmes in Poland, to examine their potential for conflicts and to indicate ways of resolving emerging conflicts in this respect. The main issue of the article is formulated in the following question: "can the values determining the licensing procedure for broadcasting of radio and television programmes give rise to axiological conflicts, and if so, how should the conflicts be resolved?" The solution to the aforementioned problem will make it possible to formulate specific questions: what values are to be protected in the licensing procedure for broadcasting of radio and television programmes? Is it possible for the

licence. A conflict of values can be observed in any of the cases.

[2] Models of the interdependence of values and legal norms within the legal order [Kwiecień 2010, 32-32].

[3] Cf. Article 30 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: the Constitution of the Republic of Poland or the CRP]: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."

conflict of values identified in that space to occur, and if so, in what situations? How to resolve the conflict of values?

The structure of the article corresponds to the problem outlined in that way. In the first section of the study, the values to be protected in the licensing procedure for broadcasting of radio and television programmes are identified; thus the procedure is determined from an axiological perspective,[4] in the second section of the article, an attempt is made to indicate possible situations of conflict of values identified in that area and to propose ways of resolving possible conflicts. The main research method used in the development of the issue under study was a dogmatic method consisting in the analysis of the content of legal provisions, the analysis of case law and the position of the doctrine on the subject matter discussed in the paper.

The consequence of the volume limit that the study cannot exceed, is the analysis of selected aspects of the issue and the deliberate omission of other ones. The study does not claim the right to formulate definitive conclusions but is an invitation to discussion by presenting a specific point of view.

1.VALUES TO BE PROTECTED IN THE RADIO AND TELEVISION BROADCASTING LICENSING PROCEDURE

While undertaking the task of identifying the values to be protected in the licensing procedure for broadcasting of radio and television programmes, it should be remembered that "the economic order or the idea of a democratic state of law cannot be separated from the content of the law and its axiological foundations. [...] both the state, the law and a system of various other ethical conditions should be legitimised by non-legal values. In that sense, every legal norm contains a reference to values" [Zdyb 1997, 12]. Consequently, "the body applying the law cannot limit itself to the literal wording of the legal provision, and its task is to find the legal norm (law) taking into account, obviously, the provisions of the law but also the values that arise from vague terms, inter alia" [Idem 2018, 7]. In the study, the identification of values concerns several areas, which is a direct consequence of the model of licensing procedure for broadcasting of radio and television programmes adopted by the Polish legislator. The above can be achieved by indicating the axiological background of the actions of the National Broadcasting Council (the NBC – Polish: *Krajowa Rada Radiofonii i Telewizji*, KRRiT), the axiological basis of the steps taken by the party or parties to the licensing procedure and the axiological foundations of the licensing procedure. It should be remembered that during the change of the

[4] The volume of the article does not allow to include the detailed description of the values; however, they are presented in the literature on the subject.

political system in Poland, and the creation of the electronic media market, its basic element was the determination of principles for the allocation of frequencies, new forms of ownership and capital restrictions criteria. Due to those conditions, from the very beginning, the electronic media market in Poland was subjected to licensing and regulations, which is the evidence of state intervention in that area.[5] It should be noted that the regulating of broadcasting activities in the form of licences is an essential instrument for safeguarding the media order.

1.1. Axiological basis of the actions taken by the NBC in the radio and television broadcasting licensing procedure

In the licensing procedure for broadcasting radio and television programmes, the legislator assigned a special role to the National Broadcasting Council and its President. Pursuant to the Broadcasting Act,[6] the authority competent for the broadcast licence is the President of the NBC, who grants the licence based on the resolution of the National Council, and the decision in this matter is final (Article 33 of the BcA). The NBC, represented in administrative proceedings by its President, is the body competent in broadcasting matters with the power to shape policy in the audiovisual market, and in licensing proceedings, the entity is authorised to make decisions within the scope of administrative discretion.[7] Given the above, it seems necessary to outline the status of the NBC, as a public administration body competent for broadcasting, and to identify the values underlying its operation.

The legal status of the NBC is determined by the provisions of the Polish Constitution and acts. The entity was established under the provisions of the Broadcasting Act and has the status of a constitutional body from the outset.[8]

Currently, the NBC has five members appointed by the Sejm (2 persons), the Senate (1 person) and the President of the Republic of Poland (1

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[5] Cf. Waniek 2007, 59.

[6] Act of 29 December 1992, the Broadcasting Act, Journal of Laws of 2020, item 805 [hereinafter: the BcA].

[7] Cf. judgement of the Regional Administrative Court in Warsaw of 7 September 2010, ref. no. VI SA/Wa 2223/09, Lex no. 759707; judgement of the Regional Administrative Court in Warsaw of 30 July 2020, ref. no. VI SA/Wa 2328/19, Lex no. 3055370.

[8] The provision on the National Broadcasting Council was introduced to the Constitution of the Republic of Poland of 1952 by the Act of 15 October 1992 on the amendment of the Constitution of the Republic of Poland (Journal of Laws of 1993, No. 7, item 33), which entered into force on 13 February 1993. The NBC retained this rank also in the Constitution of the Republic of Poland of 1997. It was created on the entry into force of the Broadcasting Act of 29 December 1992, i.e., on 1 March 1993.

person), selected from among persons distinguished by their knowledge and experience in the field of the means of social communication (Article 7 of the BcA). The term of office for the members of the NBC is six years. The members of the NBC may not belong to a political party,[9] a trade union or engage in public activities incompatible with the dignity of their function (Article 214(2) of the CRP).

Pursuant to Article 213(1) of the Constitution of the Republic of Poland, the NBC "protects the freedom of expression, the right to information and the public interest in broadcasting." By defining the tasks of the NBC, that provision determines its systemic functions – its activity is primarily to support the implementation of the three goals indicated in the provision, which are also constitutional values [Czarny 2021]. Obviously, freedom of speech in radio and television broadcasting is directly related to the fact that the Republic of Poland ensures freedom of the press and other means of social communication (Article 14 of the CRP). The constitutional regulation of the NBC is further developed in the Broadcasting Act, according to which this body "shall safeguard freedom of speech in radio and television, the independence of media service providers and video sharing platform providers, the interests of service recipients and users, and shall ensure the open and pluralistic nature of broadcasting" (Article 6 of the BcA). The Act also contains a long list of specific tasks of the NBC. Over the course of thirty years, the scope of those tasks was modified, which was mainly related to the need to adapt Polish law to the new media reality and to the requirements of the EU law but the sum those tasks guaranteed the fulfilment of the systemic functions of the NBC.

Thus, the legislator created the NBC as the guardian of certain values indicated in the Constitution and ordinary laws, and those values are: freedom of speech in broadcasting (Article 14(1) of the CRP; Article 6(1) of the BcA); the right to information in broadcasting (Article 14(1) of the CRP); the public interest in broadcasting (Article 14(1) of the CRP); the independence of media service providers and video delivery platforms in broadcasting (Article 6(1) of the BcA); the interest of service recipients and users of broadcasting (Article 6(1) of the BcA); and the open and pluralistic nature of broadcasting (Article 6(1) of the BcA).

Those values set the framework within which the NBC operates when conducting administrative proceedings on broadcasting licences.

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9 Detailed information on this subject: Jaskuła 2013, 93.

1.2. Axiological basis of the actions taken by a party/parties to the radio and television broadcasting licensing procedure

When analysing the situation of a party in a licensing procedure, it should be remembered, first of all, that it is in a subordinate position in relation to the administrative authority. However, inferiority of the party does not imply a lower status of the values that determine its action. The values underlying the party's actions are also systemic constitutional values, of two kinds in this case. On the one hand, the axiological basis for the activities of an entity that intends to get involved in broadcasting is freedom of speech across all aspects, on the other hand, it is freedom of economic activity. Thus, the axiological foundations of the actions taken by a party to a licensing procedure are the following values: freedom of economic activity (Article 20, 22 of the CRP);[10] equality of entrepreneurs (Article 32 of the CRP; Article 2 of the EA); freedom to disseminate information (Article 54 of the CRP);[11] freedom of expression (Article 54 of the CRP; Article 5, 4 of the PressL); freedom to obtain information (Article 54, 61 of the CRP; Article 4, 11 of the PressL); and access to public information (Article 61 of the CRP, Article 4, 11 of the PressL).[12]

According to the provisions of the Constitution of the Republic of Poland, "a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland" (Article 20 of the CRP). Thereby, the legislator raised freedom of economic activity to the rank of a constitutional value. While analysing that value, it should be noted that "freedom of economic activity is expressed by the possibility to undertake and carry out activities the primary purpose of which is to make a profit. An additional element is its continuity. Generally, economic activity is not a one-off action. Its framework includes the ability to make economic decisions independently, including, above all, the choice of the type (object) of activity and the selection of legal forms of its implementation" [Garlicki and Zubik 2016]. Like all forms of freedom, freedom of economic activity is not absolute and it is a subject to restrictions under general principles (Article 31(3) of the Constitution of the Republic of Poland), modified by the content of Article 22 of the Constitution [ibid.]. According to the latter provision, those restrictions "may be imposed only by means of statute and only for important public reasons" (Article 22 of the

[10] Article 2 of the Act of 06 March 2018, the Entrepreneurs Act, Journal of Laws of 2021, item 162 [hereinafter: the EA].

[11] Article 5 of the Act of 26 January 1984, the Press Law, Journal of Laws of 2018, item 1914 [hereinafter: the PressL].

[12] Article 2, 5 of the Act of 6 September 2001 on access to public information, Journal of Laws of 2020, item 2176 [hereinafter: the API].

CRP). The Constitutional Tribunal found it obvious that "economic activity, due to its nature, and especially due to its close relation to the interests of other persons and the public interest, may be subject to various restrictions to a greater extent than freedoms and rights of a personal or political nature. In particular, there is a legitimate interest of the state to create such a legal framework for economic transactions that will minimise the negative effects of free market mechanisms, if those effects are revealed in a sphere that cannot remain indifferent to the state due to the protection of commonly recognised values"[13] [ibid.]. The obligation to obtain a licence to perform the economic activity of broadcasting radio and television programmes is a specific example of restricting both freedom of economic activity and freedom of expression, and it is restricting in accordance with the rules of law.

The value constituting one of the axiological bases for actions taken by a party to a licensing procedure directly related to freedom of economic activity is the equality of entrepreneurs. According to current legislation, "Taking up, performance and termination of a business activity is available to everyone on an equal terms" (Article 2 of the EA). Legal equality of entrepreneurs is based on the constitutional principle of equality before the law.[14] The justification of the draft Act – Entrepreneurs' Law, indicates that the principle of equality of entrepreneurs before the law, meaning that in the sphere of starting, performing and terminating economic activity, entrepreneurs, to the extent that they are characterised by a given essential (relevant) feature to the same degree, should be treated equally, i.e. according to the same measure and with no differentiation, whether favourable or discriminatory [Kruszewski 2019].

With regard to the analysed dimension of the issue under study, other values are: freedom to disseminate information, freedom of expression, freedom of obtaining information and access to public information. They represent different aspects of freedom of speech (Article 14, 54 of the CRP; Article 6(1) of the BcA), and preventing the implementation of any of them makes it impossible to fully realise freedom of speech. That constitutional value is implemented by ensuring the realisation of its components. In line with the constitutional provision, "freedom to express opinions, and to acquire and disseminate information shall be ensured to everyone and preventive censorship of the means of social communication and the licensing of the press shall be prohibited. The act may introduce an obligation to obtain

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[13] Judgment of the Polish Constitutional Tribunal of 8 April 1998, ref. no. K 10/97, Lex no. 32602; judgment of the Polish Constitutional Tribunal of 11 March 2015, ref. no. P 4/14, Lex no. 1652943.

[14] Cf. Article 32 of the CRP: "(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. (2) No one shall be discriminated against in political, social or economic life for any reason whatsoever."

a licence to operate a radio or television station prior to engaging in that activity" (Article 54 of the CRP). At this point, attention should be paid to the determination of the licensing framework permitted by the Constitution of the Republic of Poland under freedom of speech. On that ground, the licensing of broadcasting is permitted, however the licensing of the press is forbidden. This *passus* makes it necessary to point out that under the law in force in Poland, the term *press* in the constitutional approach is a narrower category than the term *press* within the meaning of the Press Law Act. In constitutional terms, that concept does not include radio and television press releases.[15] Finally, the content of the provision of that article must be analysed in close connection with the content of the provision, according to which "the Republic of Poland shall ensure freedom of the press and other means of social communication" (Article 14 of the CRP).

Therefore, a party to the licensing procedure applying for a licence to broadcast radio or television programmes seeks to create for itself legal conditions for the realisation of the above-mentioned values.

1.3. Axiological basis determining the licensing procedure for broadcasting radio and television programmes

The licensing procedure itself is also determined by values. Decoded as part of the analysis of legal provisions, they can be divided into two types: substantive values and formal values. The former ones relate to the substantive aspects of the subject matter of the procedure, the latter ones to its formal aspects.

The substantive values protected in the licensing procedure are: the interests of the national culture (Article 36(2.1) of the BcA); good manners and upbringing (Article 36(2.1) of the BcA); the security and defence of the state (Article 36(2.1) of the BcA); the security of classified information (Article 36(2.1) of the BcA); the compliance with broadcasting and mass media regulations by entrepreneurs (Article 36(1.5) of the BcA); and the compliance of programme activities with the statutory requirements for the tasks resulting from the Broadcasting Act (Article 36(1.1) of the BcA). The formal values that determine the licensing procedure are: the transparency of the licensing procedure (Article 34 of the BcA); the competitiveness on the media market (Article 36(2.2) of the BcA); the subjective relation to the Republic of Poland (Article 35(1) of the BcA); the financial stability in terms of the necessary investments and programmes (Article 36(1.2) of the BcA); the inclusion of programmes produced by the broadcaster (Article 36(1.3) of the BcA); the inclusion of programmes originally produced in the Polish

[15] Cf. also: Tuleja 2021.

language and in the language of a national, ethnic or regional minority, and the inclusion of European programmes (Article 36(1.4) of the BcA). It should be recalled that the general principles of administrative procedure and the values they protect also apply in the licensing procedure.[16]

In the licensing procedure, the authority that grants the licence assesses, inter alia, to what extent the applicant for the licence guarantees the implementation of the aforementioned values. If the assessment of the guarantee leads to the conclusion that the dissemination of programmes by the applicant could jeopardise the interests of the national culture, good manners and upbringing, the security and defence of the state and the security of classified information, or the applicant could achieve a dominant position in the field of mass media in a given licence area, the licence is not granted (Article 36(2) of the BcA). Therefore, the likelihood of a threat to one of the above-mentioned values is, by law, a condition for the obligatory refusal to grant the licence.

2. TYPES OF VALUE CONFLICTS AND WAYS OF RESOLVING THEM IN THE RADIO AND TELEVISION BROADCASTING LICENSING PROCEDURE

Based on the analyses presented above, the licensing procedure for broadcasting of radio and television programmes is determined by a number of values in three distinguished areas. The multiplicity of values and the fact that various entities refer to them during the procedure may lead to a conflict of interests of those entities and, as a result, also to a conflict of values. More precisely, the source of the conflict may be a failure to respect the values referred to by a party in its statement about a violation of an indicated rule of law. This is so even though they are all based on one supreme value, which is human dignity. This value should constitute a reference point while resolving possible conflicts. Thus, in seeking an answer to the second question (is it possible for the conflict of values identified in that space to occur, and if so, in what situations?) it should be stated that, generally, the occurrence of a collision of values is possible in two forms. Firstly, between the party to the procedure (here, there may be one or more entities) and the administrative body (the NBC and the President of the NBC), secondly, between the parties to the procedure (if there is more than one entity in

[16] Among them, there are principles of: the rule of law, objective truth, taking into account the public interest and the legitimate interest of citizens, trust in public authority, provision information to parties, active participation of a party in the procedure, persuasion, speed and simplicity of the procedure, amicable settlement of disputes, written nature of the procedure, permanence of administrative decisions, judicial review of final decisions. On the essence of legal principles cf. Kordela 2006, 39-54.

the procedure and the number of licences to be granted is smaller than the number of the applications). Obviously, both types of conflict may involve the values determining the axiological basis of actions taken by the entities in the licensing procedure, i.e. the party or parties and the administrative body, as well as the values determining the licensing procedure itself. A conflict arises when the subjects of the procedure refer to values which cannot be realised at the same time as the values remain in a competitive relationship; therefore, their simultaneous implementation is impossible.

Having established that a conflict of values may arise, it is necessary to answer the question of how to resolve that conflict. It is worth remembering that the recognition of the axiological minimum and fundamental rights as a common and universal element of the legal order in states of constitutional democracy does not resolve *per se* many of the fundamental ethical and legal conflicts faced by contemporary legal systems [Safjan 2008, 14]. In a democratic state based on the rule of law, the manner in which conflicts are resolved is determined by the law in force interpreted by entities appointed to do so and applied to a specific situation, which leads to the creation of the practice of jurisprudence. A reference to the above is found in the thesis: "law plays a very important role in resolving conflicts of interest, which are always a conflict of values for the parties to the dispute" [Kość 1998, 115]. The entities that resolve the conflicts being the subject matter of this study are, respectively: at the stage of administrative proceedings – the NBC, adopting a resolution on the matter, and its President, issuing an administrative decision based on the resolution; at the stage of administrative court proceedings – administrative courts, exercising control over the legality of administrative action. Objections are raised by the parties to the procedure when the issued administrative decision is not in accordance with the party's request, in particular, in the event of a refusal. The administrative body issues a decision within the administrative discretion under the law,[17] which further reinforces the imperative to raise objections.

An example of a conflict that arose between the NBC and a party to the procedure as a result of a refusal to grant the licence may be a case when a conflict of values was resolved by the Supreme Administrative Court (the SAC, Polish: *Naczelny Sąd Administracyjny*, NSA) in a different way than

[17] "[...] the decision in this respect [granting the licence – author] is of an administrative discretion" – judgement of the Regional Administrative Court in Warsaw of 19 May 2009, ref. no. VI SA/Wa 2253/08, Lex no. 1062162; judgement of the Regional Administrative Court in Warsaw of 4 April 2016, ref. no. VI SA/Wa 2225/15, Lex no. 2259673; judgement of the Regional Administrative Court in Warsaw of 18 January 2017, ref. no. VI SA/Wa 1816/16, Lex no. 2776544; judgement of the Regional Administrative Court in Warsaw of 3 December 2019, ref. no.VI SA/Wa 1818/18, Lex no. 3021793.

by the NBC.[18] In the above-mentioned case, the NBC refused to grant the licence to a party that was the only applicant. It was clear from the justification that the reason for the refusal was a change of the nature of the programme broadcast so far – following the assessment of the party's application, the authority concluded that the nature of the programme was changed from a universal programme with a high share of spoken parts (educational, informative, journalistic and dedicated to local topics) to a specialised one – music programme. The party complained that the President of the NBC failed to explain why the programme assumptions proposed by the applicant were unacceptable, did not sufficiently examine the facts and used non-statutory and general wording in the justification of the decision. Thus, the party alleged violation of Article 7, 8 and 9 of the Code of Administrative Procedure.[19] However, the main substantive objection was the claim that the NBC, in its decision in a form of a resolution, and the President, in the administrative decision, imposed on the party a certain profile of the programme broadcast on the radio station, which meant that the authorities exceeded their statutory powers, were arbitrary, and thus, violated the principle of freedom of economic activity. Therefore, in the discussed case, there was a conflict of values – the NBC, guarding the public interest in radio and television broadcasting defined it incorrectly, the party, in its refusal decision, claimed that the authority had violated the value of economic freedom and the values protected by the principles of general administrative procedure, in particular, material truth, trust in the administrative authority or the provision of information to a party. When settling the case, the SAC stated that "the provision of Article 36(2) of the Broadcasting Act sets out exhaustively the prerequisites for not granting the licence to broadcast radio and television programmes, namely: threat to the interests of the national culture, good manners and upbringing, state security and defence, violation of national confidentiality or achieving a dominant position by the applicant in the field of mass media in a given area. Other grounds for a refusal to grant the licence are not provided for in the Act; obviously, this does not involve – the SAC added – the situation of applying for one licence by several entities when the granting of the licence to one applicant results in the refusal to grant it to the others."[20] In that particular case, in the opinion of the author, freedom of speech was also violated.

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[18] Judgment of the Supreme Administrative Court in Warsaw of 25 November 2003, ref. no. II SA 2764/02, Lex no. 1694579.

[19] Act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2021, item 735.

[20] Judgment of the Supreme Administrative Court in Warsaw of 25 November 2003, ref. no. II SA 2764/02, Lex no. 1694579.

An example of a conflict between the parties to the procedure is a case for the extension of a licence, when an administrative body refused to give the licence to one entity – Radio Alex from Zakopane, and granted it to the other one – a diocesan radio from Nowy Sącz. The party that did not obtain the licence appealed against the administrative decision of the President of the NBC. The judgments dismissing the complaint were issued in the proceedings before the Regional Administrative Court in Warsaw[21] and the Supreme Administrative Court.[22] In its complaint, the complainant alleged violation of a number of substantive and procedural provisions, both by the authority and by the party that obtained the licence. The complainant alleged, apart from the infringement of procedural provisions of Article 6, 7, 10 and 12(1) of the Code of Administrative Procedure, the violation of Article 36(1)(5) of the BcA, i.e., the improper assessment by the President of the NBC of the premise of "compliance with the provisions on radio communications and the mass media so far" by the entity that obtained the licence, claiming that that entity had been broadcasting radio programmes illegally for some time. Thus, the main accusation of the substantive argumentation was directed against the competitor. Two entities intended to implement the value of freedom of economic activity. The administrative authority, while protecting the public interest in broadcasting, was obliged to decide which of the two parties it would enable to realise that value. The allegations of the complainant were not taken into account at any stage of the proceedings. The President of the NBC has shown that the body did not violate the law when granting the licence. "The authority that granted the licence emphasised that while examining the submitted applications, it followed the rule of law, objective truth and deepening of trust. When issuing the decision, the entity was also guided by the principle of equality before the law. Also, in the course of the procedure, the submitted applications were assessed in accordance with the criteria set out in Article 36(1) of the Broadcasting Act, that is, the degree of compliance of the intended activity with the tasks specified in Article 1(1) of the Broadcasting Act, taking into account the degree of implementation of those tasks by other broadcasters operating in the area covered by the licence, the applicant's ability to make the necessary investments and finance the programme, the expected inclusion of programmes produced by the broadcaster or on the party's request or in cooperation with other broadcasters, the expected inclusion of programmes referred to in Article 15(2) of the Broadcasting Act, as well as the compliance with regulations on radio communication and other means of social communication

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21 Judgement of the Regional Administrative Court in Warsaw of 18 January 2017, ref. no. VI SA/Wa 1816/16, Lex no. 2776544.

22 Judgment of the Supreme Administrative Court of 3 April 2019, ref. no. II GSK 3024/17, Lex no. 2673704.

so far."[23] In the body's argumentation, the President of the NBC referred to a number of values underlying the regulations. The Regional Administrative Court in Warsaw noted that "Taking into account the criteria for assessing both applications, described in detail by the authority, the court came to the conclusion that the authority that granted the licence had proved in its decision why the proposal of the diocesan radio [...] was more credible and socially justified and, consequently, why the programme [...] would, to a greater extent, meet the conditions specified in the announcement of the President of the NBC of 1 August 2013, both in terms of the nature of the programme and the inclusion of programmes implementing that nature."[24] Importantly, the court also emphasised that the authority granting the licence, while analysing the two applications, was guided by the rule of law and subjected those applications to an appropriate assessment based on legal provisions.[25] With regard to the case under discussion, two elements of the court's decision are of particular importance: defining the public interest and the resolution of the allegations of infringement of the law by the competing party. In this respect, the court shared the position of the President of the NBC. The body explained that in the case at hand, the public interest was defined as the interest of listeners who were to have access to an attractive offer implemented by an entity that was to broadcast a radio programme of a socio-religious nature, and emphasised that it followed from juridical doctrine and judicature that administrative authorities were entitled to their own assessment of public interest and the legitimacy of the citizen's interest. In that dimension, the authority, taking into account the interests of the audience and ensuring the open and pluralistic nature of broadcasting, is empowered by law to shape policy in the audiovisual market. With regard to the allegation of non-compliance of the entity that granted the licence with the regulations on radio and mass media, the authority stressed that, while making its assessment in this regard, the NBC should rely on decisions that had been issued in similar cases. In that context, commenting on Article 36 of the Broadcasting Act, Jacek Sobczak adds that the wording "past compliance with broadcasting regulations" lacks accuracy and precision, and the fact that although the Act does not set time limits for the assessment of past compliance with broadcasting and mass media regulations, it seems unquestionable that acts in respect of which the statute of limitations for prosecution has expired or the conviction has been erased cannot be subject

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[23] Judgement of the Regional Administrative Court in Warsaw of 18 January 2017, ref. no. VI SA/Wa 1816/16, Lex no. 2776544.

[24] Judgement of the Regional Administrative Court in Warsaw of 18 January 2017, ref. no. VI SA/Wa 1816/16, Lex no. 2776544.

[25] Judgement of the Regional Administrative Court in Warsaw of 18 January 2017, ref. no. VI SA/Wa 1816/16, Lex no. 2776544.

to negative assessment [Sobczak 2001]. In this case, the authority and the courts resolved the conflict of interests of two entities competing for one licence. The real subject of that dispute was a number of values: freedom of economic activity, equality of entrepreneurs, public interest in radio and television broadcasting, the interest of service recipients, following the regulations by the entrepreneur and the transparency of the licensing procedure. The entities issuing the decision in the case under discussion were obliged to take all of the above-mentioned values into account, refer to the situation in question, weigh competing values and justify which one should be given the priority.[26]

In a similar case, resolved by the judgment of the Regional Administrative Court in Warsaw,[27] the complainant accused the administrative authority of unequal treatment in the licensing procedure. The President of the NBC explained that in the case under analysis, the concept of public interest was defined as the interest of listeners having access to an attractive offer implemented by a local entity that would distribute a universal radio programme addressing local issues. In the opinion of the authority, the entity that was granted the licence met the required conditions to the highest degree. As part of the issued decisions, the administrative body shaped the media policy in a given area. The authority demonstrated that the two entities covered national news in a sufficient way and that there were two radio stations responding to the religious needs of the residents in that area. Taking those circumstances into account, the authority stated that there was a lack of a non-religious programme with a local focus in that market. Programmes of an educational or advisory nature, while valuable, were not the most promoted ones within the framework of the competition under consideration, unless they were local. The essence of the procedure in question was to introduce the most attractive programme addressing the issues of interest to the local community. The entity that obtained the licence declared to increase the number of local programmes while the complainant did not. The complainant accused the authority of unequal treatment and of exceeding its administrative discretion. The court dismissed the complaint, stating that the authority had not exceeded the limits of administrative discretion set by the legislator. Sharing the position of the administrative authority, the Regional Administrative Court outlined the principles of judicial review of "administrative discretion." The court stated that, although it was not explicitly articulated in the contested decision, it could be concluded that the proactive approach of the company that was granted the licence was approved by the authority. The commitment of the company and its declaration to increase the number of local programs

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[26] On weighing values: Potrzeszcz 2015, 107-22; Bogucki 2020, 97.

[27] Judgement of the Regional Administrative Court in Warsaw of 9 November 2020, ref. no. VI SA/Wa 734/20, Lex no. 3152248.

resulted in a positive decision of the administrative body. In the opinion of the court, this does not constitute an abuse of administrative discretion. The court emphasised that, as regards decisions of a discretionary nature, the very reasoning of the authority which led to the conclusion forming the basis of the contested decision was subject to review. A key element that the court took into account when reviewing the implementation of administrative discretion by the authority was the "motivation underlying the decision."[28] "In the court's opinion, its examination makes it possible to determine whether the act issued does not bear the characteristics of arbitrariness. A decision that has a coherent and logical justification must be considered lawful in this situation."[29] The quoted reasoning of the Regional Administrative Court corresponds to the valid thesis expressed years ago by the SAC: "The exhaustive presentation of the reasons for the decision, including the criteria which guided the body in assessing the facts on which it based its decision, is of particular importance in cases where there are several entities-parties competing for a particular good that is the subject of administrative regulating. The authority's decision is then reduced to the identification (selection) of one of the entities – the one which, compared to the others, fulfils the criteria for the award of a particular good to the greatest extent. The judicial assessment of the correctness of this selection shall, therefore, be an evaluation of the validity of comparison and the conclusions drawn from this process by the authority resolving the case."[30]

In the cited examples, it was the will of each entity to implement a number of values when applying for a licence. They could not be met in every case, which resulted from their misreading or a limited amount of licenced goods. In each case, it led to conflicts resolved within the administrative discretion of the administrative authority and controlled by the administrative courts.

CONCLUSIONS

The conflict of values in public economic law is a topic closely related to the axiology of this area of law. "Anyone who creates and applies the law must be guided by values. [...] One cannot create and apply legal standards without referring to the values that give direction and motivate human action" [Kość 1998, 113-14]. The abundance of values, characterised

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[28] Judgement of the Regional Administrative Court in Warsaw of 9 November 2020, ref. no. VI SA/Wa 734/20, Lex no. 3152248.

[29] Judgement of the Regional Administrative Court in Warsaw of 9 November 2020, ref. no. VI SA/Wa 734/20, Lex no. 3152248.

[30] Judgment of the Supreme Administrative Court in Warsaw of 25 November 2003, ref. no. II SA 1794/02, Lex no. 169458.

as plurality, implemented by a large group of entities is bound to raise the question of the potential for the emergence of conflicts in this broad area. The conflict of values in the licensing procedure for broadcasting radio and television programmes is a special case of such a clash in public economic law. The purpose of this study was to identify values underlying the licensing procedure for broadcasting radio and television programmes in Poland, examine their potential for conflicts and indicate methods of their resolution.

The main issue of the article was formulated in the following question: "can the values determining the licensing procedure for broadcasting radio and television programmes give rise to axiological conflicts, and if so, how should the conflicts be resolved?".

When attempting to answer this question, it is important to note that similarly to the entire public economic law, the plurality of values appears also in the licensing procedure for broadcasting radio and television programmes. The study identified a number of values in three main areas of the analysed issue: values determining the framework of actions undertaken by the NBC in the licensing procedure for broadcasting radio and television programmes, values determining the framework of actions undertaken by a party or parties to this procedure and values determining the licensing procedure. The conducted analyses have led to the conclusion that such a situation may give rise to a conflict of values – their multiplicity and the fact that they are invoked by different entities in the course of proceedings may lead to a conflict of interests between these entities and, consequently, to a conflict of values. In such a situation, it is necessary to resolve these disputes, which can essentially occur in two forms – a party to the proceedings vs. an administrative authority or a party vs. a party. The legislator has decided that such a resolution shall be conducted by the administrative authority, which does so within the framework of administrative discretion by weighing competing values and deciding to give preference to one of them, and the administrative courts as part of their review of the legality of actions undertaken by public administration bodies. It also raises a question as to whether the administrative authority is equipped with a point of reference when carrying out this duty. The answer is "yes". This point of reference is the inherent, inalienable and inviolable dignity of the human being, which constitutes the source of all their freedoms and rights, and which the public authorities are obliged to respect and protect.

REFERENCES

Bogucki, Olgierd. 2020. "Rola wartości w interpretacji prawa. Ujęcie normatywne." *Archiwum Filozofii Prawa i Filozofii Społecznej* 23, no. 2:96-108. Doi: 10.36280/AFPiFS.2020.2.96

Czarny, Piotr. 2021. "Komentarz do art. 213." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, edited by Piotr Tuleja. 2nd edition. Warszawa: Wolters Kluwer Polska. LEX el.

Garlicki, Leszek, and Marek Zubik. 2016. "Komentarz do art. 22." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, edited by Leszek Garlicki, and Marek Zubik. Vol. 2. 2nd edition. Warszawa: Wydawnictwo Sejmowe. Lex el.

Jaskuła, Lidia K. 2013. "Krajowa Rada Radiofonii i Telewizji a postulat apolityczności administracji publicznej – pułapka, wyzwanie czy szansa? (Uwagi wybrane)." In *Media-czwarta władza?*, vol. 3, edited by Jacek Sobczak, and Witold Machura, 85-101. Opole: Wydawnictwo Naukowe Scriptorium.

Kordela, Marzena. 2006. "Zasady prawa jako normatywna postać wartości." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 68, no. 1:39- 54.

Kość, Antoni. 1998. "Relacja prawa i wartości w społeczeństwie otwartym." *Roczniki Nauk Prawnych* 8:107-16.

Kruszewski, Artur K. 2019. "Komentarz do art. 2." In *Prawo przedsiębiorców. Komentarz*, edited by Aldona Pietrzak. Warszawa: Wolters Kluwer Polska. Lex el.

Kwiecień, Roman. 2010. "Wartości i prawo a kreatywność porządku prawnego." *Forum Prawnicze* 1:30-43.

Potrzeszcz, Jadwiga. 2015. "Ważenie wartości w prawie a problem ich absolutności i relatywności." *Principia. Pisma koncepcyjne z filozofii i socjologii teoretycznej* 61-62:107-22.

Ruczkowski, Piotr. 2021. "Aksjologia Konstytucji RP, czyli od wartości do prawa pozytywnego." *Dialogi Polityczne* 30:97-114.

Safjan, Marek. 2008. "Prawo, wartości i demokracja." *Chrześcijaństwo-Świat-Polityka* 5, no. 1:5-23.

Sobczak, Jacek. 2001. *Radiofonia i telewizja. Komentarz*. Kraków: Zakamycze. Lex el.

Tuleja, Piotr. 2021. "Komentarz do art. 14." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, edited by Piotr Tuleja. 2nd edition. Warszawa: Wolters Kluwer Polska. Lex el.

Waniek, Danuta. 2007. *Dylematy* ładu *medialnego RP. Standardy europejskie a praktyka polityczna*. Kraków: Krakowskie Towarzystwo Edukacyjne sp. z o.o. – Oficyna Wydawnicza AFM.

Zdyb, Marian. 1997. *Publiczne prawo gospodarcze*. Kraków–Lublin: Zakamycze.

Zdyb, Marian. 2018. "Podstawowe zasady (standardy) ładu gospodarczego w świetle ustawy z 6.3.2018 r. – Prawo przedsiębiorców." In *Ustawa z 6.3.2018 r. – Prawo przedsiębiorców – analiza i ocena najważniejszych przepisów. (Dodatek specjalny do Monitora Prawniczego 13/2018)*, edited by Małgorzata Sieradzka, 5-13. Warszawa: C.H. Beck. Legalis el.

Zimmermann, Jan. 2013. *Aksjomaty prawa administracyjnego*. Warszawa: Wolters Kluwer Polska.

Zimmermann, Jan. 2015. "Wprowadzenie." In *Wartości w prawie administracyjnym*, edited by Jan Zimmermann, 11-16. Warszawa: Wolters Kluwer Polska.

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THE ESTABLISHMENT AND ADMINISTRATION OF RELIGIOUS COMMUNITIES IN THE AUSTRIAN PARTITION AFTER 1855. ANALYSIS OF CERTAIN CANONICAL AND CIVIL LAWS

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Abstract. The Concordat of 1855 was preceded by several events that indicated that the situation of religious orders in the Austrian Partition had begun to change gradually. The aforementioned Concordat already stated in its first article that the Church was governed by divine and ecclesiastical (canonical) law and Article XXVIII of the Concordat guaranteed religious orders and congregations full freedom, their own administration in accordance with the monastic constitutions, communal life in accordance with the rule, dependence on the Roman generals and the possibility of establishing new monasteries in dioceses, but with the consent of the bishop after agreement with the civil authorities. This paper will present canonical and civil provisions relating to the formation and administration of religious communities from 1855 onwards. In particular, issues concerning the conditions for admission to a religious order, the effects of the vows taken as well as the rights and duties of religious superiors, the decision to leave a religious order and the provisions concerning the suppression of religious orders will be addressed. Canon law is essentially the provisions of the Council of Trent and the decrees of certain Roman dicasteries, while civil law will be based during the period under discussion on the Concordat, the Austrian Civil Code of 1811 and the Pennal Code of 1852, as amended in 1867.

Keywords: Concordat of 1855; religious law; Austrian Partition; religious orders

INTRODUCTION

From the beginning of the 19th century, the situation of religious orders in the Austrian Partition began to change gradually. Emperor Franz I, in his will of 28th February 1835, addressed to his successor, Archduke Ferdinand, enclosed a request that he should "fulfil his wish and continue and bring to a happy end the work he had begun of repairing and amending the law on the foundations and conduct in respect of ecclesiastical rights" [Maass 1951-1961, 441]. Therefore, already in 1837, the diocesan clergy and members of religious orders were allowed to study in Rome, and on 24th February 1842, Apostolic Nuncio Altieri forwarded to Emperor Ferdinand I a request

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of seven superiors general to restore direct jurisdictional ties between them and the monasteries and religious provinces in Austria. This request was fulfilled on 4th May of the same year. In turn, the patent of Emperor Franz Joseph I of 26th April 1850 rejected all Josephine legislation, including legislation referring to religious orders [ibid., 742-43]. The Concordat of 1855 already stated in its first article that the Church is governed by divine and ecclesiastical (canonical) law. Article XXVIII of the Concordat guaranteed religious orders and congregations full freedom, their own administration in accordance with the monastic constitutions, common life in accordance with the rules, dependence on Roman generals as well as the possibility of establishing new monasteries in dioceses, but with the bishop's consent after consultation with the civil authorities [Schmidlin 1934, 138; Kumor 1985, 611; Bruździński 2014, 141-58].

Taking into account the aforementioned facts indicating a gradual revival of monastic life in the Austrian Partition, this paper will present canonical and civil laws on the establishment and administration of monastic communities starting from 1855, i.e. the conclusion of the Concordat, until the end of the 19th century. In particular, the issues concerning the conditions of admission to the order, the effects of taken vows, the rights and duties of religious superiors, decision to leave the order and the regulations concerning the dissolution of orders will be discussed. In the analysed period, the canon law is essentially the provisions of the Council of Trent and the regulations of certain Roman dicasteries, while civil law at that time was based on the Concordat, the Austrian Civil Code of 1811 and the Penal Code of 1852, as amended in 1867.

1. THE CONCORDAT OF 18TH AUGUST 1855 ON RELIGIOUS MATTERS

On 18th August 1855, *ad certum stabilem que ordinem rerum rationum que Ecclesiae Catholicae in Imperio* Concordat was concluded between the Holy See and Emperor Franz Joseph. The Catholic Church in the whole monarchy retained all the rights to which it is entitled according to divine establishment and the provisions of sacred canons. All matters not governed by the concordat were to be decided with respect for the doctrine of the Church and according to the ecclesiastical discipline approved by the Holy See. The Emperor retained the right to appoint bishoprics and most canonries in cathedral chapters, although it was emphasised that the appointment of bishops belonged to pope's powers. Moreover, the Concordat ensured the bishops' freedom of correspondence with Rome and the pope's jurisdictional primacy, based on divine law, was also underlined. This meant that the Church was guaranteed influence over public schools where the upbringing

of Catholic children was to be entirely in accordance with its teachings. All matrimonial matters were left to the jurisdiction of ecclesiastical courts. The state authorities undertook to condemn views contrary to the teaching of the Church. The essence of the Concordat was very well explained by Prof. Feliks Słotwiński three years after its conclusion in a scientific lecture published in 1858. He paid special attention to the first article of the Concordat, which states that the civil and ecclesiastical community consists of the same members and that the ruler has a duty to care for the Catholic Church and should defend it and obey its rules.[1]

[1] See: "Społeczność cywilna i kościelna z jednych i tychże samych członków złożona zostają, ze sobą w najściślejszym związku; bo działania członków Kościoła wpływają na cel społeczności cywilnej, a działania tychże, jako członków społeczności cywilnej wpływają na osiągnienie lub utrudnienie dostąpienia celu Kościoła chrześciańskiego. Zachodzi jedynie między temi dwoma społecznościami różnica: co do ich początku, głównego i najbliższego celu, tudzież właściwych środków, jakiemi ich cele popierane i osiągnione być mogą. I tak: co do ich początku, Kościół założonym jest bezpośrednio przez Chrystusa, prawa jego opierają się na Słowie Bożem i Tradycyi, społeczność zaś cywilna uformowaną jest przez ludzi - jej byt prawny opiera się na tak zwanej umowie cywilnej (zjednoczenia, postanowienia co do formy rządu i poddania) wyraźnej lub dorozumianej] bo z tej jedynie zasady, prawa najwyższej władzy rządzącej i obowiązki poddanych rozwiniętemi być mogą. Różnią się obydwie społeczności co do swego głównego i najbliższego celu – najbliższym bowiem celem Kościoła jest zbawienie prawowiernych, już zaś celem najbliższym społeczności cywilnej jest zabezpieczenie praw pierwotnych i nabytych Ogółu i każdego członka społeczności. Zachodzi zaś najważniejsza różnica co do środków przez każdą z tych społeczności do osiągnienia przeznaczonego jej celu użyć się mogących; zbawienie bowiem prawowiernych nie zależy od prawości samych tylko działań zewnętrznych, ale także i od prawości działań wewnętrznych, które wymusić się nie dadzą, lecz jedynie przez nauczanie i ćwiczenia pobożne zaszczepionemi i ugruntowanemi, a wykraczający przeciw postanowieniom Kościoła nie przez kary doczesne, lecz w razie uchybienia i zaciętego uporu jedynie tylko przez zagrożenie wykluczenia z społeczeństwa kościelnego spowodowanemi być mogą. Przeciwnie cel społeczności cywilnej, to jest bezpieczeństwo wszelkich praw pierwotnych i nabytych wprost i bezpośrednio nie da się osiągnąć przez same środki działające jedynie na ulepszenie umysłu i woli – lecz tylko przez przymuszenie do legalności, to jest do zastosowania działań zewnętrznych do ustaw i wszelkich przepisów, jakich cel i dobro społeczności cywilnej wymagają. Wszakże z owego najściślejszego związku między Kościołem i społecznością cywilną zachodzącego wypływa, że ich cele i środki nie tylko sobie nie są przeciwne, ale owszem jedne wspierają drugie – bo gdzie jest bezpieczeństwo praw pierwotnych i nabytych każdemu człowiekowi służących i stosowne środki do osiągnienia tegoż celu, tam ułatwiona jest także droga do wykształcenia umysłowe go i moralnego, a następnie i środki nie tylko do osiągnienia doczesnej ale i wiecznej szczęśliwości – a gdzie są podawane takie środki, tam nie tylko poszanowania wszelkich praw wrodzonych i nabytych, ale i wykonywania wszelkich cnotchrześciańskich spodziewać się należy. Mianowicie zaś spodziewać się należy tych dobroczynnych skutków od Kościoła chrześciańskiego. Tego oczywistym dowodem jest cała jego nauka nawyraźnem Słowie Bożem i Tradycyi od czasów apostolskich zagruntowana, a przez Kościół S. katolicko-apostolsko-rzymski w całości i nieskazitelności zachowana. Ona przekonywa o bytności Boga i jego najdoskonalszych przymiotach, o nieśmiertelności duszy, o nagrodach i karach w przyszłem życiu ona podaje najdzielniejsze pobudki do wszystkich cnot

The Concordat devotes only one whole article XXVIII to religious orders, while religious issues are partially addressed in articles: XXIX, XXX, XXXIV, XXXV. Thus, Article XXVIII states that the monks are subject to the authority of their Superiors General, who were also guaranteed freedom of communication with the Holy See. The monks were to observe, without hindrance, the rules of their institute, congregation and, according to the regulations of the Holy See, candidates could be admitted to the novitiate and take religious vows. The provisions of the above mentioned article of the Concordat were to apply also to women's orders. In Article XXVIII, we read:

"The monks who, by the laws of their order, are subject to superiors general residing at the Holy See, are subject to their administration according to those laws, without, however, offending the authority of the bishop, based on canon law and in particular on the decisions of the Council of Trent. The said superiors general shall communicate freely with their subordinates in all matters pertaining to their office and shall be free to make visits to them. Further, the monks shall observe the rules of their order, institute or congregation without any hindrance and admit candidates to the novitiate and

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chrześcijańskich i do wstrętu od występków i zbrodni; ona ostrzega, że zbrodnia największą tajemnicą pokryta przed Majestatem Boskim ukrytą być nie może, że więc nawet przez samobójstwo nie może być zerwanym węzeł łączący człowieka z Wszechmocnym, Wszechwładnym i Najsprawiedliwszym Stwórcą jego. Religia nie zna rozpaczy, łagodzi wszelkie cierpienia fizyczne i moralne, pociesza w zasmuceniu, dodaje hartu duszy we wszystkich dolegliwościach. Człowiek tarczą Religii uzbrojony nic upada bynajmniej na duchu wśród najcięższego prześladowania, nie lęka się wcale śmierci, która tylko dla zbrodniarza straszną być może lecz dla tego, co wykonywa przepisy Religii chrześciańskiej jest tylko słodkiemuśnieniem, jest przejściem z kłopotów i starań doczesnych do wiecznego pokoju i nowego życia. Człowiek mający Religią jest wyższym nad potężnychostaje na szczycie najwyższej godności moralnej, przed którą nawet przemoc uginać się musi; życie jego jest wiecznem, bo miłem wspomnieniem w potomności i szczęściem dla jego pokolenia, które nie może być porównanem z żadnym gatunkiem szczęścia ziemskiego, kończącem się z tem życiem, wedle Nauki Kościoła vanitasvanitatum et omnia in mundovanitas." Mianowicie zaś zlewa Religia chrześciański błogie swe skutki w społeczności cywilnej, zalecając posłuszeństwo nie tylko Władzy duchownej ale zarazem i Świeckiej, nakazując oddawać Cesarzowi, co jest Cesarskiego, a to co jest Boskiego, Bogu; ona nakazuje cześć należną Panującym ziemskim w stopniu najwyższym w słowach wyrzeczonych przez Pawła Apostoła do naczelnego rządcy w Jerozolimie: "Ad tribunalCaesaris sto, ibi me oportetjudicari" – "Caesaremappello" ona łączy wszystkich ludzi bez różnicy ich wyznania węzłem braterskiej chrześciańskiej miłości i wzajemnej pomocy, ona więc jest kamieniem węgielnym bezpieczeństwa, spokojności i pomyślności Narodów. A tak widocznie pokazuje się, że takiej instytucyi żadna władza ludzka; lecz jedynie Kościół chrześciański na opoce Piotra S. przez Chrystusa oparty zastąpić może. Możnaż przeto powątpiewać o tej prawdzie, że każdemu Panującemu służy prawo nie tylko najwyższej nad Kościołem chrześcijańskim widzialnym opieki, ale nawet obrony przez odpowiednie i stosowne środki, zniewalające każdego do zachowania w całości najświętszych Kościoła katolicko-apostolsko-rzymskiego postanowień" [Słotwiński 1858, 1-4].

to take religious vows according to the prescriptions of the Holy See. The same shall also apply to women's orders insofar as it is applicable to them. Archbishops and bishops shall be allowed to establish religious orders or congregations of both sexes in their own dioceses, according to the sacred canonical regulations, but they shall consult with the Imperial Government on this matter"[2].

The remaining – mentioned above – four articles of the Concordat indirectly concern religious matters:

a) Article XXIX: "The Church shall be entitled by law to acquire freely new estates and its property shall remain solemnly inviolable in all that it now possesses and shall for the future acquire;"[3]
b) Article XXX: "The administration of ecclesiastical property shall be carried out by those who are called to do so according to canon law;"[4]
c) Article XXXIV: "Other matters concerning ecclesiastical persons and property, which are not mentioned in these articles, shall be governed and administered in conformity with Church doctrine and discipline approved by the Holy See;"[5]
d) Article XXXV: "All laws, regulations and decrees hitherto enacted in the Austrian Empire and in the individual districts of which it is composed shall be deemed to have been repealed by this solemn agreement insofar as they are contrary to it and the agreement itself shall henceforth have

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[2] See: "Jene Ordenspersonen, welche laut den Satzungen ihres Ordens General obern, die bei dem hl. Stuhl ihren Wohnsitz haben, unterstehen, werden von den selben Gemässheit der gedachten Satzungen geleitet werden, jedoch ohne Beeinträchtigung der Rechte, welche nach Bestimmung der Kirchengesetze und insbesondere des Concils von Trient den Bischöfen zukommen. Daher werden vorbenannte Generalobern mit ihren Untergebenen in allen zu ihrem Amt gehörigen Dingenfreiverkehrer und die Visitation der selben frei vornehmen. Ferner werden alle Ordenspersonen ohne Hinderniss die Regel des Ordens, des Instituts, der Congregation, welcher się angehören, beobachten und in Gemässheit der Vorschriften des hl. Stuhls die darum Ansuchenden in's Noviciat und zur Gelübde ablegung zu lassen. Dieses Alles hat auch von den weiblischen Orden in so weitzugelten, als es auf dieselben Anwendung leidet. Den Erzbischöfen wird es frei stehen in ihren Diöcesengeistliche Orden und Congregationen bei der Geschlechts nach den heil Kirchengesetzen einzuführen. Doch werden sie sich hierübermit der kaiserlichen Regirung in's Ein vernehmen setzen" – Article XXVIII [Buss 1862, 306-308].

[3] "Die Kirche wird berechtig sein, neue Besitzungen auf jede gesetzliche Weise freizuerwerben und ihr Eingenthum wird hinsichtlich alles dessen, was się gegenwärtig besitzen order in Zukunft erwirbt, um verletzlich bleiben" [Buss 1862, 318-19].

[4] "Die Verwaltung der Kirchen güter wird von denjenigen geführt werden, welchen się nach den Kirchengesetzen obliegt" [Buss 1862, 319].

[5] "Das übrige die kirchlichen Personen und Sachen Betreffende, wo von in diesen Artikeln keine Meldung genachtist, wird sämmtlich nach der Lehre der Kirche und ihrer in Kraft stehenden von dem hl. Stuhl gut geheissenen Disciplin geleitet und verwalten werden" [Buss 1862, 326-27].

the force of state law in all districts for all time. Both contracting parties therefore promise that they and their successors shall retain everything in general and everything in particular that has been agreed upon. Should any difficulty arise later on, His Holiness and His Imperial Majesty shall confer in order to settle the matter amicably."[6]

On 13th June 1858, in order to implement the provisions of the Concordat, the Ministry of Religious Denominations and Public Enlightenment issued the following norms: a) before founding a new monastery, the episcopal ordinariate must inform the Governorate and obtain the means of support for the monks. If a given religious order did not yet exist in Austria, the matter was to be submitted to the Ministry of Religious Denominations and Public Enlightenment, together with a copy of the document of the Holy See approving the order, its rules and religious constitutions; b) in case the order already existed in Austria, the Governorate itself could settle the matter and inform the Ministry of Religious Denominations and Public Enlightenment about the new monastery; c) in cases where the order was not recognised by the Austrian government, the appropriate decision had to be sought from the Ministry of Religious Denominations and Public Enlightenment through the Governorate; d) all monasteries that existed before the conclusion of the Concordat were recognised as legally existing; e) orders recognised by the government had full legal personality [Korzeniowski 1900, 196-97].

The above provisions were actually in force until 1918.

2. CONDITIONS FOR ADMISSION TO THE ORDER

The legal establishment of an order required, according to canon law, the approval of the pope for the rules and the consent of the bishops of the dioceses in which such orders were to be established. The establishment of an order could not take place without good reason. In particular, the bishop, before giving his permission, had to hear the opinion of the parish priest

[6] "Alle im Kaiserthum Österreich und den einzelnen Ländern, aus welchen das selbst besteht, bis gegenwärtig in was immer für einer Weise und Gestalt erlassenen Gesetze, Anordnungen und Verfügungen sind, in soweits diesem feierlichenVertrag wiederstehen, für durch denselben aufgehaben anzusehen. Dieser Vertrag selbst wird in denselben Ländern von nun an immer der die Geltung eines Staatsgesetzes haben. Deshalb verheissen beide vertragschliessenden Theil, dass Sie und Ihre Nachfolger Alles und Jedes worüber man sich vereinbart hat, gewissenhaft beobachten werden, wofern sich aber in Zukunft eine Schwerigkeiter geben sollte, werden Seine Heiligkeit und Seine kaiserliche Majestätsich zur freudschaftlicher Beilegung der Sache in`s Einvernehmen setzen" [Buss 1862, 327-29].

and all concerned.[7] Women's convents could only be established in larger towns.[8]

The first condition for admission to the order was to come from a "worthy family". The age of the candidate was also important. According to the resolutions of the Council of Trent, women wishing to join a religious order had to be at least 12 years old. As far as men were concerned, the Council of Trent had set 16 as the minimum age for joining an order, but "this provision was changed by the breve of Pius IX *Ad Universalis Ecclesiae Reginem* of 7th February 1862, to allow men to take the simple vows (*vota simplicia*) at the age of 16, and three years later, i.e. at the age of 19, to take the solemn vows (*professio*) at the earliest" [Bartoszewski 1893, 58]. According to Articles 148 and 216 of the Civil Code, and also according to the Decree of the Court Chancellery of 26th January 1844, minors were obliged to obtain the consent of their father or guardian in order to join the order" [ibid.].

Another important element of admission to the order was the free will of the entrant. The Council of Trent (Sess 25 de reg. c. 17) instructed the bishops not to allow girls who wished to enter the order, and were already 12 years old, to wear a religious robe, and not to allow them to take the vows, until they ascertained the girl's will that she wished to enter the order of her own free will, without any compulsion, and that she knew what she was doing. To this end, the superiors of the order were also instructed to inform the bishop of any intention to take vows one month in advance, under penalty of removal from their office. Contrary to the above regulations, women in general, virgins, married women and widows, "who force others to join or violently draw others away from the order, whether lay or clerical, shall be cursed."[9]

According to the Decretals of Gregory, spouses were not allowed to join a religious order without the permission of the other party, unless the marriage was not *consumatum* or the other party had become guilty of adultery.[10] If the marriage was not *consumatum*, each spouse was allowed to join a monastery, even against the will of the other, "and whoever claims that a marriage is not dissolved by solemn vows, let him be accursed."[11]

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[7] Council of Trent, X, Sess. 25, de reg. c. 3.

[8] Council of Trent, X. Sess. 25, de reg. c. 5.

[9] Council of Trent, Sess. 25, X, de reg. c. 17-18.

[10] "Maritus factus monachus a conjuge adulterata revocari non potest". Ibid., c. 15. [Pozostała na świecie małżonka, jeżeli nie jest bardzo wiekową, winna złożyć ślub czystości, gdyż inaczej „conjugatus ad sacrosordines non estordinandus"]. C. 5, c. 18.

[11] Council of Trent, Sess. 24, X, de sacr. matrimonii, c. 6.

According to Austrian law, even solemn religious vows did not dissolve a marriage.[12] If parents offered their children to the order, the monastery acquired the right to care for and supervise them, but on reaching maturity, they could leave the monastery.[13]

According to canon law, a candidate for the order had to have the same education as required for minor orders. The Austrian court decree of 1st September 1814 required candidates to prove that they had completed lower philosophical studies, while the patent of 19th August 1784 demanded that they had completed a catechism preparation course [Jaksch 1828, 207]. Furthermore, only candidates of Austrian nationality could be admitted to religious orders.

3. THE EFFECTS OF TAKING RELIGIOUS VOWS

Taking solemn vows in the light of the canon law of that time had the following effects: it conferred privileges of the clerical state; it dissolved any previous *votum simplex*; it dissolved betrothal and marriage *ratumsed non consumatum*; it gave rise to incapacity to contract a valid marriage; it removed *irregularitatem ex defectu natalium*; it gave rise to the incapacity to obtain *beneficium saeculare* with the exception of the papacy, the cardinalate and the episcopate; it conferred on the monk the right to demand from the order a lifelong provision of food and sustenance; it rendered the monk incapable of owning or acquiring property for himself. The last effect of taking religious vows, namely the limitation of monk's property, was applied depending on whether the monk was bound by a vow of poverty or a solemn vow.[14]

According to the norms of the Council of Trent, the monks were obliged by their rules not to go outside the monastery walls. The superior could grant permission to go outside only for important reasons and always in the company of another monk. The entrance of strangers into the order could only take place with the permission of the superior, which permission the

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[12] Cf. Civil Code, Article 111.

[13] Council of Trent, Sess. 25. X, de reg, c. 14.

[14] A single vow of poverty – *votum paupertatissimplex* – in particular, it does not take away neither the ability to acquire nor the ability to possess property, it only imposes, in accordance with the rules of the congregation, the obligation to hand over this property to be administered by third party. In the event of death or leaving the order by such monk, the congregation is to be given only a dowry that is specified in the constitution, the rest will be returned to such monk who also regains the unlimited freedom of administration and disposal of such remaining part of his property. These principles were clearly stated in Congregatio super statu of 25 April 1860 [Bartoszewski 1893, 63].

superior could rarely grant.[15] In women's orders, no nun who had taken solemn vows was allowed to go outside the monastery walls without the permission of the superior or bishop, while lay persons, on pain of a curse, needed a written permission from the bishop to enter the interior of the order.[16]

As far as the provisions of civil law were concerned, the effects of taking religious vows governing *foro civili* were mostly based on the provisions of canon law. In particular, a religious vow in general had some effects *pro foro civili* only if it was a solemn vow. "The Austrian Civil Code is not concerned with the vow of obedience [religious vow] and does not assign any *pro foro civili* effects to it. The superiors of the order are allowed to demand obedience from subordinate monks and to determine its extent, but only within the limits defined by secular legislation [Bartoszewski 1893, 65]. The vow of chastity also created, according to Austrian law, the incapacity to enter into a valid marriage and the nullity of the marriage contracted. According to § 63 of the Civil Code, "Religious persons who have solemnly professed celibacy cannot enter into a valid marriage and according to § 94 of the Civil Code, this is an impediment to the nullity of marriage that should be enforced ex officio. On the other hand, a religious vow taken after the conclusion of a valid marriage does not, according to Austrian civil law, dissolve the marriage" [ibid., 66].

As far as the vow of poverty is concerned, the effects of this vow were not settled by Austrian civil law. Property that a monk had not disposed of before taking the vows remained under the administration of a court-appointed guardian until the monk's death (or his release from the vows), "after which the so-called non-testamentary succession took place, and testamentary or counter-testamentary succession only if the will had been made before the vows or according to the provisions of the second item of § 573 of the Civil Code. The monk, therefore, did not lose the property he possessed before taking his vows, nor did this property pass to the monastery, and as long as the monk lived, this property could be considered as heirless inheritance – the monk only lost any administration of this property, which was entrusted by the court to a guardian. This was stated in particular in § 182 of the Imperial Patent of 9th August 1854" [ibid.].

Article 356 of the Civil Code referred to the military service of monks. Novices who had been conscripted into the army could be conscripted into the reserve and in time of peace as well as war they were free from any active service, periodical military exercises and inspection assemblies. After

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[15] Council of Trent, Sess. 25, X, de reg. c. 4. Cf. also: Piusa V, Motu proprio "Romanum", 16 Julii 1570, as cited in Bartoszewski 1893, 65.

[16] Council of Trent, Sess. 25, X, de reg. c. 16.

priestly ordination, they were transferred from the reserve to the registry post, and in case of mobilisation they could only be used for pastoral service until the end of their military obligation [ibid., 70].

4. THE RIGHTS AND DUTIES OF RELIGIOUS SUPERIORS

According to the resolutions of the Council of Trent, the election of religious order superiors should take place *per vota secreta, sine nullafraude*.[17] The superiors of male religious orders were entitled to the rights of a parish priest in relation to the monks under their charge. Each monastery created parishes for itself. Priestly ordained abbots were entitled to grant tonsure and minor orders to members of their order. According to canon law, outside monks were not to interfere in pastoral work without the bishop's permission. According to Austrian state law, on the other hand, monks were obliged to provide pastoral assistance to the lay clergy.[18]

As regards the rights and duties of religious superiors regarding the disciplinary power over their subordinates, the principle of canon law was that the superiors were obliged and entitled to see to it that everything was done according to the rule, statutes and canonical laws, and that those who transgressed these provisions were subject to the provisions of canonical penal law.[19]

Austrian law stipulated that complaints by religious clergy against superiors, with the exception of those concerning the transgression of state laws, were to be lodged directly with the competent consistory. The superiors could transfer monks from one monastery to another by way of disciplinary measures, "provided that such measures do not burden the religious fund" [Bartoszewski 1893, 73].[20]

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[17] Council of Trent, Sess. 25, X, de reg. c. 6.

[18] Cf. Court decree of 15 October 1803, in: Jaksch 1828, 339.

[19] Council of Trent, Sess. X, de jud. c. 53.

[20] See "Żadna osoba należąca do jakiego zakonnego towarzystwa, któraby z jakiegokolwiek powodu z zarządzenia odnośnego przełożonego trzymaną była w więzieniu, wbrew swej woli nie może być tamże zatrzymaną. Ponieważ jednak także co do tych osób z świeckiego i zakonnego duchowieństwa, które się poddają dobrowolnie wyznaczonemu sobie przez przełożonych uwięzieniu, nie wolno spuszczać z oka względów ludzkości i zachowania zdrowia, przeto należy ministrowi wyznań i oświaty przedkładać wykazy księży świeckich i osób zakonnych, faktycznie znajdujących się w dobrowolnem więzieniu, z podaniem nazwiska, czasu, odkąd więzienie trwa, na jak długo kara uwięzienia jest wyznaczoną, opisu lokalu więziennego pod względem wielkości, światła, powietrza i urządzenia, tudzież zaopatrzenia; przy. nowo zdarzających się zaś wypadkach uzupełniać takie wykazy. Gdyby biskupi nie chcieli się podjąć układania takich wykazów co do świeckiego i zakonnego kleru swych dyecezyj i z dostateczną gwarancyą za zupełność tychże i prawdziwość wszystkich tamże

5. DECISION TO LEAVE THE ORDER

The decision to leave the religious community could be taken according to canon law in several cases: 1) by the death of a monk; 2) by annulment of vows. A request for annulment of vows should be submitted to the competent superior of the order and the bishop. The annulment could be pronounced only after a process of annulment, to which all interested parties, including the appointed defender of the order, were summoned. The defender of the order was obliged to appeal to the higher ecclesiastical authority against a decision favourable to the monk. There was no ordinary legal remedy against two unanimous decisions. The annulment of vows could be legally requested 5 years after taking the vows at the latest; 3) as a result of papal suspension, which either freed the monk from all his vows, after which he was transferred to the secular state (the so-called laicisation), or freed him only from the solemnity of his vows, after which he obtained only the right to stay in the world with the obligation to keep his vows (the so-called secularisation); 4) by transfer to an order of a stricter rule. The transfer from an order of a lighter rule to an order of a stricter rule required, unless the statutes provided otherwise, the permission of the superior of an order. The transfer from an order of a stricter rule to an order of a lighter rule required a papal permission.[21] Nuns needed papal permission for each change of religious order. Canon law also required a papal permission for the abolition of the rules by the entire order; 5) by appointing a monk as bishop. The monk who became the bishop was freed from the vow of poverty and monastic obedience for the duration of his bishopric, but instead of a bishop's robe, he was obliged to wear a monastic habit, or at least a bishop's robe in the colour of a monastic robe; 6) by total dissolution of a religious order, permitted by canon law only on the basis of a papal permission; 7) by expulsion from the order. Such expulsion could take place only in the case of completely incorrigible monks, after the unsuccessful application of the penalties of the order and proper proceedings. Even if the order was not under the bishop's supervision, the decision expelling a monk from the religious community had to be brought to the bishop's attention. The superior of the order was obliged to learn annually about the condition and behaviour

zawartych dat szefom krajowym przedkładać, natenczas starostowie powiatowi mają sami sporządzić wspomniane spisy, o ile takowe dotyczą księży świeckich; co się zaś tyczy zakonników, mają starostowie żądać takowych wykazów bezpośrednio ód przełożonych pojedynczych konwentów i kongregaeyj, zbadać je dokładnie, sprawdzić i jak najwcześniej przedłożyć. Rozporządzenie to należy udzielić każdemu nowo wstępującemu członkowi jakiego religijnego zakonu lub jakiej kongregaeyj przed złożeniem ślubów, a dowód na to w każdym pojedynczym przypadku przedłożyć naczelnikowi rządu krajowego" [Bartoszewski 1893, 74].

[21] Council of Trent, Sess. 25, X. de reg. c. 19.

of those excluded, to admit those who had improved their condition to the monastic community, and to censure those who had erred. In case of return, there was no need to take vows again. Nuns, due to the greater fear of public outrage, should not be expelled from the order in general, but only punished by monastic disciplinary measures.[22] Only in the case of a complete and explicit annulment of monastic vows, the monk would return to the full rights of his former state, in other cases his vows would remain in force. In the case of secularisation (*indultum saecularisationis*), the monk was obliged to observe the duties that his solemn vows had imposed on him, but only his reciprocal rights and duties towards the order and vice versa were not binding upon him. If he was expelled from the religious community, he was obliged to keep his *voticastitatis*. The vows were not dissolved by absconding or arbitrary abandonment of the order. As for those who fled (*fugitivos*), the canon law, in presuming their intention to return, imposed on them the penalties provided for in the monastic rules [Bartoszewski 1893, 87].

6. SUPPRESSION OF RELIGIOUS ORDERS

The suppression of a religious order, or even of one legally existing monastery, according to canon law could only take place with the permission of the Holy See. The bishop only had the right to expel incorrigible monks from the monastery and to replace them with others, if possible of the same rules, and if there were none, of different rules. In the event of sudden suppression of an order or monastery by a secular authority, the order continued to exist in the face of canon law. Nor were the privileges of monks extinguished, with the exception of those that were inseparably connected with communal life, and the rights of the order and monks were considered by canon law to be merely suspended in their exercise.[23]

In the event of suppression of an order by a competent ecclesiastical authority, the property of the suppressed order could only be allocated for other ecclesiastical purposes. The detailed allocation of the remaining property, in the absence of the relevant reservations of the rules, was left to the exclusive decision of the pope. It was not permissible to suppress a religious community either by the consent of the members of the order or by their

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[22] "Mulier autem propter vitandumordinis scandalum, ne detureilicentiavagandi in saeculo, decernimusut in domunculo infra curtem Monialiumlonge a caeteris habitaculisposita, manęatinclusanunquamindeexitura; sed et ibijejuniis et orationibus et caeteris gravis poenitentiaeremediistantireatusmaculasdiluturasecundumprovisionem Priorisomnem per fenestram tantum vitae accipiatministrationem". *Konstytucja Dominikanek*, as cited in Bartoszewski 1893, 87.

[23] Responsa Sanctae Penitentiariae 12 September 1872, ASS (1872), VII, p. 147.

extinction. An order was considered to legally exist, even if only one member of that community remained [Bartoszewski 1893, 87].

In addition to these provisions of canon law concerning the suppression of religious orders, state legislations, on their part, also set conditions for the valid establishment of religious communities, and if these conditions were not met, they had the right to suppress such orders. Thus, according to Austrian legislation, specifically according to Article 26 of the Civil Code, communities "which are expressly forbidden by political statutes, are opposed to public order or good morals" were not allowed.[24] By contrast, according to the Penal Code: "Any formation of secret associations with whatsoever intention and under whatsoever form is prohibited,[25] and according to Article 286 of the same Code "any real association of several persons shall be considered a secret association: a) if its existence is intentionally concealed from the authorities, b) if, although its existence is known, its organisation or statutes are concealed, or a different organisation, different statutes or different purpose, but not the real ones, were given to the authorities."[26]

CONCLUSIONS

The presented analysis of the canonical legislation shows that the ecclesiastical legislation in matters related to religious life has been stable since the Council of Trent. Changes in this area would only come with the reform of canon law, the result of which would be the 1917 Code of Canon Law. Unfortunately, the same cannot be said of the civil legislation in Austria after 1855. On the one hand, we have the Concordat, but on the other hand, there are many provisions (patents) from the Josephine era still in force. The act of 7 May 1874 formally abolished the Concordat, but in its place no new regulations relating to religious life were established. In this situation, a great deal of chaos and confusion ensued. This legal mess is aptly described by Witold Bartoszewski: "with the current state of the legislation and the Tribunal's rulings, even a craftsman selling even the smallest movable property to a monk cannot be sure that the order will not apply for the annulment of this purchase, as by a person incapable of acquiring things" [Bartoszewski 1893, 112].

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[24] Civil Code, Article 26.

[25] Penal Code of 1852, as amended in 1867, Article 295.

[26] Penal Code, Article 286.

REFERENCES

Bartoszewski, Witold. 1893. *O zakonach wedle austriackiego prawa kościelnego i kanonicznego*. Lwów.

Bruździński, Andrzej. 2014. "Kasaty klasztorów męskich w Krakowie nas przełomie XVIII i XIX w." In *Kasaty klasztorne na obszarze dawnej Rzeczypospolitej Obojga Narodów i na Śląsku na tle procesów sekularyzacyjnych w Europie*. Vol. I: *Geneza Kasaty na ziemiach zaborów austriackiego i rosyjskiego*, edited by Marek Derwich, 141-58. Wrocław: Wrocławskie Towarzystwo Miłośników Historii.

Buss, Franz J. 1862. Österreich*'s Umbau im verhältniss des Reichs zur Kirche*. Wien: Braumüller.

Jaksch, Peter K. 1828. *Gezetzlexikon im Geistlichen. Religions und Toleranzfache*. Prag: Zu haben bei dem Verafsser, und in der k.k. Gubernialregistratur.

Korzeniowski, Ignacy. 1900. *Zbiór przepisów odnoszących się do Kościoła i duchowieństwa katolickiego na podstawie zbioru ustaw administracyjnych*. Lwów: Nakładem własnym.

Kumor, Bolesław. 1985. *Diecezja tarnowska. Dzieje ustroju i organizacji 1786-1985*. Kraków: Wydawnictwo Polskiego Towarzystwa Teologicznego.

Maass, Ferdinand. 1951-1961. *Der Josephinismus. Quellen zu sejner Geschichte in* Őstereich *1760-1850*. Vol. 5. Wien: Verlag Herold.

Schmidlin, Josef. 1934. *Papstgeschichte der neuesten Zeit*. Vol. 2. München: Josef Kösel & Friedrich Pustet.

Słotwiński, Feliks. 1858. *Wykład naukowy konkordatu między Jego* Świątobliwością *Piusem IX i Jego Ces. Król. Apostolską Mością Najjaśniejszym Franciszkiem Józefem I Cesarzem Austryi D. 18 sierpnia 1855 r. w Wiedniu zawartego*. Kraków.

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NEW POSSIBILITIES OF OPERATION FOR COMMERCIAL PARTNERSHIPS AND COMPANIES IN INTERNAL RELATIONS, PROVIDED FOR AS PART OF REGULATION OF THE SO-CALLED ANTI-CRISIS SHIELD

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Abstract. The article synthetically summarizes in a comparative form the new main possibilities for the operation of commercial partnerships and companies in their internal corporate relations (in the area of internal decision-making, including in particular the adoption of resolutions), mainly in the area of introducing or extending the possibilities for using means of distance communication, including electronic means of communication, which were provided for by the legislature directly in the regulations consisting of the so-called anti-crisis shield setting out specific support instruments due to the spread of the SARS-CoV-2 virus causing the COVID-19 pandemic, i.e. in the Act of 31 March 2020 (Journal of Laws item 568), as well as in the Act of 16 April 2020 (Journal of Laws item 695) as well as those resulting from references (to the solutions introduced) set out in applicable legal provisions. Subsequently, certain selected, general and specific doubts as to the manner and scope of regulation of these legal solutions have been pointed out, as well as proposals to modify them, presented in the form of specific proposals *de lege ferenda* (for the law as it should stand), consisting of a general proposal for a broader, comprehensive and more symmetrical regulation of this matter, primarily in relation to commercial partnerships and companies) according to the comprehensive, optimal theoretical model of its regulation.

Keywords: commercial partnerships; commercial companies; COVID-19; anti-crisis shield; means of direct distance communication; means of electronic communication

1. INTRODUCTION

1.1. Aim and scope of the study

The aim of the article is to present synthetically, in the form of a comparative study, the new possibilities for commercial partnerships and companies[1] to act in internal relations (i.e. in the area of running corporate

[1] The basis for regulation of commercial partnerships and companies in Polish law is the Act

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affairs, including, above all, adopting resolutions), which were provided for by the legislature directly in one of the first regulations that make up the so-called anti-crisis shield,[2] i.e. in Article 27 of the Act of 31 March 2020 on amendments to the Act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them and some other acts,[3] and in Article 29 of the Act of 16 April 2020 on special support instruments related to the spread of the SARS-CoV-2,[4] as well as those that result from the references (to the changes introduced) existing in the legislation. Moreover, the article is to indicate certain selected, general and detailed doubts related to the manner and scope of regulation of these new possibilities of action, as well as to put forward proposals for their modification in the form of detailed postulates *de lege ferenda* (proposals of the law as it should stand), constituting a general proposal for a broader, comprehensive and symmetrical (even) regulation of this matter with regard to commercial partnerships/companies according to the proposed comprehensive, optimal theoretical model of its regulation. It is not the author's intention to comment in detail on each of the regulations that introduced particular improvements, or to analyse and assess in detail the legislative technique applied in introducing particular new possibilities of action, as these could constitute the subject of at least several separate studies on this subject.

The article concerns commercial companies that have legal personality, including primarily limited liability company (*spółka z ograniczoną odpowiedzialnością*) and joint-stock company (*spółka akcyjna*), as well as commercial partnerships that are organizational units without legal personality, on which the legislation confers legal capacity, including in particular professional partnership and limited joint-stock partnership. Companies, as legal persons, act (i.e. perform factual acts concerning the organisation and management of internal corporate relations, as well as adopt resolutions and

of 15 September 2000, the Code of Commercial Partnerships and Companies, Journal of Laws of 2020, item 1526 as amended [hereinafter: CCPC].

[2] The term "anti-crisis shield" has been used for special solutions and a comprehensive catalogue of actions aimed at countering the negative economic and social effects of the COVID-19 pandemic caused by SARS-CoV-2, as well as for the package of legislation proposed by the Polish Government, adopted by the Polish Parliament and signed by the President of the Republic of Poland in March 2020, enabling the implementation of these actions; see: Explanatory note to the draft Act of 16 April 2020 on special support instruments in relation to the spread of SARS-CoV-2 (Sejm Papers no. 330) [hereinafter: explanatory note no. 2-330], p. 1. I use herein the term "anti-crisis shield" to refer to this legislation package with respect to commercial partnerships/companies.

[3] Journal of Laws of 2020, item 568 [hereinafter referred to as the Act of 31 March 2020 on the SARS-CoV-2 Act amendment].

[4] Journal of Laws of 2020, item 695 [hereinafter: Act of 16 April 2020 on special support instruments in relation to SARS-CoV-2].

perform acts in law, including the submission or acceptance of statements submitted to them within their scope of signatory powers) through their governing bodies [Pazdan 1969, 203], while commercial partnerships as organizational units without legal personality, on which the legislation confers legal capacity – act through their statutory representatives (i.e. as a rule by their partners, e.g. partners in a general partnership) or so-called quasi-authorities[5] (including e.g. by the management board – in a professional partnership or by the supervisory board – in a limited joint-stock partnership. This statement refers to the activity of these commercial companies in the sphere of their internal corporate relations, and thus in the area of running internal affairs, including in particular the adoption of resolutions by governing bodies of companies and the adoption of resolutions by representatives and *quasi*-bodies of partnerships.

1.2. The semantic scope of the category of "new possibilities of operation"

I consider as the new possibilities of internal operation for commercial partnerships and companies presented and analysed herein the introduction or extension by the legislature of the possibilities of: (1) the participation in meetings of governing bodies and the adoption of resolutions by such bodies via direct distance communication (e.g. teleconferencing and video-conferencing), including electronic means of communication (in particular software for on-line meetings or audio and video transmission [Ostrowski 2020, 34; Osajda 2020, 20-21], such as e.g. *ZOOM*, *Webex*, *Microsoft Teams*, *Google Meet*, or even chat service – e.g. via *Signal*, *Whatsapp or WeChat*), (2) casting a written vote through another member of the body (at meetings held traditionally and by means of direct distance communication), and (3) the adoption of resolutions by written vote. In view of the contemporary dynamic development and growing practical application of various types of modern communication technologies, including in particular electronic communication means,[6] this article will address mostly the new possibilities

[5] A *quasi*-body is not a strictly (full-fledged) governing body of a commercial partnership as the partnership does not have legal personality, whereas its members are merely representatives of the other partners of that partnership as defined for the management board of professional partnership by e.g. Górska 2001, 36-37; Jacyszyn 2001, 171; Krześniak 2002, 243ff; Ciecierska 2005, 62ff; Kozieł 2006, 29]. There is also a different view presented in the literature that *quasi*-bodies, including specifically the management board of professional partnership, have the nature of a governing body as proposed by e.g. Asłanowicz 1999, 14-21; Sołtysiński, Szajkowski, Szumański, et al. 2001, 481; Szajkowski 2005, 544ff.

[6] In particular, electronic means of communication that enable holding meetings and adopting resolutions (or casting votes) by individual management boards of companies or representatives of partnerships, which is also recognised in foreign literature [Kosmin and

of operation related to the use of means of direct distance communication, especially electronic communication means.

The legal solutions currently adopted for companies regarding the new possibilities of action analysed herein, as well as the broadest proposed model for the regulation of these improvements, defined by me as optimal, do not provide for temporary limitation of their application only to the period of introduction of the state of epidemiological threat or state of epidemic, referred to in the Act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans,[7] which takes into account the current state of development of modern technologies, diverse means of communication, including electronic means of communication, as well as resulting possibilities and needs, regardless of the existence and scope of communication restrictions caused by SARS-CoV-2.

1.3. The research methodology used

Due to the purpose and scope of the study, the prevailing method used is the formal-dogmatic method.

2. NEW POSSIBILITIES OF OPERATION BY COMPANIES

2.1. General remarks

New operation possibilities provided for in the provisions introducing the so-called anti-crisis shield in a group of commercial partnerships and companies concern directly limited liability company and joint-stock company (including the actions of the management board, the supervisory board or the audit committee and the shareholders' meeting in a limited liability company, as well as the action of the management board, the supervisory

Roberts 2020, VII-IX] as measures that meet the contemporary needs of corporate action. It is pointed out in this respect to the obligation to comply with the rules of cybersecurity generally applied in the area of corporate governance [Kosseff 2020, 155].

[7] Journal of Laws of 2020, item 1845 as amended. [hereinafter: APCI]. Unlike the improvements introduced in cooperatives, associations or foundations, which, apart from the debatable question of their substantive scope which differs significantly from the rules set out in this respect for companies (especially limited liability company and joint-stock company), they can only be applied for the period of a state of epidemiological threat or epidemic situation – see Article 36(9-13) of the Act of 16 September 1982, the Law on Cooperatives, Journal of Laws of 2020, item 275 as amended [hereinafter: the Law on Cooperatives], Article 10(1e) of the Act of 7 April 1989, the Law on Associations, Journal of Laws of 2020, item 2261 as amended [hereinafter: the Law on Associations.], or Article 5(1b) of the Act of 6 April 1984, the Law on foundations, Journal of Laws of 2020, item 2167 [hereinafter: Law on Foundations] – which must now be regarded as insufficient, if not doubtful or incorrect.

board and the general meeting in a joint-stock company). They refer to the legal solutions previously provided for in the regulations on a simple joint-stock company (Articles 300^{1} to 300^{134} CCPC) with regard to the possibility to act in internal relations, contained in Article 300^{58}(1-5) CCPC and Article 300^{59} CCPC (with regard to the management board and supervisory board – in the dualistic system of management, or – board of directors – in the monistic system of management), as well as in Article 300^{80} CCPC and Article 300^{92} CCPC (with regard to the general meeting), which entered into force one year and four months after the introduction of the first of the acts comprising the anti-crisis shield, namely on 1 July 2021 [Kozieł 2020, XIX-XXXVII].

The new possibilities of operation of governing bodies of limited liability companies and joint-stock companies have primarily been provided for in the similarly formulated provisions on: 1) the governing board (Article $208(5^{1}–5^{3})$ CCPC and Article $371(3^{1}–3^{3})$ CCPC); 2) the supervisory board (Article $222(1^{1}$, 2, 3 and $4^{1})$ CCPC and Article $388(1^{1}$, 2, 3 and $3^{1})$ CCPC, which in the limited liability company, under Article 222(7) CCPC, is related also to the audit committee established therein), as well as 3) the shareholders' meeting in a limited liability company (Article 234^{1} CCPC) and the general meeting of shareholders in a joint-stock company (Article 406^{5} CCPC).

2.2. New opportunities for companies to operate by management, supervisory and audit bodies

New possibilities of operation in the case of management boards and supervisory boards of companies (also audit committees in limited liability companies) include – unless the articles of association provides for otherwise (i.e. on the basis of the so-called *opt-out* model)), the possibility of: 1) participation in a meeting of the body using means of direct (and not necessarily simultaneous [Osajda 2020, 21]) distance communication (Article 208(51) CCPC, Article 222(11) CCPC, Article 371(31) CCPC, Article 388(11) CCPC); 2) adopting resolutions in writing or using means of direct distance communication (Article 208(52) CCPC, Article 222(4) CCPC, Article 371(32) CCPC, Article 388(3) CCPC; 3) members of these bodies taking part in adopting resolutions by casting their vote in writing through another member of the body (Article 208(53) CCPC, Article 222(3) CCPC, Article 371(33) CCPC, Article 388(2) CCPC).

Re: 1. Regarding the participation in the meeting of the body in this manner, the legislature imposed on the supervisory board, only for a joint-stock company, and unfortunately not for a limited liability company (or also to the management board, supervisory board or board of directors of a simple

joint-stock company), in connection with the application *mutatis mutandis* of Article 406^5(3) of the Code of Commercial Partnerships and Companies the obligation to define in the form of by-laws the detailed rules of participation in the meetings of these bodies with the use of electronic means of communication, with the exception of requirements and restrictions that are not necessary to identify shareholders and ensure the security of electronic communication. However, it seems that one may also draw from the application *mutatis mutandis* of the mentioned provision of 406^5(3) CCPC a less legitimate conclusion that the obligation to establish these by-laws with regard to the management board rests with the management board, and not with the supervisory board, which may raise additional doubts. The above should be treated as an expression of a kind of inconsistency and lack of a comprehensive, complete and optimal legislature's approach to the legal solutions introduced.

Re: 2. With regard to the adoption of resolutions in such procedures, however, a certain legislative insufficiency is connected with the fact that only in the case of the supervisory boards of a limited liability company and a joint-stock company, also audit committees (as well as in the case of a supervisory board or a board of directors – Article 300^{58}(1-2) CCPC), but not in relation to the management boards of these companies (including the management board in a simple joint-stock company), the legislature introduced a regulation under which a resolution is valid when all members of the board have been notified of the content of the draft resolution and at least half of the members of the board took part in the adoption of the resolution, and the articles of association of the company may provide for stricter requirements for adopting resolutions in such a manner. This should be assessed as an expression of a certain inconsistency and lack of a holistic, comprehensive and optimal approach to the legal solutions being implemented.

Re: 3. As regards adopting resolutions adopted in such a procedure, it is regrettable that its only the case of supervisory boards, and not also in the case of management boards of these companies (or also in the case of management boards, supervisory boards and boards of directors in a simple joint-stock company), for which the legislature adopted a principle that written vote casting may not concern matters put on the agenda at a meeting of the body), which should be perceived, similarly as above, as an expression of a certain inconsistency and lack of a comprehensive, holistic and optimal approach to the legal solutions being implemented.

At the same time, the legislature has rightly repealed Article 222(5) CPCC and Article 388(4) CPCC related to supervisory boards (and, also to audit committees in limited liability companies), which excluded the above possibilities of adopting resolutions and casting votes (particularly in

writing or using means of direct distance communication) with regard to electing the president and vice-president of the supervisory board, appointing a management board member, as well as dismissing and suspending these persons. Similarly, the legislature rightly added to these rules the provisions of § 3^1 (with wording analogous to Article 222 CCPC) and § 4^1 (with wording analogous to Article 388 CCPC), in which he granted supervisory boards (and also audit committees in a limited liability company) the right to adopt resolutions in writing or by means of direct distance communication also in matters for which, respectively, the articles of association (of a limited liability company or a joint stock company) provide for a secret ballot, provided that none of the supervisory board members raises an objection. It is a pity, however, that no regulations analogous to those provided for in Article 222(3^1) CCPC and Article 388(4^1) CCPC were introduced by the legislature with regard to management boards and shareholder meetings of companies (including bodies of a simple joint-stock company). This may be assessed as above as an expression of a certain inconsistency and lack of a comprehensive, holistic and optimal approach to the improvements being implemented.

2.3. New possibilities for operation by stockholder bodies in companies

On the other hand, in the case of shareholders' meetings, new possibilities of operation involve assuming the possibility of taking part in a shareholders' meeting (in a limited liability company) or a general meeting (in a joint-stock company), unless the articles of association (of a limited liability company or a joint-stock company) provide for otherwise (and therefore, as in the case of management boards and supervisory boards or audit committees on the basis of the so-called opt-out model). Unfortunately, these possibilities, unlike in the case of management boards and supervisory boards (or also the board of directors in a simple joint-stock company – Article 300^{58} CCPC), do not include the use of all means of direct distance communication in general, but only a specific, narrower yet the most commonly used group of these means today, namely electronic means of communication[8] (Article 234^1(1) CCPC and Article 406^5(1) CCPC). This participation,

[8] Ostrowski presents a different opinion, boiling down this difference in the regulations concerning the management and supervisory boards (and also audit committees in the limited liability company) and shareholders' meetings of companies only to the problem of different terminology to be unified [Ostrowski 2020, 36]. On the other hand, Osajda rightfully derives the possibility of holding meetings on a permanent basis by the management board or the supervisory board (or the audit committee in the limited liability company) using means of direct distance communication from the difference between the term "means of direct distance communication" used in the provisions on management

in accordance with, respectively, Article 234^1(2) CCPC and 406^5(2) CCPC includes, in particular, for example: 1) two-way real-time communication between all persons participating in the meeting, in which they may speak in the course of discussion while staying elsewhere, and 2) exercise of voting rights in person or by proxy before or during the meeting.[9]

Participation in the shareholders' meeting (or the general meeting) using electronic means of communication is decided by the entity who convenes the meeting, i.e. primarily the management board (see in the case of a limited liability company – Articles 235 to 237 CCPC, while in the case of a joint-stock company – Articles 399 to 401 of CCPC). Regardless of this, a public company has been required to ensure the transmission of the general meeting in real time (Article 406^5(4) CCPC, first sentence).

In accordance with the provisions of Articles 234^1(3) CCPC and 406^5(3) CCPC, the supervisory board (or shareholders in a limited liability company where the supervisory board is not established) are required to lay down, in the form of rules of procedure, detailed rules for participation in the shareholders' meeting (or general meeting) using electronic means of communication, which may not contain requirements and limitations that are not necessary to identify the shareholders and ensure the safety of electronic communication. In the limited liability company, the adoption of these rules of procedure may take place by a resolution of the shareholders without holding a meeting if the shareholders representing an absolute majority of the votes agree in writing to its content (Article 234^1(3) CCPC, third sentence).

Only with regard to the shareholders' meeting in a limited liability company, and not in relation to the general meeting in a joint-stock company, other bodies of these companies (management boards and supervisory boards, or audit committees), or any of the bodies of a simple joint-stock company, which can be treated as an expression of a specific inconsistency and lack of a holistic, comprehensive and optimal approach to the introduced improvements, the legislature rightly adopted in Article 238(3) CCPC a principle stating that if participation in the shareholders' meeting takes place using electronic means of communication, the notification (about this

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boards and supervisory boards and the term "means of electronic communication" used in the rules on shareholders' meetings and at the same time notes that this is not possible in the case of general meetings held by electronic means of communication (in a limited liability company or joint-stock company) [Osajda 2020, 21ff].

[9] The literature also rightly points to the possibility of participating in the company's general meeting of using electronic means of communication in the mode of real-time transmission of the shareholders' meeting – mentioned by the legislature explicitly only in relation to the general meeting of a public company in Article 406^5(4) (first sentence) CCPC (i.e. the so-called tele-meeting) [Żaba 2020, 14].

meeting) should additionally include information on how to participate in this meeting, take floor during it, exercise voting rights and submit objections to the resolution or resolutions adopted.

In a similarly non-comprehensive way, this time on the contrary: only in relation to the general meeting in a public limited liability company, and not also in relation to the meeting of shareholders in the limited liability company and the other bodies of these companies (management boards and supervisory boards, or – in the limited liability company – the audit committee or any of the bodies of a simple public limited liability company), the legislature in Article 506^5(5) and (6) CCPC imposed on the (joint-stock) company the following obligation in the event of exercise of the voting right using means of electronic communication: 1) to promptly send to the shareholder an electronic notice of receipt of the vote (Article 506^5(5) CCPC), as well as, 2) to send to the shareholder, at the request of the shareholder submitted no later than three months after the date of the general meeting, a confirmation that his or her vote has been properly registered and counted (unless such confirmation has been given to the shareholder or his/her representative in advance (Article 506^5(6) CCPC).

The above can be assessed in two ways. On the one hand, this can generally be perceived as an expression of a certain inconsistency and of the lack of a comprehensive and optimal approach to the improvements made, and, on the other hand, in the area of the general protective importance of this element of the regulation, as an essentially appropriate legal solution.

2.4. The *opt-out* model forms the basis for new possibilities for the operation of companies through their governing bodies

Both in the case of the management board and the supervisory board (or the audit committee in a limited liability company), as well as in the case of the shareholders' meeting (in a limited liability company) and the general meeting (in a joint-stock company), completely differently than in the regulations in force before the introduction of the analysed amendment relating to supervisory boards (Article 222 and Article 388 CCPC), as well as the general meeting in a joint-stock company (Article 406^5 CCPC), and also differently than in the currently binding Article 300^{92}(1) CCPC concerning the general meeting of a simple joint-stock company, the improvements presented above are binding by operation of law, unless articles of association of a limited liability company or a joint-stock company provide otherwise, respectively [Szumański 2020, 4].[10] This reflects the adoption of

[10] Szumański rightly considers this element of the improvements as fundamental one [Szumański 2020, 4].

the so-called opt-out model in this respect. Thus, in the case of supervisory boards and the general meeting, one could make a statement similar to the one that "the roles (functions) of rules and exceptions havereversed."[11] Under the currently applicable provisions, the rule is that these improvements may be used, contrary to the previous rules, which, in the case of supervisory boards and general meetings, required an explicit legal grounds for their use in the company's articles of association. Under the previous provisions, these improvements did not apply to management boards and the general meeting of shareholders. Currently, in order for them not to be used in the area of activity of a limited liability company or joint-stock company by the management board or supervisory board (also by the audit committee in a limited liability company) or shareholders' meeting or general meeting, the articles of association of the limited liability company or the joint-stock company should be amended to exclude such possibility. However, it does not seem justified in view of the related formal and legal requirements, certain costs as well as the lack of purposefulness of the action (including the purposefulness of restricting the possibility of more efficient operation).

2.5. Doubts and comments regarding the legal regulation of new possibilities for the operation of capital companies by management, supervisory and audit bodies

Solutions adopted with respect to the management board in a limited liability company and a joint-stock company are to a large extent modelled on the previously applicable and currently modified regulations concerning supervisory boards in these companies (i.e. Article 222 CCPC and Article 388 CCPC, respectively). One can see in their structure a reference to the provisions relating to the management board, supervisory board and board of directors in a simple joint-stock company (i.e. primarily Article 300[58] CCPC). Similarly to the regulations relating to supervisory boards and shareholders' meetings, they may be a source of certain doubts, the more so as the legislature failed to provide any explanation in this respect in the explanatory notes to the draft acts introducing the so-called anti-crisis shield.[12]

It seems that in this case it is pointless to differentiate the regulations regarding management boards and supervisory boards by not including in

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[11] In the German law, a similar relationship is noted in the literature in relation to the previous (original) and current regulation of § 131 (in conjunction with § 138) of the Handelsgesetzbuch of 10 May 1897 [Schmidt 2002, 1455ff].

[12] See: Explanatory note to the draft Act of 31 March 2020 amending the SARS-CoV-2 Act, Sejm papers no. 299 [hereinafter: Explanatory note 1] and the Explanatory note to the draft of 16 April 2020 on special support instruments in relation to the spread of SARS-CoV-2, Sejm papers no. 324 and 330 [hereinafter: Explanatory note no. 2].

the regulations on management boards of the limited liability company and the joint-stock company the provisions concerning the notification of the content of the draft resolution and the regulation, related only to the case of a collegial board, of the issue of the quorum required to adopt resolutions in writing or using means of direct distance communication provided for in the provisions on supervisory boards, i.e. in Article 222(4) (sentences 2 and 3 CCPC and Article 388(3) (sentences 2 and 3) CCPC (likewise the provisions of Article 300^{58}(2) CCPC relating to the supervisory board and the board of directors in a simple joint-stock company).

It is also interesting why the provisions on the supervisory board in a limited liability company that introduce improvements (Article 222 CCPC) there is no reference to the Article 234^{1}(3) CCPC (applied *mutatis mutandis*) analogous to the reference provided for in Article 388(1^{1}) CCPC (applied *mutatis mutandis*), Article 406^{5}(3) CCPC, which imposes on the supervisory board the obligation to lay down in the form of by-laws the rules of participation in its meetings using electronic means of communication, and also specifies what requirements and limitations may be included therein. A question arises here why analogous references to Article 234^{1}(3) CCPC (applied *mutatis mutandis*), as well as Article 406^{5}(3) CCPC (applied *mutatis mutandis*) were not introduced in the provisions on management boards of respectively limited liability companies and joint-stock companies. A similar question regarding the justification for the lack of such regulation can be asked in relation to the management board, supervisory board and board of directors of a simple joint-stock company.

2.6. Doubts and comments regarding the legal regulation of new possibilities for the operation of capital companies by stockholder bodies

As regards new possibilities of operation by stockholder bodies, fundamental doubts arise as to why the legislature did not adopt regulations analogous to those aptly set out in the provisions of 406^{5}(5) and (6) CCPC, imposing on the company an obligation to immediately send to the shareholder an electronic confirmation of receipt of the vote cast via electronic means of communication (Article 406^{5}(5) CCPC) and confirmation of the correct counting and registration of the vote cast in this form (Article 406^{5}(6) CCPC), also for the shareholders' meeting in a limited liability company in the form of, for example, Articles 234^{1}(4) and (5) CCPC, the general meeting in a simple joint-stock company, nor did it introduce the rules resulting from Article 406^{5} CCPC with regard to management boards and supervisory boards in limited liability companies and joint-stock companies.

It is also puzzling what prevented a regulation similar to that governing the shareholders' meeting in a limited liability company in Article 238(3) CPCC, which specifies the specific requirements for notification of the shareholders' participation in the general meeting, which are the basis for the knowledge of the rules of participation in this meeting by shareholders where that participation in the shareholders' meeting is to take place using electronic means of communication, to be introduced in relation to the general meeting of a joint-stock company, e.g. in Article 402(4) CPCC and the general meeting in a simple joint-stock company, as well as in relation to management boards and supervisory boards in limited liability and joint-stock companies, or the management board, supervisory board and board of directors in the simple joint-stock company.

It seems that there is no justification for limiting the possibility of using only electronic means of communication for participation in meetings of companies (unless the articles of association provide otherwise) (Art. 234^{1}(1) CCC, Article 406^{5}(1) CPCC, Article 300^{92} CPCC), and not – as in the case of management boards and supervisory boards of these companies (or of the management board, supervisory board and board of directors in a simple joint-stock company) – more broadly, i.e. including generally all means of direct distance communication.

2.7. Summary of doubts and comments regarding new possibilities of operation of capital companies versus the postulate to introduce a comprehensive, optimal model of regulation of this matter

The general idea of introducing new possibilities of operation for governing bodies of companies, comprising (with respect to limited liability companies and joint stock companies), first of all, the possibility to make decisions using means of remote communication, including electronic means, regardless of the duration of a state of epidemiological threat or state of epidemic, and even more so in view of the current pandemic, which constitutes a significant obstacle to efficient communication, including decision-making by company bodies in a traditional way based on the personal presence of their members at one place, should be assessed positively.

However, the legal solutions adopted by the legislature and analysed above look incoherent and deprived of a certain legislative consistency, symmetry (in the sense of balance, uniformity) within the scope of regulating the same or similar issues (in relation to particular bodies), as well as an overall (comprehensive) and optimal character (outlook, approach), even in their part concerning companies, not to mention the incompleteness of the regulation of this matter with regard to a simple joint-stock company, or no

regard to commercial partnerships (which will be discussed in more detail below in point 3 of the study).

It seems that in this case the optimal solution would be changes to broadly include, with respect of the governing bodies of companies, almost all important elements set out in the provisions concerning particular, different bodies of limited liability company, joint-stock company and simple joint-stock company, merged into one entity aimed at improvement of their operation, taking into account postulates arising from the above doubts and questions pointing to lack of consistency and a comprehensive, holistic and optimal approach to the legal solutions introduced. This optimal character and the resulting scope of legislative changes could be considered as the basis for an optimal model to regulate the matter in question.

A number of arguments speak in favour of the introduction of such a consistent, comprehensive and optimal regulation.

Firstly, it is generally beneficial for companies and partnerships, including their bodies and members, owing to improvements in their operation.

Secondly, it provides a legal basis for the obligation (duty) to meet elementary requirements for the implementation of the new possibilities of operation, including security requirements in the area of the existence of a regulatory basis for the detailed rules for their implementation, the convening of meetings, the identification of members of bodies, participation in meetings and activities undertaken, and the confirmation of actions undertaken.

Thirdly, such optimal regulation meets civilisational progress in the area of the development of new and innovative communication technologies (means of direct distance communication, including in particular electronic communication).

Fourthly, the Explanatory notes to the above-mentioned bills introducing the so-called anti-crisis shields do not give answers to these doubts, including to the questions about the method of regulation adopted, and thus the explanation (or justification) of the legislative concept adopted by the legislature, from which it can be concluded that the legislature itself was not entirely convinced, perhaps as regards specific issues, as to its final correctness and scope of the concept. On the other hand, the legislature wanted to take, perhaps not the first, but another very important step, to open the door more widely to certain new possibilities of operation, especially with the use of means of direct distance communication, including electronic means of communication, primarily in order to limit the negative consequences of the current coronavirus epidemic caused by SARS-CoV-2.

3. NEW POSSIBILITIES OF OPERATION BY PARTNERSHIPS

3.1. General remarks

Due to the principle of applying *mutatis mutandis* certain regulations concerning limited liability company or joint stock company in the provisions applicable yet before the adoption of the provisions that make up the so-called anti-crisis shield in specific cases, the catalogue of commercial partnerships and companies, including areas to which the improvements in operation provided for in this shield apply, is wider than only these companies. It includes: 1) professional partnerships in which, in accordance with Article 97(1) CCPC, the management board was established , i.e. the so-called hybrid management model was adopted in terms of the new operational capabilities of this board (due to the application *mutatis mutandis* to these companies under Article 97(2) CCPC of the provisions of Articles 201-211 CPCC and Articles 293-300 CCPC, including the provisions of Article 208(5^1-5^3) CPCC, which concern the management board in the limited liability company), as well as 2) limited joint-stock partnerships – in the area of new operational possibilities for the supervisory board established in accordance with Article 142(1) CPCC, due to the existing statutory requirement or requirement stated in the articles of association and the general meeting – only in terms of the resolutions of shareholders adopted at its meetings (due to the application *mutatis mutandis* to these companies under Article 126(1)(2) CPCC. the provisions of the Code of Commercial Partnerships and Companies on joint-stock companies – including Article 388(1-3) CPCC and Article 406^5 CPCC) [Szumański 2020, 5].[13]

3.2. New possibilities of operation by professional partnerships

For the introduction of solutions proposed above in a limited liability company, in the area of making use of new possibilities of action by particular bodies, as part of the broadest, optimal model of regulation with regard to companies, the reference to selected provisions on the management board of a limited liability company, i.e. Articles 201-211 CCPC and 293-300 CCPC, existing (even before the introduction in the regulations referred to as the so-called anti-crisis shield) in the provision of Article 97(2) CCPC in respect of activities of a partnership in which the management board has been established, may remain a good and simple way of introducing these new possibilities of operation (regarding the use of means of direct distance

[13] Szumański, however, probably due to the area of analysis intentionally narrowed down to meetings, refers this only to the general meeting in the limited joint-stock partnership, not to mention the supervisory board established in this company or the management board established in the professional partnership.

communication, including electronic means) by the management board of a professional partnership. It seems that, in this case, a separate regulation of this matter directly in the provisions on professional partnership is not justified, due to the similar substantive scope of regulation, despite their different legal natures,[14] including functions and powers, and thus also the resulting formal and legal status of the management board in a professional partnership in relation to the management board in a limited liability company.

Another, very important, issue is to consider, from the perspective of the law as it should stand, the introduction of the analysed new possibilities of operation of a professional partnership, in which a traditional model of operation has been adopted (i.e. the management board has not been established) – in relation to running affairs by its partners in matters requiring adopting resolutions by them (and thus, as a rule, in matters exceeding the scope of ordinary activities of the partnership), the more so, because pursuant to Article 97(3) CCPC, also in the hybrid model of partnership management, the management board of such a company should include at least one partner by operation of law.

3.3. New possibilities of operation by limited joint-stock partnership

Where the solutions proposed above are introduced in a joint-stock company in the area of using new possibilities of operation by individual bodies as part of the broadest, optimal model of regulating this matter in relation to capital companies, the reference existing (even before the introduction of the provisions referred to as the so-called anti-crisis shield) in Article 126(1)(2) CCPC to the properly applicable provisions on the supervisory board and the general meeting of a joint-stock company in relation to a limited joint-stock partnership, also with regard to the use of means of distance communication, including electronic means of communication, may remain a good and simple way of introducing new possibilities of operation (and specifically the use of these means) by the supervisory board of this company and the general meeting, as regards resolutions adopted by shareholders. As it may be assumed, a separate regulation of this matter directly in the provisions on a limited joint-stock partnership is not justified in this case, due to a similar, despite having a different legal nature, substantive scope of the regulation, including functions and powers, and therefore also the resulting formal and legal status of the supervisory board and the general meeting in a limited joint-stock partnership in relation to these bodies in a joint-stock company.

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[14] See, for example, Górska 2001, 36-37; Jacyszyn 2001, 171; Krześniak 2002, 243ff; Ciecierska 2005, 62; Kozieł 2006, 29.

Another issue, a very important one, is to consider, from the perspective of law as it should stand, the introduction of these new possibilities of operation of a limited joint-stock partnership with regard to the running of affairs by its general partners in matters requiring the adoption of resolutions by them (i.e., in principle, in matters exceeding the scope of ordinary activities of the partnership), as well as in relation to expressing a consent of the general partners (unanimously by all or by a majority of votes) to shareholders' resolutions adopted at the general meeting, in accordance with Article 146(2-3) CCPC. It should be borne in mind that the provisions on joint-stock companies in the light of Article 126(1)(1-2) CCPC applied *mutatis mutandis* to the general meeting in the limited joint-stock partnership do not refer to consents of the general partners to these resolutions, as required under Article 146 CCPC.

3.4. New possibilities of operation of general partnerships and limited partnerships – a proposal *de lege ferenda*

The proposal to introduce these new operational possibilities remains valid also for partners of other commercial partnerships, i.e. partners of a general partnership, partners of a limited partnership (general partners and the limited partners who, unless the articles of association provide otherwise, have the right to consent to the resolutions of the general partners on the matters of running affairs of the partnership, which exceed the scope of the ordinary activities of the partnership – Article 121(2) CCPC). It seems that there is no justification for the differentiation in this area (new possibilities of operation) of the legal position of the bodies of a limited liability company and joint-stock company (or a simple joint-stock company), and on the other hand the legal status of the members (partners) in commercial partnerships who make decisions collectively, i.e. primarily in the form of resolutions.[15]

CONCLUSION

It seems that the new possibilities of operation by commercial companies and partnerships introduced by the legislature in the regulations of the so-called anti-crisis shield are a key step, perhaps a milestone, and at the same time they begin another very important stage in regulating this matter, which should generally be assessed positively. However, as mentioned

[15] On the other hand, Szumański holds that the use of means of direct distance communication generally in all commercial partnerships may contradict the personal nature of commercial partnerships, including the primacy of the person over capital [Szumański 2020, 5].

above, individual detailed and very important legal solutions in this area are selectively and unevenly "scattered" over the provisions relating to individual governing bodies of companies, without any justification, including without taking into account the need for a specific analogy, symmetry and the completeness of regulation in each case, instead of being comprehensively, holistically and symmetrically related to each of them. It can be assumed, as in other analogous cases, that this results from the specific, but easily noticeable (also against the backdrop of similarly incomplete and asymmetrical legal solutions introduced for other entities, e.g. in cooperatives,[16] associations[17] or foundations[18]) inconsistency and lack of a holistic, comprehensive and optimal approach to the solutions being introduced. Apart from the above-mentioned specific doubts concerning the regulations for companies (applied *mutatis mutandis* to the management board of a professional partnership, as well as the supervisory board and the general meeting of a limited joint-stock partnership), there are no grounds in this respect, *inter alia*, for the fact that the new possibilities of operation do not apply to entities other than the bodies adopting resolutions in commercial partnerships, i.e. to their members (partners), or – like for the bodies of a limited liability company and joint-stock company – to the bodies of a simple joint-stock company (including, in particular, to its general meeting).

A way to address the imperfections of these regulations, and thus to remedy the insufficiencies caused by them, may be the introduction of legislative changes based on the optimal model of regulation proposed above. Its application should be considered from the perspective of the law as it

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[16] New possibilities of operation for the governing bodies of cooperatives (acting under general rules) have been set out mainly in the provisions concerning: 1) the management board and the supervisory board (Article 35(4^1-4^4) of the Act of 16 September 1982, the Law on Cooperatives, Journal of Laws of 2020, item 275 as amended [hereinafter: Law on Cooperatives]), 2) the general meeting (Article 36(9-13) of the Law on Cooperatives, Article 40(3) of the Law on Cooperatives and Article 46a, third sentence, of the Law on Cooperatives), 3) the meeting of representatives (Article 35(4^1-5) of the Law on Cooperatives in conjunction with Article 37(5) of the Law on Cooperatives) and 4) the meetings of member groups (Article 35(4^1-5) of the Law on Cooperatives in conjunction with Article 59(1), third sentence, of the Law on Cooperatives).

[17] New possibilities of action of the governing bodies of associations have been set out in the provisions of Article 10(1a) to Article 10(1d) of the Act of 7 April 1989, the Law on Associations (Journal of Laws of 2020, item 2261 as amended [hereinafter: Law on Associations]). These generally refer to the authorities (bodies) of the association (general meeting of members, internal auditing body and management board).

[18] New possibilities of operation of foundation's bodies have been set out in provisions of Article 10(1a) to Article 10(1d) of the Law on Associations in conjunction with Article 5(1a) of the Act of 6 April 1984 on foundations (Journal of Laws of 2020, item 2167) and relate in general to all foundation's authorities (bodies) (the management board and bodies established on the basis of the foundation's statutes, such as e.g. the founders' council).

should stand (*de lege ferenda*) not only in the area of commercial companies and partnerships, but also in relation to other entities, including both those which pursue business activities and those which do not, in particular: co-operatives, state-owned enterprises (in relation to the bodies of self-government of the personnel in these enterprises) or associations.

REFERENCES

Asłanowicz, Marcin. 1999. "Charakter i pozycja zarządu w spółce partnerskiej." *Przegląd Prawa Handlowego* 8:14-21.

Ciecierska, Magdalena. 2005. "Charakter prawny zarządu w spółce partnerskiej." *Przegląd Sądowy* 6:62.

Górska, Beata. 2001. "Spółka partnerska w prawie niemieckim i w polskim kodeksie spółek handlowych." *Przegląd Prawa Handlowego* 3:36-37.

Jacyszyn, Jerzy. 2001. *Spółka partnerska*. Bielsko-Biała: PPU PARK.

Kosmin, Leslie, and Catherine Roberts. 2020. *Company meetings and resolutions. Law, Practice, and Procedure.* Oxford: Oxford University Press.

Kosseff, Jeff. 2020. *Cybersecurity law*. New York: Wiley.

Krześniak, Eligiusz J. 2002. *Spółka partnerska ze szczególnym uwzględnieniem spółek adwokatów i radców prawnych*. Warszawa: Wolters Kluwer Polska, Kantor Wydawniczy Zakamycze.

Kozieł, Grzegorz. 2006. *Przeniesienie praw i obowiązków w handlowych spółkach osobowych. Uwagi na gruncie regulacji art. 10 k.s.h.*. Warszawa: Wolters Kluwer Polska, Kantor Wydawniczy Zakamycze.

Kozieł, Grzegorz. 2020. *Prosta spółka akcyjna. Komentarz do art. 300^{1}-300^{134} k.s.h.*. Warszawa: C.H. Beck.

Osajda, Konrad. 2020. "Zarząd spółki kapitałowej (nowelizacja Kodeksu spółek handlowych w związku z pandemią)." *Przegląd Prawa Handlowego* 6:18-29.

Ostrowski, Łukasz. 2020. "Nowa regulacja posiedzeń zarządów i rad nadzorczych odbywanych przy wykorzystaniu *środków* komunikacji elektronicznej." *Przegląd Prawa Handlowego* 5:32-38.

Pazdan, Maksymilian. 1969. "Niektóre konsekwencje teorii organów." *Zeszyty Naukowe Uniwersytetu* Śląskiego. *Prace Prawnicze* 1:203.

Schmidt, Karsten. 2002. *Gesselschaftsrecht*. Köln-Berlin-Bonn-München: Carl Heymanns (Verlag).

Sołtysiński, Stanisław, Andrzej Szajkowski, Andrzej Szumański, et al. 2001. *Kodeks spółek handlowych*. Vol. 1: *Komentarz do art. 1-150 k.s.h.*. Warszawa: C.H. Beck.

Szajkowski, Andrzej. 2005. "Status prawny zarządu spółki partnerskiej." In *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, edited by Aurelia Nowicka. Poznań: Wydawnictwo Uniwersytetu Adama Mickiewicza.

Szumański, Andrzej. 2020. "Nowa regulacja udziału w zgromadzeniu spółki kapitałowej przy wykorzystaniu środków komunikacji elektronicznej." *Przegląd Prawa Handlowego* 5:4-14.

Żaba, Mateusz. 2020. "Uczestnictwo i głosowanie na zgromadzeniu wspólników przy wykorzystaniu środków komunikacji na odległość." *Przegląd Ustawodawstwa Gospodarczego* 3:13-20.

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RESTRICTION OF LEGAL CAPACITY IN THE SLOVAK LAW AND RELATED COURT PRACTICE

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Abstract. In the first part of the article, the author makes an excursion into history and gives the reader information about the legal capacity of persons in Slovak legal history. This part includes information about feudal law, the first related codification of 1877, the Czechoslovak Civil Code of 1950, and the Czechoslovak Civil Code of 1964. Further on, the author presents the up-to-date effective regulation encompassed in the Slovak Civil Code and in the procedural act, i.e., the Act on Non-Contentious Civil Procedure. At the center of attention is the abolishment of deprivation of legal capacity, introduced in 2016. The author reasons that this abolition was a response to the case-law of the European Court of Human Rights and to the UN Convention on the Rights of Persons with Disabilities. Inevitable for this article, were the practice and experiences of The Office of the Commissioner for Persons with Disabilities. From the practical point of view, the most important is the last part of the article, where the author lists some examples of good and bad practices of the Slovak Courts concerning legal capacity. The author deems it necessary to pay attention to this important topic. The improvement of the legal position of adults with disabilities definitely contributes to legal certainty and the rule of law in modern societies. *Last but not least, it reflects the degree of social forwardness.*

Keywords: legal capacity; deprivation of legal capacity; restriction of legal capacity; restoration of full legal capacity; mental disorder

INTRODUCTION

According to J. Potrzeszcz, it is necessary to distinguish between legal security (the value worthy of protection) and legal certainty (the instrumental value). Legal certainty constitutes "one of the most important means of the implementation of legal security as the goal and sense of the existence of positive law." The author states that legal security is the state achieved by positive law, in which the goods of life and human interests are protected as closely as possible in an entire and effective way. She agrees with J. Wróblewski, who stated that: "Legal security means certainty considered from the point of view of the protection of rights of the individual" [Potrzeszcz 2016, 146].

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The changes in Slovak law in 2016, which led to the abolition of the deprivation of legal capacity definitely are in accordance with the principle of legal security. Also, I. Majstorović and I. Šimović agree that the improvement of the legal position of adults with disabilities contributes to legal certainty and the rule of law [Majstorović and Šimović 2018, 65].

n this article, I will emphasise that to deprive a person of legal capacity is no longer possible under Slovak law. Furthermore, I will present the related court practice with regard to the power of the judiciary, as some courts try to enhance the position of people with mental disorders they deal with more and some less.

Under the Slovak Civil Code (Act no. 40 of 1964 Coll.), the full capacity of an individual to acquire rights and assume duties through legal acts (i.e., to conclude a marriage, enter into a contract, etc.) shall arise at the moment of majority. The majority shall be acquired by achieving the age of eighteen years. Before this age, the majority can be acquired only by entering into a marriage. Mental sanity is a prerequisite to full legal capacity.

Deprivation (full restriction) of legal capacity has no longer been possible in Slovakia since 2016, which is a true milestone from a historical point of view.

From the 11th until the 20th century, the Slovaks lived in the multicultural Hungarian Kingdom. There, only a minority of the population had full legal capacity. The factors that influenced the extent of legal capacity were: sex, age, health, wastefulness, honor, religion, citizenship, occupation, social class, and marital status. It means that only a man older than 24 years old, physically and mentally healthy, economically aware, honorable,[1] of Catholic denomination, Hungarian citizenship, with a reputable occupation,[2] member of nobility or bourgeois, and preferably married enjoyed full legal capacity [Mosný and Laclavíková 2010, 48-54]. Lack of any of these attributes meant restricted legal capacity.

In the 19th century, Act no. XX of 1877 on Guardianship and Curatorship abolished the feudal limitations and only conserved limitations such as age, mental health, and sex [Idem 2014, 93-95]. Article 28 limited the legal capacity of people deranged, feebleminded, and deaf-mute unable to use sign language.[3] The Act did not use the terms limitation and deprivation of legal capacity. Under Article 8, the court could prolong the minority and keep the minor under the father's or guardian's power due to the lack of

[1] One could lose honor if he was an executioner, a criminal, an out-of-wedlock child, etc.

[2] Of a reputable occupation were clergymen, merchants, clerks.

[3] For example, in the effective Czech Civil Code, there is still a clause reminding us that problems in communication cannot lead to restriction of legal capacity (Act no. 89 of 2012 Coll., Article 57(2)).

physical or mental health, which led to the inability to take care of oneself, or due to wastefulness, or desolate life. Under Article 28 (letters a-c), the court could place people deranged, deaf-mute unable to use sign language, feeble-minded, or squanderers under curatorship. Under Article 33, a person under curatorship could not assume duties and disclaim rights without the curator's consent. However, the protected person could acquire rights or disclaim responsibility based on a voluntary act with no exchange for value.

After the establishment of Czechoslovakia in 1918, the law of Austro-Hungarian origin remained in effect. Hence, the changes in the regulation of legal capacity were scarce. Among some 20th century improvements, it is necessary to emphasize that the Constitution of 1920 stipulated gender equality;[4] in 1919, the age of majority got lowered to 21 years of age;[5] and the quality of healthcare and knowledge on mental health significantly improved. The Czechoslovak legal terminology recognized both deprivation and restriction of legal capacity as in the Czech countries the Imperial Act no. 207 of 1916 on Deprivation of Legal Capacity remained in effect. Under this Act, alcoholism and wastefulness could be reasons for restricting legal capacity. Insanity and feeblemindedness connected to a wasteful lifestyle could be reasons for depriving legal capacity. In Slovakia remained effective the Hungarian Act of 1877 that conserved the prolongation of minority and curatorship. That implies that the regulation of the legal capacity of persons in Czechoslovakia was of a dual character – different in Slovakia and different in the Czech countries.

After the Munich Agreement and following territorial demands, the First Czechoslovak Republic disintegrated. The first Slovak Republic was established in 1939. The Czech countries, i.e., the partially annexed territory of Nazi Germany, formed the so-called Protectorate of Bohemia and Moravia. The regulation of legal capacity was heavily impacted by the racial laws, revoked only in 1945.

The Czechoslovak Civil Code of 1950 (Act no. 141 of 1950 Coll.) abolished legal dualism, i.e., the same law applied in all of Czechoslovakia. According to Articles 13-16, it was possible to partially or fully restrict the legal capacity. A court could decide about restricting the legal capacity of a fullage individual who suffered from permanent mental illness or immoderately consumed alcoholic beverages, narcotics, or poisons and therefore was not capable of a decent life. Depriving the minor older than six years of age of legal capacity was possible due to permanent mental illness and incapacity to lead an independent life. The terminology used in the Civil Code was of Latin origin, based upon the term *sui iuris,* which literally means "of

[4] However, many legal regulations in Slovakia still had feudal traits.

[5] It was changed to 18 years of age in 1949.

one's own right." It proves that the Civil Code of 1950 was a "middle-way code" [Laclavíková and Švecová 2019, 115]. The mid-20th-century experts defined mental illness as "various mental states that caused suffering to the patient, the relatives, or all of them. They could be of different types and grades" [Knobloch and Knoblochová 1957, 13-14]. The most common mental illnesses that led to the deprivation of legal capacity were schizophrenia, progressive paralysis, feeblemindedness, psychopathy, and alcoholism [ibid., 30]. There was no wastefulness among the reasons listed in the Civil Code of 1950. The lawmakers reasoned that in the bourgeois society, such a reason existed only to protect the property of an individual and relatives. They said that only a negligible number of squanderers lived in the new, advanced society approaching communism.[6]

The Socialist Civil Code (Act no. 40 of 1964 Coll., Article 10)[7] did not use the *sui iuris* terminology as the Explanatory Report artificially denoted it as disrespectful to shift from "bourgeois" law. According to the new code, the Court could restrict the legal capacity of a citizen who suffered from permanent mental illness or immoderately consumed alcoholic beverages, narcotics, or poisons and therefore was able to do only certain legal acts. The Court could deprive the citizen of legal capacity due to permanent mental illness who, therefore, was unable of any legal acts. Compared to the Civil Code of 1950, the lawmakers used the term "citizen" instead of "the minor older than six years" (deprivation) and "a full age individual" (restriction). According to the new regulation, in each case, the extent of restriction of legal capacity had to be clearly specified. This rule retroactively applied to cases decided between 1950 and 1964, too. The main aim was to end up with mechanical and inappropriate parable to the legal capacity of 15 years old persons as it had been under the previous legal regulation from 1950. According to the jurisprudence, there was no general rule about the immoderateness of consumption of addictive substances. In each case, it was necessary to assess the after-effects of the consumption. Immoderateness was linked to disability to perform legal acts. Furthermore, this disability had to be of some duration [Luby and Knapp 1974, 233]. This explanation substituted the formerly used legal term habitudinal immoderate consumption of addictive substances.

The actual and effective version of the Slovak Civil Code (Act no. 40 of 1964 Coll.) regulates the interference in a legal capacity in Article 10: "(1) If

[6] The Explanatory Report is available at: https://www.psp.cz/eknih/1948ns/tisky/t0509_10.htm [accessed: 16.03.2022].

[7] According to the Explanatory Report: "The Civil Code of 1950 got outdated. It regulated dead social relations, nonexistent in the 1960s society. It was inapplicable in the socialist society, and hence, hindered its development."

an individual is completely unable to perform legal acts due to a permanent mental illness, the court shall deprive him or her of the capacity to legal acts. (2) If an individual is able to perform only certain legal acts due to a permanent mental illness or to immoderate consumption of alcoholic beverages, narcotics, or poisons, the court shall restrict his or her capacity to legal acts and shall specify the extent of such restriction in the decision. (3) The court shall change or cancel the deprivation or restriction of the capacity to legal acts if reasons leading thereto changed or fell out."

If we compare Article 10 to its 1964 version, we see a terminological change. The term natural person (individual) replaced the term citizen [Laclavíková and Švecová 2019, 132].

However, the Civil Code did not comply with the recodification of civil procedural law from 2016. Article 231 of Act no. 161 of 2015 Coll. on Non-Contentious Civil Procedure cites that the court can restrict the legal capacity, alternate or cancel the restriction. "After the Act on Non-Contentious Civil Procedure came into effect, it has no longer been possible to deprive an individual of legal capacity, despite the unamended version of Article 10 of the Civil Code."[8]

In this sense, the recodification of civil procedural law means a historical milestone and progress in protecting human integrity and dignity as it has abolished deprivation of legal capacity *pro-futuro.* The negative thing is that persons deprived of their legal capacity before 2016 experienced no change, i.e., the courts did not open their cases. We speak about 16 816 persons, which might be why Article 10 of the Civil Code remained unamended.[9] Naturally, persons with deprived legal capacity, their close persons, persons with a legal interest in the case, healthcare providers, and social care providers can ask the court for a change through their legal action.

The reason why the lawmakers decided to abolish deprivation of legal capacity was that it violated human rights. They reflected on the rulings of the European Court of Human Rights and the UN Convention on the Rights of Persons with Disabilities.

In March 2008, the European Court of Human Rights made a decision in the case of *Shtukaturov v. Russia*.[10] The applicant has suffered from a mental disorder since 2002. In 2003 he obtained the status of a disabled person. In 2004 the applicant's mother lodged an application, seeking to deprive

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[8] The Košice Regional Court ruling, file no.: 8CoP/15/2019.

[9] The survey of the Office of the Commissioner for Persons with Disabilities [Dobrovodský 2018b].

[10] European Court of Human Rights: Persons with disabilities and the European Convention on Human Rights. 12.09.2018. https://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf [accessed: 30.03.2022].

the applicant of legal capacity. She was appointed the applicant's guardian and requested his admission to the hospital in 2005. The applicant claimed that he had been confined to the hospital against his will and deprived of legal capacity without his knowledge. The applicant requested the hospital administration to allow him to see his lawyer in private, but the Director refused. The Court unanimously held that there was a violation of Article 8 of the European Convention on Human Rights (right to respect for private and family life) on account of the applicant's full incapacitation. The Court referred to the principles formulated by Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe; Principle 3: "The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in the complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, to make a will, to consent or to refuse to consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so."[11]

In February 2012, the European Court of Human Rights made a decision in the case of *X and Y v. Croatia*: "Divesting someone of legal capacity entails serious consequences. The person concerned is not able to take any legal action and is, thus, deprived of his or her independence in all legal spheres. Such persons depend on others to make decisions concerning various aspects of their private life. These include, for example, where to live or how to dispose of their assets and all income. Numerous rights of such persons are extinguished or restricted. For example, such person is not able to make a will, cannot be employed, and cannot marry or form any other relationship creating consequences for their legal status, etc."[12]

The European Court of Human Rights made a related decision concerning a Slovak citizen in 2009. It was the case of *Berková v. Slovakia*. The applicant complained that the proceedings concerning the motion for restoration of full legal capacity to her were unfair. The court failed to hear her in person and decided that she was not allowed to make a fresh request for

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[11] Council of Europe Committee of Ministers: Recommendation No. R (99) 4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults. 1999. https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf [accessed: 30.03.2022].

[12] European Court of Human Rights: *Case of X and Y v. Croatia.* [online]. Strasbourg: ECHR, 2012. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-107303%22]} [accessed: 30.03.2022].

full legal capacity to be restored to her for three years from the date of the judgment. The Court unanimously held that this lengthy period constituted a violation of Article 8 of the Convention.[13]

The UN Convention on the Rights of Persons with Disabilities does not expressly forbid or condemn deprivation of legal capacity. However, Article 12 requires equal recognition before the law. Paragraph 4: "States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will, and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent, and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."[14]

The Czech Constitutional Court criticised depriving the person of legal capacity: "Deprivation of legal capacity is problematic from the constitutional point of view. It is a relic of the old regime. It is not allowed under Austrian or German law, and the French Code Civil does not recognise it either."[15]

Before the recodification of the Slovak civil procedural law in 2016, the Slovak Constitutional Court recommended seeking inspiration in Article 55 of the Czech Civil Code, which only recognizes restriction of legal capacity. Furthermore, the Court commented upon the frequent error of the courts, i.e., the mechanical admissibility of expert evidence in a judicial review without further scrutiny.[16]

Neither the Slovak public had high confidentiality in deprivation of legal capacity. One can see it in media, which shortly after the recodification of the Slovak civil procedural law published articles with headlines such as "It will not be possible to abuse mental illness anymore" [Pagáč 2015, 16].

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[13] European Court of Human Rights: *Case of Berková v. Slovakia* [online]. Strasbourg: ECHR, 2009. https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22berkova%22],%22itemid%22:[%22001-91802%22]} [accessed: 30.03.2022].

[14] The Convention on the Rights of Persons with Disabilities [online]. https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext [accessed: 30.03.2022].

[15] Constitutional Court of the Czech Republic: I.ÚS 557/09 from 18 August 2009. [online]. Par. 23. http://kraken.slv.cz/I.US557/09 [accessed: 01.04.2022].

[16] Constitutional Court of the Slovak Republic: I. ÚS 313/2012-52 from 28. November 2012. [online]. Par. 35-36. http://www.zpmpvsr.sk/dokumenty/I_US_313_2012.pdf [accessed: 01.04.2022].

If we speak about the power of the judiciary in this context, the extent to which different judges respect the individual's rights in cases of capacity limitation varies. The Office of the Commissioner for Persons with Disabilities (hereinafter: "The Office") calls attention to both the examples of good practice and bad practice.

The Office was established together with The Office of the Children's Commissioner under Act no. 176 of 2015 Coll. It came into effect on 1 September 2015 following Article 33(2) of The Convention on the Rights of Persons with Disabilities (National Implementation and Monitoring).[17] The Office became operational on 1 March 2016. It is based in Bratislava, and its head is Zuzana Stavrovská, Doctor of Law.

Under Article 8, The Office is an independent body that works separately from other bodies competent to protect human rights according to law. Anybody can apply to The Office if the rights of persons with disabilities have been breached or endangered. Individuals with limited legal capacity or individuals deprived of legal capacity are entitled to address The Office directly or indirectly without previous approval or notice of their legal representative.

The Act regulates the competence of The Office in Articles 9-11. According to the Report on the Activities of the Commissioner for Persons with Disabilities for 2020: "The central issue in the assessment of complaints in civil relations remains the handling of complaints concerning interference with legal capacity."

Below, we provide some examples of bad practices, as pointed out by The Office.

"At the daughter's request, the Poprad District Court limited the legal capacity of her mother. However, the court did it to the extent that she was, de facto, deprived of her legal capacity. She filed a motion to restore legal capacity, but the court did not hear her and rejected the motion. The Office, therefore, requested to intervene in the appeal proceedings."[18] The Office notes that: "Some courts continue to rule on legal capacity following their

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[17] "States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights." The full text of the Convention is available at https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf [accessed: 05.04.2022].

[18] File number: KZP/0425/2021/03R. In the Office of the Commissioner for Persons with Disabilities: Agenda – Court Procedures. https://www.komisarprezdravotnepostihnutych.sk/Agenda/Sudne-konania [accessed: 05.04.2022].

standard procedures, although the Act on Non-Contentious Civil Procedure has been in force more than five years. E.g., the decision-making practice of the courts in restricting legal capacity is still disproportionately extensive. Often, the legal capacity is fully limited, except for disposing of some 25 euros per week, which the Commissioner considers to be in absolute violation of Article 12 of the Convention on the Rights of Persons with Disabilities and Article 231 of the Act on Non-Contentious Civil Procedure. In addition, judgments limit even acts of non-legal character, such as the right to decide who may visit a person of limited legal capacity or where that person will live. The court does not hear the person, does not inquire about the current state of health, does not send a deputy to meet the person in the facility where the person lives. And this process is not triggered by the COVID-19 pandemic."[19] Such procedure is contrary to Article 243 of the Act on Non-Contentious Civil Procedure (necessity to hear the person and see the person during the proceedings).

nother negative trait of the court practice is the persistence of "uncritical acceptance of expert opinions." The 2020 Report witnesses that "the experts often consider the medical records only and talk to the disabled person only for a few minutes. Furthermore, the experts tend to assess the health state of the disabled person in the presence of the person seeking the limitation of legal capacity."

Similarly, it is perceived negatively "if the guardian is entrusted with such a power as if the person was of deprived legal capacity." Furthermore, "not all courts require guardians to report about how the protected persons are doing and under what conditions they live."

The Office notes that the courts are accustomed to "appointing a family member who has filed a motion as a procedural guardian." It is, of course, not appropriate. The Office considered it equally inappropriate if a social services facility became a guardian. Due to the conflict of interests, this is no longer possible thanks to the fresh amendment to Act no. 448/2008 Coll. on Social Services. According to Article 8(12): "The social service provider or an employee of the social service provider cannot become the guardian of the social service recipient in the facility where it provides the social service to the social service recipient. The restriction under the first sentence shall not apply if the statutory body or the employee of the social service provider is a close person of the recipient of the social service."

According to The Office, historical paternalism persists. This paternalist approach means "a cautious, protective decision-making by the courts

[19] The Report on the Activities of the Commissioner for Persons with Disabilities for 2020 is available at https://www.komisarprezdravotnepostihnutych.sk/getmedia/a3779384-2843-4455-8332-2117097d07c2/Sprava-o-cinnosti-za-rok-2020.aspx [accessed: 05.04.2022].

concerning a person who has applied for restitution of the legal capacity and in whom the courts have no confidence."

There are also problems with the entry of The Office into the legal proceedings; "The Košice II District Court announced that it would not take into account the petition of The Office. The Court said that to take the petition into account, The Office had to submit the consent of the person whose rights were to be protected. At the same time, the Court noted that the person in question could not consent due to the mental state and that the procedural guardian protected the rights and interests of the person sufficiently." Such reasoning contradicts the Paris Principles (The UN General Assembly resolution 48/134 from 20 December 1993 on Principles Relating to the Status of National Institutions) and the UN Convention on the Rights of Persons with Disabilities. The Office emphasizes that its entry into the legal proceedings should happen based on written notification, not only after the delivery of the court order.

Some examples of good practices are:

The decision of the Regional Court of Košice from 25 May 2020, no.7Co /15/2020: The Regional Court upheld the decision of the Košice II District Court, which rejected the petitioner's motion for an urgent measure ordering limitation of the legal capacity of his son. "The restriction of legal capacity is a dangerous interference with the personal and property autonomy of the individual concerned, with personal freedom and thus a significant interference with fundamental human rights. These constitutional rights include the capacity to rights (Article 14 of the Constitution of the Slovak Republic), the right to integrity and privacy (Article 16, Paragraph 1 of the Constitution of the Slovak Republic), and the right to be free from unjustified interference in private and family life (Article 19, Paragraph 2 of the Constitution of the Slovak Republic). These rights correspond to Article 8 of the European Convention on Human Rights (the right to private and family life) and Article 12 of the Convention on the Rights of Persons with Disabilities (the equality before the law). The petitioner expressed concern about his son´s refusal of treatment and hospitalization. However, the Court of Appeal stated that the Court of the First Instance correctly referred to the possibility to admit a person into a healthcare facility under Articles 252-271 of the Act on Non-Contentious Civil Procedure, which make the concern irrelevant. It is possible to restrict legal capacity only after exhausting all the less repressive measures or impossibility to apply other measures." The courts appropriately protected "the weaker party" in this case.

The decision of the Regional Court of Nitra from 30 October 2020, no. 5CoP / 34/2020: The Court of First Instance received a motion from the Center for Legal Aid to limit the legal capacity of F.D., who was repeatedly and abusively seeking free legal aid at the Center. "F.D. persistently burdened

the employees in the Center, advocates, courts, and other institutions with numerous motions. On a long-term basis, he kept addressing them with long, unreasonable, hand-written documents with defamatory expressions. The Center asked to limit the legal capacity of F. D., so he would no longer be able to file motions, claims, complaints, and other submissions to courts, state bodies, public administration bodies, and self-government bodies." The Court of First Instance terminated the legal proceedings. The Court of Appeal emphasized that when deciding on a limitation of legal capacity, the court must be careful not to restrict it to a greater extent than is strictly necessary. The court stated that the restriction of legal capacity is a protective measure for those who do not have the opportunity to control their actions or assess the consequences. Such a measure should protect and not harm or endanger the citizen's interests. Although the precondition for limited legal capacity is a permanent mental disorder, the mental disorder itself does not automatically constitute a reason for the limitation of legal capacity, nor a reason to maintain the limited legal capacity in the legal capacity restoration proceedings. It is necessary to examine whether this disease affects the social life, family life, health, and property interests of the person suffering from mental disease. The Court of Appeal stated that restricting the right of access to bodies and courts only because of an abusive approach should always be considered illegal and contrary to the principles of democracy and the rule of law. The Court of Appeal thus upheld the decision of the Court of First Instance.

The decision of the Regional Court of Nitra from 6 June 2019, no. 9CoP / 53/2018: "A ground for limiting legal capacity is objectively valid if it precludes performing specific legal acts. The reason alone is not sufficient to limit the legal capacity of a person. The precondition is to prove that the reason excludes the ability of a person to perform specific legal acts. It is impossible to answer this question solely according to an expert opinion without further evidence and proper evaluation in a mutual context. The court, therefore, can not only rely on the expert opinions (including the related interrogation of the expert, necessary under Article 244 of the Act on Non-Contentious Civil Procedure) but must evaluate them in connection with other pieces of evidence. Primarily, the court must interrogate the person suffering from mental illness and consider their social and legal interactions, family- and property circumstances. Individual approach is inevitable. Only a comprehensive assessment makes it possible to conclude whether the conditions for limiting the legal capacity are sufficient."

The decision of the Constitutional Court of the Slovak Republic from 22 March 2018, no. IV. ÚS 220 / 2018-10: The District Court of Ružomberok rejected to deprive or limit the legal capacity in the case where it reasoned that "the dependence on virtual internet social relations is only a mental

disorder of long-term, but not permanent character, and, therefore, can not be a ground for limitation of legal capacity." The Regional Court upheld the decision of the Court of the First Instance: "The mere reason that the behavior is bizarre, improper, immoral, or criminal does not justify the Court to interfere with one of the most fundamental rights of individuals, i.e., their legal capacity. This right enjoys protection under The Charter of Fundamental Rights of the European Union."

The Supreme Court upheld the decision of the Court of Appeal.

The Constitutional Court adjudicated that: "There was no proof of even the minimum legal requirement, i.e., permanent mental illness. On 15 January 2015, the District Court ruled that the person did not suffer from mental illness but suffered from immaterial addiction to virtual social relations and mixed disturbance of emotions and conduct. In the opinion of the Constitutional Court, the conclusion of the general courts to reject the complainant's motion to limit or deprive the person concerned of legal capacity was constitutionally acceptable and sustainable."

Of course, these are just a few examples from which it is clear that the situation is much better than in the recent past, despite the persistent negatives mentioned above. Believing in an ongoing sensitive approach of the courts to legal capacity issues, we conclude with a "happy ending story" from the Report on the Activities of the Commissioner for Persons with Disabilities for 2020. "During one of the monitoring visits to social services facilities, a client from the visited facility requested a discussion with an employee of The Office. He stated that he was deprived of legal capacity for many years. He confessed that such a decision was meaningful as he suffered from alcoholism and had debts. During the discussion, he showed interest in leaving the facility and living an independent life. Since 2018, The Office has been helping the client with debt relief in the form of personal bankruptcy and restoration of legal capacity. In 2020, the district court issued a judgment restoring the client's legal capacity. At the same time, the Court appointed a social services facility as a guardian for supervising purposes related to health care. The client applied for his dream job as a chief shepherd. He got the job and accommodation and, as he said, he found a new meaning in his life."

To appoint a guardian under Article 29 of the Civil Code is undoubtedly a better option than limiting legal capacity if it is sufficient to protect a person with a mental disorder. The regulation of adult guardianship will be regulated in a more detailed and progressive manner in the new version of the Civil Code. As the General State Advisor in Civil Law and Commercial Law matters at the Ministry of Justice, R. Dobrovodský, Doctor of Law says: "It is necessary to provide a legal possibility for adults under guardianship to express their will in a declaration addressed to the court. Such a declaration

would contain information on a preferred guardian (an individual or a legal person – e.g., an association that protects the rights of persons with disabilities), the wished scope of the guardian's powers, and the desired place where the adult under guardianship wishes to live, etc. Unless contrary to the best interests of these adults (e.g., an inevitable hospitalization of a person in a medical facility), the declarations would be binding."[20]

CONCLUSIONS

To conclude, mental disorders are the major overlooked challenge to global population health. According to statistics from the Slovak National Center for Health Information, more than 61,000 patients were diagnosed with mental disorders for the first time in psychiatric clinics in 2020. In the same year, 364 464 people with a diagnosed mental disorder underwent an examination in psychiatric clinics. In 2020, 36 862 were hospitalized in psychiatric wards of medical facilities due to mental disorders.[21] For a more comprehensive picture, as of June 30, 2020, according to the Statistical Office of the Slovak Republic, the population of the Slovak Republic was 5 460 136 inhabitants. To demonstrate the pre-pandemic period, I provide data from 2014 and 2015, when the number of new patients with a diagnosed mental disorder increased by 136.7 per 10 000 people, representing more than 74 000 patients [Dobrovodský 2018b]. The national statistics from 2012 to 2018 evidence the rising number of restrictions of legal capacity, too [Dobrovodský and Hamran 2021]. The current issues and lifestyle have affected daily life in unprecedented ways, including global mental health. Hence, it is more than desirable to pay sufficient attention to this issue and to reflect on it with the idea that it affects each of us more than our hasty consciousnesses allow us to think.

REFERENCES

Dobrovodský, Róbert. 2018a. "Limity slovenskej právnej úpravy v ochrane dospelých." *Sociálna prevencia: riziká a ohrozenia internetu a iné nežiaduce sociálne a sociálnopatologické javy* 13, no. 1:17-19.

Dobrovodský, Róbert. 2018b. *Vecný zámer reformy opatrovníctva dospelých a ochrany seniorov v Slovenskej republike*. https://uzcpp.sk/wp-content/uploads/2016/03/Reforma-opatrovnictva.pdf [accessed: 10.04.2022].

[20] See also: Dobrovodský 2021a, 4-11; Idem 2021b, 1452-455; Idem 2019, 28-30; Idem 2018a, 17-19.

[21] See https://www.nczisk.sk/Aktuality/Pages/Psychiatricka-starostlivost-v-Slovenskej-republike-v-roku-2020.aspx [accessed: 10.04.2022].

Dobrovodský, Róbert. 2019. "Ochrana seniorov pred novodobými formami podvodov: občianskoprávne aspekty." *Sociálna prevencia: vybrané riziká a ohrozenia súčasnej spoločnosti* 14, no. 2:28-30.

Dobrovodský, Róbert. 2021a. "Opatrovníctvo dospelých ako súčasná výzva slovenského zákonodarcu". *Ars notaria: Notary Journal* 24, no. 3:4-11.

Dobrovodský, Róbert. 2021b. "Zu aktuellen Entwicklungen im slowakischen Familienrecht in den Jahren 2020-2021." *FamRZ – Zeitschrift für das gesamte Familienrecht* 68, no. 18:1452-455.

Dobrovodský, Róbert, and Matej Hamran. 2021. *Opatrovníctvo dospelých v podmienkach samosprávy – aktuálne legislatívne zmeny*. https://npmodmus.zmos.sk/download_file_f.php?id=1565136 [accessed: 10.04.2022].

Knobloch, Ferdinand, and Jiřina Knoblochová. 1957. *Soudní psychiatrie pro právníky* a *lékaře*. Prague: Orbis.

Laclavíková, Miriam, and Adriana Švecová. 2019. *Praktikum* k *dejinám* štátu a *práva na Slovensku. III. zväzok (1948-1989)*. Trnava: Typi Universitatis Tyrnaviensis.

Luby, Štefan, and Viktor Knapp. 1974. Československé *občanské právo vysokoškolská učebnice*. Prague: Orbis.

Majstorović, Irena, and Ivan Šimović. 2018. "The Scope of the Deprivation of Legal Capacity as a Precondition for the Protection of Rights and Dignity of Persons with Disabilities." *Ljetopis socijalnog rada* 25, no. 1:65-86. https://hrcak.srce.hr/file/300268 [accessed: 14.03.2022].

Mosný, Peter, and Miriam Laclavíková. 2010. *Dejiny štátu a práva na území Slovenska I. od najstarších čias do roku 1848*. Šamorín: Heuréka.

Mosný, Peter, and Miriam Laclavíková. 2014. *Dejiny štátu a práva na území Slovenska II. (1848-1948)*. Kraków: Towarzystwo Słowaków w Polsce.

Pagáč, Ľ. 2015. "Právny seriál: Duševná choroba sa už nebude dať zneužiť." *Hospodárske noviny* 09.07.2015:16.

Potrzeszcz, Jadwiga. 2016. "Legal Security – Synthetic Presentation." *Teka Komisji Prawniczej PAN Oddział w Lublinie*, 140-52.

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INSTRUMENTS INDUCING THE COOPERATION OF MEMBERS OF ORGANISED CRIMINAL GROUPS WITH LAW ENFORCEMENT AUTHORITIES IN POLISH CRIMINAL LAW – ARTICLE 60(3) AND ARTICLE 259 OF THE POLISH CRIMINAL CODE

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Abstract. The article is devoted to the analysis of instruments used to induce cooperation of members of organised criminal groups with law enforcement authorities. The most important regulations relating to this problem in terms of substantive criminal law are Article 60(3) and Article 259 of the Criminal Code. The article presents selected problems of interpretation of both provisions, the problem of their possible concurrence and also indicates the reasons why particularly Article 259 of the CC, despite the fact that it provides for complete impunity of the perpetrator, is not very often used in practice. This is because the benefits offered by it do not cover, which is fully justified, individual offences committed by an offender who is a member of a criminal group. Attention was also drawn to other criminal law and procedural institutions with similar functions, including in particular the institution of a crown witness.

Key words: organised crime; organised criminal group; crown witness; small crown witness

INTRODUCTION

For many years now, organised crime has been perceived as one of the greatest threats to public security. Undoubtedly, instruments of substantive criminal law play a huge role in combating this type of crime. In Poland, organised crime became a significant problem after the social and economic transformations connected with the change of the state system at the turn of 1980s and 1990s. In the earlier period, the most characteristic manifestations of organised criminal activity had been actions undertaken to the detriment of state-owned work establishments, causing the depletion of the assets of these establishments and de facto transferring part of their production to the black market [Jasiński 1997, 41-60; Majchrzak 1965, 1-192; Pływaczewski 1997, 107-108]. The emergence of organised criminal gangs in the 1990s, often characterised by very brutal methods of operation at the time, made the legislator aware of the need to create special mechanisms to

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combat this criminal phenomenon, which would expand the existing system of reaction to organised criminal activity. Since the Criminal Code of 1932, Polish criminal law has traditionally provided for the punishment of participating in, founding and directing a criminal association. The emergence of new forms of criminality, including violent criminal gangs, resulted in the introduction of a new form of criminal association into the criminal law system, which was called an organised criminal group. This was done with the amendment of 1995[1] when the Criminal Code of 1969 was still in force. The distinction of this new form was due to the fact that criminal association was traditionally perceived as a structure with a high level of organisation and, therefore, the introduction of a criminal offence of taking part in an organised criminal group was to allow a proper response to participation in structures with a lower level of organisation.

Since its entry into force, the 1997 Criminal Code[2] has consistently indicated the fact of committing an offence by an offender acting in an organised group or association whose aim is to commit an offence as a basis for the application to him/her of the severe rules for the application of punishment and application of probation measures provided for repeat offenders (Article 65(2) CC in connection with Article 64(2) CC). From the very beginning, the Code also provided for specific solutions which made it possible to avoid responsibility or to mitigate it in the case of an offender who undertook certain forms of cooperation with law enforcement authorities. The first of these solutions, already known to Polish criminal law,[3] was the non-punishment clause contained in Article 259 CC. The second – an extraordinary mitigation of punishment in relation to the so-called "small crown witness" described in Article 60(3) CC.

1. EXCLUSION OF PUNISHMENT UNDER ARTICLE 259 CC

Article 258 CC penalises the participation in, foundation and directing of various types of criminal structures, including those of an armed nature and of a terrorist nature. However, in accordance with Article 259, a person who voluntarily abandoned participation in an organised group or association and disclosed to an authority appointed to prosecute offences all the essential circumstances of the committed act or prevented the commission of

[1] Act of 12 July 1995 on the amendment of the Criminl Code, the Criminal Execution Code and on the increase of the minimum and maximum value of fines and exemplary damages in criminal law, Journal of Laws No. 17, item 68.

[2] Hereinafter: CC.

[3] The equivalent of Article 259 in the 1969 Criminal Code was Article 277, which was slightly different, though.

an intended offence, including a fiscal offence, shall not be subject to punishment for the offence specified in Article 258 of the Criminal Code.

Despite the seemingly attractive solution provided for in the provision under analysis, according to which a perpetrator who fulfills the conditions set out in the provision is not subject to punishment[4] for a crime under Article 258, Article 259 CC is extremely rarely used in practice, which seems to be evidenced by the practical lack of judicial decisions concerning its interpretation. The reason for this is the manner in which the requirements for the application of Article 259 CC are defined. The perpetrator must, firstly, voluntarily renounce participation in the group or association, and secondly, either disclose to an authority appointed to prosecute offences all material circumstances of the committed act or prevent the commission of an intended offence, including a fiscal offence. The condition of voluntary renunciation does not raise major doubts – it is generally accepted in the literature that abandonment of participation in a criminal structure must be an expression of a sovereign decision of the offender to permanently withdraw from the activity of the group or association, while the motivation of the offender is irrelevant. It is also important that the perpetrator manifests his or her will to permanently abandon activity in the group or association outwardly: the will of the perpetrator to give up participation in a criminal group may be evidenced, for example, by a direct announcement to other members of the group or association that the perpetrator is ending his criminal activity. The same will be demonstrated by breaking off contact with members of such structures, undertaking some activity against them, or a definite refusal to carry out orders from the head of the group or association [Wojciechowski 1997, 256; Michalska-Warias 2006, 315].

What raises greater doubts is the requirement of disclosing all material circumstances of the committed act. The wording of the provision seems to indicate unequivocally that the disclosure should relate to the circumstances of committing an act under Article 258 CC, as this is the offence to which impunity is to apply. However, the problem lies in the fact that the literature and the judicature quite unanimously recognise the commission of offences which are the objective of a group or association as an obvious manifestation of membership in such structures [thus: e.g. Ćwiąkalski 2017, 535; Wiak 2021, 1434; Michalska-Warias 2017, 385; Flemming and Kutzmann 1999, 79-80; Gadecki 2008, 69; Góral 1998, 442; Górniok 1999, 311; Kalitowski 2016, 1447-449; Skała 2004, 65; Wojciechowski 1997, 445].[5]

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[4] Not being subject to punishment constitutes a negative procedural prerequisite, the occurrence of which results in not instigating criminal proceedings or discontinuing initiated ones (Article 17(1)(4) of the Code of Criminal Procedure). Therefore, there is no conviction of the perpetrator and no determination of his/her guilt.

[5] As examples of rulings recognising the commission of offences that are the aim of a group

However, there is a dispute in the doctrine as to whether the perpetrator has an obligation to disclose offences committed by him as a member of a group, but even accepting the view that such an obligation does not arise from, and should not be derived from, Article 259 CC [thus: e.g. Michalska-Warias 2006, 316] does not change the fact that in practice it is difficult to disclose information only about membership of organised criminal structures, without mentioning the offences committed within them. Meanwhile, the impunity provided for in Article 259 of the Criminal Code certainly does not apply at all to individual crimes committed by an offender as part of his or her membership of a group or association. As a result, the solution offered by Article 259 CC is not often used in practice. This regulation may be most attractive for a perpetrator who only took part in an organised criminal group or association, but for some reason did not personally commit offences which were the aim of the group or association, and such cases must be extremely rare.

It is worth noting that the benefit of Article 259 CC may be availed of by each of the perpetrators of offences specified in Article 258 CC, including the leader of the group, as well as its founder (provided that he or she is subsequently a member of the group). However, the probability of applying the clause of not being subject to punishment to the leader of the group seems very low, because such a perpetrator, when disclosing what the leadership consisted of, would at the same time have to disclose other offences committed by him, often punishable by much more severe punishments. For the same reason, members of the group who have committed serious crimes

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as a manifestation of belonging to the group, the judgment of the Court of Appel in Cracow of 13 Novemver 2015 may be indicated, in the justification of which this court stated: "The causative act of the offence under Article 258(1) of the Criminal Code consists in «taking part» in an organised group or association. The meaning of «taking part» consists in belonging to a group or association, accepting the rules which govern it and carrying out orders and tasks specified by persons who are respectively higher in the hierarchy of the group or association. It may consist of joint criminal actions, their planning, holding meetings, agreeing on the structure, finding hiding places, using aliases, acquiring supplies necessary for the group or association to achieve its goals, as well as taking actions aimed at preventing the detection of perpetrators or sharing the spoils of crime" (ref. no. II AKa 105/15, Lex no. 2052687) or the judgment of the Court of Appeal in Katowice of 24 November 2005, according to which: "Taking part in an organised criminal group also means taking part in committing crimes for which the group was established. Such an interpretation cannot be regarded as a broadening interpretation. It is obvious that if there is a group with defined criminal goals, led by one person or even a group of persons, with a certain, at least basic level of organisation, conducting systematic criminal activity with the use of the same opportunities and persons, then participation in particular crimes of this group, which constitute the aim of its activity, constitutes informal, through acceptance of these goals, joining of the group and participation in its activity" (ref. no. II AKa 343/05, "Krakowskie Zeszyty Sądowe" 2007, No. 7-8, item 86).

cannot perceive the solution under Article 259 CC as bringing them real benefits.

2. THE INSTITUTION OF THE "SMALL CROWN WITNESS" UNDER ARTICLE 60(3) CC

When creating the new Criminal Code in 1997, the legislator was aware of the fact that the solutions of Article 259 of the Criminal Code will not, in practice, play an important role in persuading offenders to abandon their previous activities within organized criminal structures. Probably for this reason, a complex of solutions referred to as a "small crown witness" was then introduced into the system of Polish criminal law. These are the regulations of articles 60(3) and (4) of the Criminal Code, whereas special attention should be paid to the first of these provisions, i.e. article 60(3) CC, because – as follows directly from the justification of the Criminal Code – it was created as a tool for breaking criminal solidarity in organised criminal structures.[6]

Pursuant to Article 60(3) CC, the court applies an extraordinary mitigation of punishment and may even conditionally suspend its execution with regard to an offender who cooperates with other persons in the commission of an offence, if he/she discloses to an authority responsible for prosecuting offences information on the persons participating in the offence and essential circumstances of its commission.

From the very beginning, this new solution in the Polish criminal law system appeared to be an attractive option for offenders willing to take advantage of the offer made to them by the legislator. The practical significance

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[6] In the justification it was indicated that it would be insufficient to merely reproduce the regulation of the previously binding Article 57(2) of the 1969 Criminal Code providing for optional extraordinary mitigation of punishment, *inter alia*, with regard to a perpetrator of an offence committed in cooperation with other persons, if his/her role was subordinate and the unlawful benefit gained by him/her was insignificant. The explanatory memorandum of the 1997 Criminal Code emphasises, referring to Article 60(3) of the Criminal Code, on the one hand, that "the fight against organised crime nowadays requires recourse to penal measures adequate to the threat," while on the other hand it is indicated, referring to the former Article 57(2) of the 1969 Criminal Code, that "the new Code, taking into account the ineffectiveness of such a regulation and very rare use of the possibility of an extraordinary mitigation of punishment, as well as with a view to breaking up the solidarity of a criminal group, provides for an obligatory extraordinary mitigation of punishment without previous limitations for that perpetrator acting in agreement with other persons, who discloses to an authority appointed for the prosecution of offences information concerning persons participating in the commission of an offence and essential circumstances of its commission", see *Uzasadnienie rządowego projektu Kodeks karnego*, in: *Nowe kodeksy karne – z 1997 roku z uzasadnieniami*, Wydawnictwo Prawnicze, Warszawa 1997, p. 155-56.

of the solution provided for in Article 60(3) CC is confirmed by a large number of court decisions, both of the Supreme Court and common courts, referring to the interpretation of this provision. The usefulness of the analysed solution as an instrument encouraging an offender to start cooperating with law enforcement authorities is undoubtedly connected with the obligatory extraordinary mitigation of punishment resulting from fulfilling the requirements set out in Article 60(3) CC.

Such a construction appeared for the first time in the general part of the 1997 Code, although it is worth remembering that it is also present in several provisions in the special part of the Criminal Code.[7] Mandatory extraordinary mitigation of punishment means that a perpetrator who meets the formal conditions on which the application of this institution depends must have his punishment inflicted with extraordinary mitigation, and the court is obliged to impose such a punishment, regardless of whether in a given state of facts it assesses the perpetrator as deserving such treatment. Thus, the court's discretion is de facto limited in such cases to how much mitigation will be applied in the case of punishment which has anyway to be below the minimum statutory punishment.

Such an approach means that instrumental use of this provision by perpetrators of offences cannot be ruled out. This is related to the fact that Article 60(3) CC does not indicate any exceptions, and thus, absolutely every offender who meets the requirements of this provision must have his/her sentence mitigated. The benefit of this solution may be enjoyed by any perpetrator, who committed an offence in cooperation with other persons. Cooperation is understood broadly, not only as co-perpetration, but also as any other phenomenal forms of committing an offence, including – of course – incitement and aiding and abetting. The above, in turn, means that e.g. a directing perpetrator, who directed the execution of the act by a direct executor and an aider, will have to have the punishment mitigated. Moreover, there are no grounds for not applying Article 60(3) CC to a perpetrator who was assisted in the commission of a prohibited act by two aiders, if he/she discloses the information required by this provision. This problem has already been noticed in criminal law literature [Buchała 1998, 445; Kulesza 1999, 490; Michalska-Warias 2006, 221-22; Konarska-Wrzosek 2000, 42-43].

It is also worth noting at this point that, guided by the desire to combat organised crime, the legislator did not decide to limit the application of the institution of a small crown witness only to perpetrators who committed an

[7] In the Criminal Code of 1969 there was only one case of obligatory extraordinary mitigation of punishment, which was introduced by the Act of 18 December 1982 on special legal regulation during the suspension of martial law (Journal of Laws No. 41, item 273). Article 243 of the 1969 CC provided for three cases of mandatory extraordinary mitigation of punishment with regard to perpetrators of some corruption offences.

offence while acting in an organised group or association whose aim was to commit an offence. A broader approach was chosen, according to which the benefit of extraordinary mitigation of punishment may be enjoyed by any perpetrator who participated in the commission of an offence with other persons. This solution means, moreover, that the provision cannot be applied, for example, to a member of an organized criminal group, who independently commits an offence on the orders of the group leader, because in such a case there would be no cooperation of at least three persons, which is necessary from the point of view of the analyzed regulation.

In the initial period when Article 60(3) CC was in force, it was a source of great interpretation controversies, however with time – especially in case law – a certain consensus emerged as to the understanding of this provision. First of all, it is currently assumed that the requirement to disclose certain information to law enforcement authorities means the necessity for the offender to subjectively believe that what he discloses is not known to these authorities (the necessity to adopt such an interpretation results from the fact that Article 60(4) CC refers to the disclosure of circumstances which have not yet been known to the law enforcement authorities, and therefore the term "discloses" used in Article 60(3) CC should have – according to common rules of interpretation – a slightly different meaning).[8] This view seems predominant in literature [see e.g. Ćwiąkalski 2016, 161-62; Konarska-Wrzosek 2020, 500-50; Łabuda 2012, 427-29; Zgoliński 2020, 422-23], though on the one hand an opposite interpretation, assuming that the information provided should be objectively unknown to law enforcement authorities may also be found [Zalewski 2021, 959-61; Marek 2010, 203-204; Wojciechowski 1997, 130] and on the other hand the necessity to apply the provision in every case of transferring information, even information known to the law enforcement agency, seems also to be advocated by some authors [Ćwiąkalski and Raglewski 2017, 444; Kulik 2021, 257]. There is also a predominant opinion on the necessity for procedural loyalty of an offender who wants to benefit from obligatory extraordinary mitigation of punishment, which means that such an offender should consistently throughout the whole trial uphold his/her statements made initially before law enforcement authorities[9] [Ćwiakalski and Raglewski 2017, 440;

[8] Such an interpretation has become established since the Supreme Court resolution of 29 October 2004, I KZP 24/04, OSNKW 2004, No. 10, item 92.

[9] Thus: the Supreme Court in the judgment of 29 May 2003, ref. no. III KK 36/03 (Lex no. 78375). More recent statements maintained in this tone can be found e.g. in the judgment of the SA in Warsaw of 11 June 2019, ref. no. II AKa 38/19 (Lex no. 2701235), judgment of the Court of Appeal in Warsaw of 19 December 2018, ref. no. II AKa 268/18 (Lex no. 2610485), judgment of the Court of Appeal in Szczecin of 27 November 2018, ref. no. II AKa 124/18 (Lex no. 2685602).

Ćwiakalski 2016, 155-56; Gądzik 2021, 580; Konarska-Wrzosek 2020, 502; Zgoliński 2020, 424; Marek 2010, 203-204; Michalska-Warias 2012, 68-82].

3. THE PROBLEM OF CONCURRENCE OF ARTICLE 259 CC AND ARTICLE 60(3) CC

An interesting issue seems to be the mutual relationship between Article 259 CC and Article 60(3) CC, as it seems obvious that these two provisions may coincide in the case in which a person disclosing information to law enforcement authorities is a member of a criminal group. Theoretically, the extraordinary mitigation of punishment provided for in the second of these provisions may also apply to a perpetrator who cooperated with other persons in perpetrating the offence of participation in an organised criminal group, however it should be noted that a perpetrator who meets the conditions set forth in this provision, will probably also meet the requirements indicated in Article 259 CC. In such a situation, Article 259 CC will take precedence as a more far-reaching and definitely more beneficial provision, as it makes it impossible to hold a perpetrator criminally liable for participation in an organised criminal group.

One also cannot exclude a situation in which a member of a criminal group fulfils the conditions for not being subject to criminal prosecution set out in Article 259 CC, and at the same time discloses information specified in Article 60(3) CC relating to an offence or offences which, as a member of the criminal group, he or she committed in cooperation with other persons. It seems that such a situation may constitute a sufficient incentive to cooperate with law enforcement authorities, as it means avoiding criminal liability for participation in an organised criminal group or association in general and a significant mitigation of punishment for offences committed during activity in the group/association. A prerequisite here, however, is that any offence committed by the perpetrator as part of his/her membership of the organised group or association must involve two more perpetrators.[10]

[10] It is also worth remembering, that in the situation described above, apart from extraordinary mitigation of punishment and conditional suspension of such mitigated punishment, it is also possible to refrain from imposing a punishment at all on the basis of Article 61(1) of the Criminal Code, according to which the court may refrain from imposing a punishment in a case defined in Article 60(3), especially if the role of the perpetrator in committing an offence was minor and the information provided contributed to preventing the commission of a different offence.

4. OTHER LEGAL INSTRUMENTS AVAILABLE TO ORGANISED CRIME MEMBERS

Committing a certain act in cooperation with only one person (for example, with the leader of an organisation who gave the relevant order) means that the rules of punishment mitigation laid down in Article 60(3) CC cannot be applied to this offence. It is worth remembering, however, that in the case of a perpetrator who loyally cooperates with law enforcement authorities and discloses valuable information, there is always a possibility to apply an extraordinary mitigation of punishment on general principles. However, as this is optional, the perpetrator cannot be sure of the final decision of the court (although a certain solution, which significantly increases the likelihood of obtaining a favourable verdict, may be the submission by the prosecutor of a motion for passing a sentence at the court sitting and imposing penalties agreed with the accused or other measures provided for the misdemeanour[11] charged, also taking into account the legally protected interests of the victim according to Article 335(1) of the Code of Criminal Procedure).

It is also worth noting that in certain cases a situation may occur in which the perpetrator may simultaneously benefit, for example, from Article 60(3) and Article 60(4) of the Criminal Code (the latter allows to reward the perpetrator with an optional extraordinary mitigation of punishment for disclosing someone else's serious crime, of which the law enforcement authorities had not been previously aware) – the former provision would necessitate mitigation of punishment for a crime committed in cooperation with other persons, the latter would allow for extraordinary mitigation of punishment for some other crime committed by the perpetrator on his/her own or in cooperation with only one person, if he/she disclosed a serious crime committed e.g. by other members of the group or association without his/her participation.

It follows from the above that for offenders who have participated in an organised criminal group or association over a longer period of time and have committed a greater number of offences as members of those structures, it will only be possible to make use of these solutions in certain circumstances. It may, on the other hand, be much easier to meet the requirements of the provisions in question for offenders who have only participated in the group or association, but for some reason, for example, have not managed to commit any other offence or have only committed one or a few offences in a multi-person configuration. However, from the point of view of the interests of justice, information provided by members of criminal structures who have been active in those structures for a long time and therefore

[11] This solution cannot therefore apply to felonies.

have a wealth of knowledge about how such structures operate can be far more valuable. For these offenders, the optimal solution from their point of view may be to obtain the status of a crown witness within the meaning of the Act of 25 June 1997 on Crown Witnesses,[12] which guarantees the offender impunity not only for the offence of participation in an organised criminal group or association, but also for offences committed as part of their membership, regardless of the specific personal arrangement in which they were committed. The status of a crown witness may, however, be granted in specific cases, when the assistance of such an offender appears to be necessary to hold other offenders accountable (pursuant to Article 3(1)(1) of the Act, one of the conditions for admitting evidence from the testimony of a crown witness is that the offender provides the authority conducting the proceedings with information that may contribute to the disclosure of the circumstances of the offence, the detection of other offenders, the disclosure of further offences or the prevention thereof). In addition, certain categories of perpetrators have been excluded *ex lege* from this possibility.[13] The common feature of the leniency and exoneration measures discussed above is that the motivation of the offender is irrelevant. A decision to withdraw from participation in a criminal group and to disclose various types of information to law enforcement authorities may be taken either as a result of remorse, or out of mere calculation, when the offender believes that such a solution will be the most profitable for him. This does not in any way change the basis for applying the analysed solutions to him, and it may only play a role in the case of extraordinary mitigation of punishment – the motivation of the perpetrator may in such a case be of significance for the final scope of the exceptionally mitigated punishment, although it will not affect the application of this institution itself.

CONCLUSION

To sum up, the Polish criminal law currently contains a whole range of solutions aimed at encouraging members of organised criminal groups and criminal associations to cooperate with law enforcement authorities in exchange for total avoidance of criminal responsibility (Article 259 CC and Article 9(1) of the Act on Crown Witness) or mitigation of punishment

[12] Journal of Laws 2016, item 1197.

[13] According to Article 4 of the Crown Witness Act, the provisions of the Act shall not apply to a suspect who, in connection with participation in an offence or fiscal offence referred to in Article 1: 1) attempted to commit or committed the offence of murder or participated in the commission of such an offence; 2) incited another person to commit the offence referred to in Article 1 in order to bring criminal proceedings against him or her; 3) directed an organised group or association aimed at committing an offence or a fiscal offence.

on an obligatory (Article 60(3) of the Criminal Code) or optional (Article 60(4) CC) basis. In the case of the same offender, there are no obstacles to applying several of these solutions to different offences, provided that the conditions for applying each of them are met, whereas in the case of a single offence, the solution which is most favourable to the offender should be applied.

As far as the interpretation of the analysed solutions is concerned, there are still some discrepancies, especially in the literature, which could perhaps be most easily removed through a certain modification of the wording of the provisions – it is difficult to indicate e.g. the reason why the obligation to repeat before a court the explanations provided to law enforcement authorities cannot be directly included in Article 60(3) CC. Some doubts may also be raised as to the potentially too broad scope of application of the above mentioned provision and the related possibilities of its instrumental use by perpetrators, who for criminal-political reasons do not deserve an extraordinary mitigation of punishment – here, too, a change would have to result from the introduction of relevant changes to the wording of the provision, as it does not seem possible to limit the scope of its application through interpretation to the detriment of the perpetrator. This does not change the fact that, in general, the discussed regulations seem now to be well established in Polish criminal law, and their practical application – after nearly a quarter of a century of their being in force – does not pose too many difficulties.

REFERENCES

Buchała, Kazimierz. 1998. In Kazimierz Buchała, and Andrzej Zoll, *Kodeks karny. Część ogólna. Komentarz*. Kraków: Wydawnictwo Zakamycze.

Ćwiąkalski, Zbigniew. 2016. "Komentarz do art. 60 k.k." In *Kodeks karny. Część ogólna. Komentarz*, vol. 1, part. 2, edited by Włodzimierz Wróbel, and Andrzej Zoll, 124-77. Warszawa: Wolters Kluwer.

Ćwiąkalski, Zbigniew. 2017. "Komentarz do art. 258-259." In *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 212-277d*, edited by Włodzimierz Wróbel, and Andrzej Zoll, 533-58. Warszawa: Wolters Kluwer.

Ćwiąkalski, Zbigniew, and Janusz Raglewski. 2017. "Nadzwyczajne złagodzenie kary." In *Nauka o karze. Sądowy wymiar kary. System prawa karnego*, vol. 5, edited by Tomasz Kaczmarek, 409-66. Warszawa: C.H. Beck.

Flemming, Marian, and Witold Kutzmann. 1999. *Przestępstwa przeciwko porządkowi publicznemu, Rozdział XXXII Kodeksu karnego. Komentarz*. Warszawa: C.H. Beck.

Gadecki, Bartłomiej. 2008. „Branie udziału w zorganizowanej grupie przestępczej (art. 258 k.k.)." *Prokuratura i Prawo* 3:68-83.

Gądzik, Zuzanna. 2021. "Komentarz do art. 60 k.k." In *Kodeks karny. Komentarz*, edited by Alicja Grześkowiak, and Krzysztof Wiak, 575-86. Warszawa: C.H. Beck.

Góral. Roman. 1998. *Kodeks karny: Praktyczny komentarz*. Warszawa: Wydawnictwo Zrzeszenia Prawników Polskich.

Górniok, Oktawia. 1999. "Przestępstwa przeciwko porządkowi publicznemu." In Oktawia Górniok, Stanisław Hoc, and Stanisław M. Przyjemski, *Kodeks karny. Komentarz*, vol. 3, Gdańsk: Arche.

Jasiński, Jerzy. 1997. "Spojrzenie na przestępczość w europejskich państwach postkomunistycznych." *Państwo i Prawo* 8:41-60.

Kalitowski, Michał. 2016. "Przestępstwa przeciwko porządkowi publicznemu." In *Kodeks karny. Komentarz*, edited by Marian Filar, 1431-462. Warszawa: Wolters Kluwer.

Konarska-Wrzosek, Violetta. 2000. "Prawnokarne środki walki z przestępczością zawodową i zorganizowaną przewidziane w kodeksie karnym." *Prokuratura i Prawo* 3:40-52.

Konarska-Wrzosek, Violetta. 2020. "Komentarz do art. 60 k.k." In *Kodeks karny, Komentarz*, edited by Ryszard A. Stefański, 492-509. Warszawa: C.H. Beck.

Kulesza, Jerzy. 1999. "Glosa do uchwały SN z dnia 25 lutego 1999 r., I Kzp 38/98." *Orzecznictwo Sądów Polskich* 10:490-91.

Kulik, Marek. 2019. "Komentarz do art. 60 k.k." In *Kodeks karny. Komentarz*, edited by Marek Mozgawa. 253-60. Warszawa: Wolters Kluwer.

Łabuda, Grzegorz. 2012. "Komentarz do art. 60 k.k." In *Kodeks karny. Część ogólna. Komentarz*, edited by Jacek Giezek. 418-38.Warszawa: Wolters Kluwer.

Majchrzak, Irena. 1965. *Pracownicze przestępstwo gospodarcze i jego sprawca*. Warszawa: Wiedza Powszechna.

Marek, Andrzej. 2010. *Kodeks karny. Komentarz*. Warszawa: Wolters Kluwer.

Michalska-Warias, Aneta. 2006. *Przestępczość zorganizowana i prawnokarne formy jej przeciwdziałania*. Lublin: Verba.

Michalska-Warias, Aneta. 2012. "Obowiązek potwierdzenia wyjaśnień przed sądem przez tak zwanego małego świadka koronnego." *Prokuratura i Prawo* 9:68-82.

Michalska-Warias, Aneta. 2017. "Przestępstwa przeciwko porządkowi publicznemu." In *Kodeks karny. Komentarz. Część szczególna*, vol. 2, edited by Michał Królikowski, and Robert Zawłocki, 309-463. Warszawa: C.H. Beck.

Pływaczewski, Emil W. 1997. "Organized Crime in Poland." *Trends in Organized Crime* 3, no.3:107-108.

Skała, Jacek. 2004. "Normatywne mechanizmy zwalczania przestępczości zorganizowanej w świetle przepisów kodeksu karnego (część 1)." *Prokuratura i Prawo* 7-8:35-65.

Wiak, Krzysztof. 2021. "Przestępstwa przeciwko porządkowi publicznemu." In *Kodeks karny. Komentarz*, edited by Alicja Grześkowiak, and Krzysztof Wiak, 1403-455. Warszawa: C.H. Beck.

Wojciechowski, Janusz. 1997. *Kodeks karny. Komentarz, Orzecznictwo*. Warszawa: Librata, sp. z o.o.

Zalewski, Wojciech. 2017. "Komentarz do art. 60 k.k." In *Kodeks karny. Część ogólna. Komentarz*, vol. 2, edited by Michał Królikowski, and Robert Zawłocki, 949-62. Warszawa: C.H. Beck.

Zgoliński, Igor. 2020. "Komentarz do art. 60 k.k." In *Kodeks karny. Komentarz*, edited by Violetta Konarska-Wrzosek, 417-28.Warszawa: Wolters Kluwer.

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CONCORDIA OR CONSENT. CATHOLICS *UTRISQUE RITUS* OF THE LVIV ECCLESIASTICAL PROVINCE IN THE ORBIT OF CANON LAW AND CUSTOMARY REGULATIONS

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Abstract. In the area of the Lviv church province the coexistence of Christians of the Greek and Latin traditions had developed for centuries. After the introduction of the church union in the dioceses of Lviv and Przemyśl at the beginning of the 18th century, the entire Christian population found itself within the Catholic Church. Despite the doctrinal community, Catholics of various rites were subject to different religious customs and functioned according to different calendars. During the widespread nationalisation of the local people on the basis of religious traditions, various national identities emerged, becoming more and more radical and hostile to each other. Hence, on the ecclesiastical level, initiatives appeared to alleviate tensions and introduce order and harmony resulting from Christian teaching. Concordia of 1863 was such an attempt at an agreement, which under the canon law consolidated the established customs that had been present in the religious life of Galicia for centuries.

Keywords: Concordia; Galicia; union; Lviv metropolis; rite

INTRODUCTION

The charm of the multiculturalism of the former borderlands was deeply rooted in the harmonious coexistence of various nations and mutually complementary religions, creating the picturesque colouring of the space where this phenomenon occurred. The lands of historical Red Ruthenia[1] were regarded since the times of the beginning of their historical life as areas of contention between Poland and Ruthenia, and the western and eastern Slavs. The shaping of the Polish-Ruthenian borderland is lost in the

[1] Red Ruthenia – the historical name of the area on the Polish-Ruthenian border, referring with its etymology to "the Cherven Cities". It is noted that it was not an ethnographic and permanent concept, but a geographic and changeable one. During the reign of Casimir the Great, Red Ruthenia became a part of the Polish Kingdom in 1340. During the reign of King Władysław Jagiełło, the name of the Ruthenian Voivodeship was given to Red Ruthenia [Glogier 1903, 212-14].

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thicket of presumptions, contradictory historical testimonies, and mutually exclusive historical concepts concerning "the Cherven Cities"[2] mentioned in chronicles. It is known that these lands, formed in the 12th century as an integral part of Ruthenia, were captured by the Grand Duke of Kiev, Vladimir the Great, from Poles in 981. In 1091, the Polish king Bolesław the Brave, during his expedition to Kiev, joined "the Cherven Cities" to his territories, which, however, did not ensure their permanent belonging to the Piast state [Koneczny 1920, 12-13]. Red Ruthenia was incorporated into the Polish Kingdom, first as a separate part of the state "Regnum Russiae", then as eastern voivodeships of which Lviv became the centre, the capital of the Ruthenian voivodeship, and also an important centre of religious life not only in the Borderlands, but also of the entire Polish state. Belonging to the Orthodox Church, or also known as the Ruthenian Church, and to the Latin Church, was a boundary between the Ruthenian and the Polish populations. The coexistence of these two nations went through a series of experiences, including religious ones, resulting from the relations between religious centres in Constantinople and Rome.

As we know, the only until 1054 Church of both the Latin and Byzantine traditions maintained dogmatic unity despite various adversities. In Rus, the divisions among Christians were not apparent, or at least did not occur with such a load of hostility and aggression as, for example, in the lands belonging to Byzantium. As the Polish settlement intensified in the 14th century and as a result of the organisation of social and political life on the basis of the privileged position of the Catholic – Latin – population, there were more and more problematic situations that required regulation in everyday life as well as conceptual solutions with a universal dimension. Church unions facilitated the formal regulation of the coexistence of Christians belonging to different traditions.

1. THE HISTORY OF THE MULTI-RITE TRADITION OF THE BORDERLAND LANDS

Leaving aside the dependency associated with the beginnings of Christian missions on the Polish-Ruthenian borderlands of interest to us, we must take as a starting point the fact that in the 12th-13th centuries the Ruthenian Church had its hierarchical structure there. Episcopal seats were established in Halicz, Przemyśl, Chełm and Łuck [Gil and Skoczylas 2014,

[2] "The Cherven Cities" – a term used in Ruthenian chronicles to describe the territories of contention between Poland and Ruthenia. They covered the area between the Wieprz and Bug rivers reaching in the south to the springs of the San, Dniester and Styr. The name comes from the town of Czerwień [Dominiczak 2018, 24-25].

62-63]. In terms of religion and culture, the Byzantine-Ruthenian character was preserved here, the Ruthenian population belonged to the Orthodox Church.

At the junction with the countries originating from the Latin civilisation circle – Poland, Hungary – the Orthodox and Catholic populations interpenetrated in a natural way and the areas of shared residence were created. In the territories of "Red Ruthenia", Polish settlement advanced, which intensified after the incorporation of the country into the Polish Kingdom in the second half of the 14th century. The borderland areas were relatively sparsely populated, hence the settlement movement from the west was quite intensive. The royal administration settled foreigners in empty areas, who founded new cities, gathered franklins around them, and expanded the economy and defence. Poles came to the Ruthenian lands not only as donors of vast estates, but also as a poor free people, petty nobility. The greatest number of settlers came from Mazovia [Jabłonowski 1912, 89-90]. The settlements of the incoming population, situated at the crossroads of trade routes and in places associated with the extraction of salt, became important centres of political and economic life. Along with this, also centres of the religious life of the Roman Catholic Church were established. In 1375, the capital of the Latin metropolis was established in Halicz, the second after the primate one in ancient Gniezno. Soon, in 1414, the capital of the metropolis was moved to Lviv [Urban 1984, 17-19], which assumed the role of the capital city in the region.

St. Józef Bilczewski,[3] Metropolitan Archbishop of Lviv (1901-1923), described the situation of the Polish element in the Ruthenian lands as follows: "But not only the Ruthenians lived in the Ruthenian lands. For centuries, it was also inhabited by Poles and Germans, who came here to trade. More Polish merchants, Polish craftsmen and peasants settled here when King Casimir the Great incorporated a large part of the Ruthenian lands into Poland […] The immigrant Polish and German populace lived mainly in the cities where the first Catholic churches and parishes were established. Soon Polish

[3] Józef Bilczewski (1860-1923), Lviv Metropolitan Archbishop of the Latin rite, a saint of the Catholic Church; priest ordination 1884; studied in Vienna, Paris and Rome. 1900 Rector of the University of Lviv, on 20 January 1901 he took over the rule in the Archdiocese of Lviv. Merit for the development of the parish network of the archdiocese, religious architecture, Christian-social and educational activities among the faithful. During his reign, 21 parishes and 96 branches were erected in the archdiocese, 328 new branch churches and chapels were built. The last "primate of Galicia and Lodomeria", author of numerous publications, including scientific publications in the field of Christian archeology and dogmatics, co-founder of "Przegląd Theologiczny". In 1959, the process of beatification began, completed with beatification on 26 June 2001, and on 23 October 2005, he was canonised [Nitecki 1992, 30; Krasowski 1996, 32-36; Tarnawski 1924].

settlements appeared around courts in the countryside. If this Polish population was not to lose the rite and faith it was necessary to visit them with pastoral ministry as often as possible."[4]

Gradually, the situation of the followers of the Eastern and Western Christian traditions living together in the same areas consolidated in the borderlands. Generally, it coincided with the understanding of the ethnic composition of the population of the south-eastern borderlands, Ruthenians were Orthodox, and Poles were Catholics. As a result of socio-cultural processes in these areas, Polish and Latin cultures dominated in cities, noble houses, and compact Polish settlements. The Russo-Byzantine element was the basis of life of rural communities. No areas of residence were hermetic, and both Ruthenian-Orthodox enclaves – larger or smaller – existed in cities and towns, and Polish and Latin rite families were represented in almost all Ruthenian villages [Pawłowski 1919, 24].

Before the church union was established, both groups existed side by side, and with the development of the Catholic Baroque culture, the conversion to Catholicism of the Ruthenian elites (princes, boyars, nobility) and the bourgeoisie intensified. After the formal recognition of the pope's authority by the Kiev metropolis of the Ruthenian Church in the Polish-Lithuanian Commonwealth in 1596 [Osadczy 2019] and the actual acceptance of the union by the dioceses of Lviv and Przemyśl at the beginning of the 18th century, the obstacle of religious otherness in relations between Christians, Catholics belonging to the Greek Catholic and Latin rites disappeared. From then on, the practice of mixed – in terms of rituals – marriages, engaging in common religious practices, receiving the sacraments in one or the other rite become the norm. These tendencies were favoured by the policy of the Austrian authorities, applying the principles of Josephinism – subordination the Church to the state machine – equalising Latin and Uniate rights and promoting the emancipation of the Greek Catholic rite [Śliwa 1979b, 294].

In terms of the church, these areas included in the 19th century the Archdiocese of Lviv of the Latin Rite, the Archdiocese of Lviv of the Greek Catholic Rite, the Przemyśl Diocese of the Latin Rite and the Przemyśl Diocese of the Greek Catholic Rite. In 1885, these structures were completed with the Stanisławów diocese of the Greek Catholic rite [Śliwa 1979a, 630].

For the sake of accuracy, one should also mention the structures of the Catholic Church of the Armenian rite, established in 1630 after the union with Rome of Armenians, inhabiting the lands annexed to the Polish Kingdom in the fourteenth century. The Armenian population was a separate hermetic group, living mainly in towns and cities in the borderlands. In the

[4] *Pamiątka pięćsetnej rocznicy śmierci błog. Jakóba Strepy franciszkanina, arcybiskupa lwowskiego 1409-1909. Kazania*, Nakładem oo. Franciszkanów, Lwów 1910, p. 18.

18th century, however, the process of assimilation of Armenians intensified, as they merged into a common national group with Poles, especially in large cities. On the outskirts of the then civilisation influences, e.g. in Kuty on the Cheremosh River, the Armenians still retained their national and religious identity. As a minority nationality adding cultural colour to the religious palette in the borderland, they did not play any role in the tendencies and currents of inter-ritual relations [Obertyński 1974, 327].

2. THE PURSUIT OF AGREEMENT

The accession of the Przemyśl and Lviv dioceses to the union opened the door to mass mixed marriages, not in terms of denomination, but in the ritual sense. Representatives of the same denomination – Catholicism – united with each other in common families, without a problem for either party in connection with the possibility of betraying the Church or exposing children to apostasy. Poles and Ruthenians doctrinally belonged to the same Catholic Church under the authority of the same Pope, and living next to each other willingly married each other. According to Franciszek Bujak's calculations, at the beginning of the 20th century, 20% of Greek Catholics were married to persons of the Latin rite [Bujak 1908, 80]. Due to numerous relationships by marriage at the municipality level, in the interwar period, "all Polish-Ruthenian families were more or less closely related to each other. Only a few entered into purely Polish or Ruthenian marriages" [Sobków 1999, 16]. Well-known Polish ethnographer Eugeniusz Romer, describing the population situation in Galicia, aptly noted that the border between nationalities crossed the marriage bed here.

The general climate of the borderland was very special and unique. It was mentioned by an inhabitant of borderland Koropiec upon the Dniester: "On Christmas days, both Polish and Ruthenian, schools, the post office, the municipality and all shops were closed. The double celebration was fun especially for children from mixed families with sons and daughters, two Christmas Eve parties were prepared and Easter was celebrated in the same way, so that no one would be disadvantaged. It should also be mentioned that on church holidays, purely Ruthenian families refrained from hard work, prohibited by religious canons, and Poles reciprocated in the same way. The ceremonies related to the Epiphany, commonly known as Jordan, had a special character. The Koropczyk River ran near the church. When the procession was leaving the church to celebrate the service on the altar carved in the ice, the same procession was going out from the Orhodox church. The greeting consisted of the banners bent three times, then the priests greeted each other, to finally unite and go down together towards the riverbed. Ruthenians, in turn, or Greek Catholics, after fourteen days celebrated the

same ceremony on the same river, but not in this place […]. The reason was that their procession should go near the church. The ceremony was the same" [ibid., 19].

The permanent coexistence of Catholics of various rites created a unique atmosphere of mutual getting to know each other, real everyday biculturalism, and harmony in interpersonal relations. Generally, at the church level, benevolent openness to the faithful of the other rite was maintained, and active participation in religious practices in both rites was facilitated. The "Polish" and "Ruthenian" temples were visited in great numbers by the faithful of both rites, the mode of celebrating services was commonly known. Indulgences were a special occasion for this, particularly those celebrated in famous sanctuaries. The famous Franciscan monastery in Kalwaria Pacławska invited Greek Catholic priests to indulgences to help them hold spiritual service for the faithful of the Eastern rite. In the Latin monastic church even the Blessed Sacrament consecrated according to the Greek Catholic rite was kept [Barcik 1975, 36-37].

A rather sparse parish network of the Latin rite made it impossible for an individual faithful living among the Greek Catholic majority to attend Mass. It was a standard situation that Roman Catholics visited local Orthodox churches during festive services. They obligatorily went to Latin churches, sometimes several dozen kilometres away, only during Easter confessions and for indulgences. Uniate churches, funded quite often by the Roman Catholic nobility, sometimes had the so-called "Noble altars", where occasionally staying Latin priests could celebrate services according to the Western rite [Pulnarowicz 1937, 36].

3. CUSTOM AND LAW

Before concluding the Church Union, that is, before formally merging with the Catholic Church, Orthodox Christians were outside the scope of the term of the Church. From the perspective of Catholic theology, the principle of St. Cyprian "Extra Ecclesiam nulla salus", which entered the official magisterium of the Church during the Fourth Lateran Council of 1215, was binding. It was taught that outside the Church there was no salvation [Hryniewicz 1995, 59]. The Orthodox Church, which did not have such a specific religious doctrine as the Catholics, viewed Latin rite followers as "papists", heretics who had distorted the original, apostolic teaching. The customarily passed on prejudices and hostility, resulting from the experience of living under Catholic domination, accumulated. Any meeting between the Christians of both traditions could in consequence only lead to dominance by one side or the other. Usually, the dominant trend was the conversion of the followers of Eastern Christianity to Latin Catholicism, due

to its dominant role in society and a more attractive and culture-forming position in society. Ruthenian elites were converted to Catholicism quite quickly. They united with the Polish nobility in terms of religion, nationality and culture, becoming "nobiles Lachos" [Widajewicz 1925, 38].

The Polish and Ruthenian people living next to each other maintained hermetic separateness. Mixed relationships were rare, as each side – Catholic and Orthodox – not only cared about their own property and feared the transfer of their assets to the other party. However, much more was at stake. For Catholics, leaving the Catholic Church was tantamount to losing the prospect of Salvation! Allowing such a situation to happen was in the conscience of priests not only neglect but also a sin.

This would undermine the soteriological understanding of the reality in which, apart from the Church, headed by the Bishop of Rome, there was no salvation [Hryniewicz 1995, 59-60]. The importance of the awareness of the salvific adherence to the Catholic Church in the post-Trent era is evidenced, for example, by Jesuits' expeditions to the borderlands on the so-called "missio ukrainenesis", during which they obtained from the authorities of borderland towns exclusivity to hear the confession of those condemned to death, so that they could, after the culprits had joined the Catholic Church, provide them with eternal salvation [Załęski 1908, 193].

Of course, cooperation between Christians of different Churches in religious life, organisation of common services, prayer meetings were impossible. All these obstacles disappeared after the conclusion of the Union of Brest (1596) and the Union of Polish Armenians (1630), when the followers of the Eastern Churches recognised the pope's supremacy and the whole Catholic dogmatics and teaching. The relations between Latin rite followers and Greek Catholics as well as Armenian Catholics became intra-church affairs. However, in addition to the truths of faith – the inviolability of which in the Catholic Church was ensured by the office of the Pope – common to all faithful Catholics, there remained numerous areas which introduced diversity in the relations between the various Catholic traditions. This mainly concerned the difference between the calendars in the liturgical life and the celebration of holidays in the Latin and Greek Catholic rites. In the case of faithful Armenians, due to the intensified romanisation of the Armenian rite, obstacles of this nature were not so evident, as the Gregorian calendar was harmoniously adopted, Latin practices were introduced into the life of the Armenian Catholic Church, and the lack of national tensions between Latin rite followers and Armenian Catholics eliminated all misunderstandings resulting from the adaptation to the Latin rite [Osadczy 2000, 183-92].

When it comes to the common coexistence of Latin Catholics and Greek Catholic Ruthenians, the phenomenon of the functioning of two calendars binding in the life of churches of different rites was important. Greek

Catholics adhered to the Julian calendar, attached great importance to it, because the preservation of the "old style" was provided by the articles of the Union of Brest [Jobert 1994, 248]. After the introduction of the new calendar by Pope Gregory XIII, the difference between it and the Julian calendar was 10 days, in the 20th century it rose to 13 days. As a result, religious holidays of both rites were not celebrated on the same day [S[zeptycka] 1926, 339]. The terms "Ruthenian Christmas", "Polish Christmas", "Ruthenian Easter", "Polish Easter" etc. became common.

Attending various temples, participating in services held according to various modes, and receiving sacraments celebrated according to various rites required the introduction of certain norms and rules. The sphere of married life in particular required the introduction of discipline, because after the union was accepted by the Przemyśl and Lviv dioceses, this phenomenon – as mentioned above – was common. In the pre-partition Poland, this problem concerned the peasant class, as the process of romanisation was taking place in the milieu of the nobility and the middle class. The customary rule of "ritus ruthenus ritus rusticus" was binding, the Uniate element was generally reduced to the religiosity of rural people. In this environment, however, the process of "Rutheniasation" – the adoption of the Uniate rite by the Latin marriage partner – could not take place on a large scale because the provisions of canon law did not allow it. In the Catholic Church the principle of the superiority of the Latin rite over other rites was a legal norm. The subject of changing the Latin ordinance appeared after the conclusion of the Union of Florentine in 1439 in connection with the cases of the conversion of the Latin rite followers to the Greek rite. Pope Nicholas V on 6 April 1448 issued the bull *Pervenit ad Nos*. Such practices were forbidden due to the assumption that the dignity and primacy of the Holy See also extended to the Roman Catholic rite [Skubiś 1977, 274]. This assumption was consistently observed and reproduced in other documents of the Holy See until the pontificate of Leo XIII. It was only then that the constitution *Orientalium dignitas* of 30 November 1894 made the rights of all Catholic rites equal [ibid., 279].

This led to an unusual situation when the conversion of the Uniate side of a mixed family to the Latin rite could be legally tolerated, while the majority of the folk stratum in Eastern Galicia were Greek Catholic Ruthenians. The Latin rite parish network was very scarce, pastoral care did not reach the faithful who sometimes lived even 40 km from their own temple [Osadczy 1999, 171-72]. Unable to be drawn into the Ruthenian Uniate element, Latin Catholics in mixed marriages in terms of rituals kept their religious identity, quite often losing their national and cultural traditions.

Attempts were made to regulate customarily the impasse situation in the area of legal regulation that arose at the junction of the relations between

two Christian traditions and complex socio-cultural systems. Practices of taking the father's rite by sons and the mother's rite by daughters were adopted. Such solutions were practiced throughout the entire borderland area, from Lithuanian lands to the territories of Subcarpathian Ruthenia. This solution appeared to be such a successful means of normalising the relationship between rites that it served as the basis for ecclesiastical ordinances having the force of local law. In 1714, the Archbishop of Lviv of the Latin Rite, Archbishop Jan Skarbek, issued "articles" to his clergy, which were the legal basis for pastoral proceedings on the level of inter-ritual relations. In ten guidelines, the hierarch explained how the relations of both rites should develop, assuming equality and reciprocity. The orders of Archbishop Skarbek covered not only the clergy, but also all the faithful of the archdiocese. He showed special sensitivity to the matters of the Uniate Church, which was guaranteed full autonomy of religious life, and at the same time, by defending the rights of faithful Greek Catholics, he prevented them from converting to the Latin rite. In the case of mixed marriages, a ritual was adopted to baptise children according to the rite of the parent of their sex: daughters – mothers, and sons – fathers. The administration of the sacraments by a priest of another rite should always be agreed with the proper clerical authority [Fenczak 1990, 178-80]. This document became the basis for regulating pastoral matters in the Archdiocese of Lviv, and also influenced the regulations in other Roman Catholic dioceses of Chełm, Przemyśl, Łuck [ibid., 175-76].

4. CONCORDIA

The status quo maintained in the relations between the rites in the 18th and early 19th centuries began to falter after the intensification of the nationalisation of the people. The Greek Catholic clergy played a special role in perpetuating disharmony in religious life after the Austrian authorities, on basis of the structures of the Ruthenian Church, began to create a political Ruthenian nationality hostile to Poles. The existing social and religious system ensuring order and peace in Galicia was destroyed. The Greek Catholic Church, i.e. the Ruthenian Church, became a mainstay of claims undermining the Polish cultural character of the country. The existing consent in inter-ritual relations turned into a battlefield of two hostile camps, churches, wishing to preserve and increase their possessions. The fight for the faithful was also a fight for national rights. The practice of "stealing souls" – unlawful appropriation of the faithful of another rite by Latin and Uniate priests became an established norm. Customary norms and legal recommendations gave way to nationalist doctrines treating neighbouring Christians as enemies. Moreover, animosity towards Polishness in Greek Catholics translated

into tracking and elimination of "Latin accretions" in the Ruthenian rite [Osadczy 2007, 115-34]. All common elements in the religiosity of Uniates and Latin ordinance were radically discarded, the reluctance towards Latin rite followers strengthened the Russophile sentiment among Ruthenians, and it also caused philo-Orthodox sympathies. The general religious atmosphere deteriorated significantly, the prospect of apostasy appeared in religious and political rhetoric. Local Galician affairs became an element of the great geopolitical game where the interests of great powers (Austria and Russia) and great religious centres (Rome and St. Petersburg) crossed. In view of the above, the achievement of inter-ritual agreement became an important religious and political factor ensuring stability on the international arena.

The Latin and Greek Catholic bishops started talks on this matter with the highest church authorities in Rome. On 19 December 1851, Grzegorz Jachimowicz, Bishop of Przemyśl of the Greek Catholic rite, issued a pastoral letter containing 10 points on which the future agreement could be based. In turn, on 26 April 1853, the Archbishop of the Latin Rite from Lviv, Łukasz Baraniecki, presented his vision of the problems and the way to solve them [Harasimowicz 1862, 1093-1095, 1102]. It was possible to come to the common denominator after the apostolic nunciature in Vienna and the imperial government joined the negotiation process. In 1853, a letter containing proposals for the regulation of controversial issues was signed. The joint position was presented by Archbishop Michał Lewicki, the Greek Catholic Metropolitan of Lviv and the Primate of the Kingdom of Galicia and Lodomeria, Archbishop Łukasz Baraniecki, the Latin Metropolitan of Lviv, Bishop Grzegorz Jachimowicz, the Przemyśl Greek Catholic Bishop, Bishop Franciszek Ksawery Wierzchlejski, Przemyśl Latin Bishop, Bishop Józef Pukalski, Ordinary of Tarnów and Bishop Jan Bocheński, Greek Catholic suffragan from Lviv [ibid., 1116].

On Pope Pius IX's orders , the newly established Congregation for Eastern Rites at its general meetings held on 4 and 12 August 1862 reviewed the agreement between the Catholic hierarchy of both rites submitted to the Holy See on 23 December 1853. Additionally, the Holy Father asked the Galician ordinaries and suffragans to clarify additional questions. The provision concerning the manner of regulating the religious identity of children from mixed marriages aroused controversy. As mentioned above, the tradition established in the borderlands honoured the principle of baptism of the child according to the sex of the parents (daughters in the mother's rite and sons in the father's rite). Canon law, on the other hand, provided for the conversion of the Uniate partner to the Latin rite in such situations, following the still binding principle of the superiority of the Latin ordinance [Osadczy 1999, 108].

The hierarchs who came from Galicia were pleasantly surprised by the thorough knowledge of the "Ruthenian issue" in Rome. The meeting was summed up by Cardinal Alessandro Barnabo, the prefect of the Congregation for the Propaganda of the Faith. On 19 July 1863, the agreement was signed by the ordinaries of both rites and submitted to the court of the Congregation for Propaganda. In the same year, on 30 September at the general meeting of the Congregation for Propaganda, the agreement was signed with minor changes, and on 6 October Pope Pius IX approved the document by the Apostolic Authority and it appeared as the decree of the Congregation entitled *Ad graves et diuturnas* or *Concordia* [Osadczy 2011, 161-62].

The main assumptions of this document once again reminded border Catholics of the obligation to adhere to their rite and to refrain from the practice of unlawful conversion from rite to rite. When it comes to performing liturgical functions, it was emphasised that by participating in common church celebrations, one should observe obligatory discipline in one's own rite. The document once again reminded about the possibility of receiving the sacraments in various rites, but this should not mean that conversion to the other church structure should be made. In particular, it concerned the issue of family life and raising offspring in mixed rite relationships. It was ordered, inter alia, that: 1) there should be no obstacles to marrying Catholics of the Ruthenian and Latin rites; 2) according to the ancient custom, as mentioned above, a weeding is presided over by the bride's priest; 3) henceforth children of mixed rite married couples are to be brought up in the rite of the parent of their sex; 4) in families where it had already been established that children were to be brought up in the father's rite "to avoid disagreements in families and disorder in parish files", this custom was to be kept; 5) children born out of wedlock were to follow the mother's rite[5].

The arrangements adopted under Concordia remained a beautiful testimony to the pursuit of understanding and to halting the politicisation of religious life at a time when nationalisms were awakening and attempts were made to instrumentalise religion as a factor in the national struggle. The bloody Polish-Ukrainian war of 1918-1920 perpetuated the division between Catholic rites as hermetic zones of the functioning of two hostile communities. Subsequent events connected with the Second World War further deepened these divisions. Concordia, however, was a testimony to the striving for agreement and the possibility of achieving it through mutual respect and sensitivity to otherness that had existed there for centuries. The spirit of Concordia survived in times of repression and communist persecution

[5] Państwowe Centralne Archiwum Historyczne we Lwowie, f. 385, op. 1, sp. 165, p. 6; Prawo Kościelne w stosunkach obu obrządków w Galicji, greckokatolickiego, słowiańskiego Rusinów i łacińskiego Polaków, Lwów 1865, p. 238-39.

among those faithful Catholics for whom the awareness of the community of faith was something that surpassed nationalist prejudices and cultural differences.

REFERENCES

Barcik, Józef. 1975. "Obrządek greckokatolicki w Kalwarii Pacławskiej w latach 1668-1945." *Roczniki Teologiczno-Kanoniczne* 22, no.7:35-42.

Bujak, F. 1908. *Galicja*. Vol. 1: *Kraj, ludność, społeczeństwo, rolnictwo*. Lwów-Warszawa: Wydawnictwo Księgarni Altenberga.

Fenczak, August S. 1990. "Z dziejów inicjatyw polskich na rzecz uregulowania stosunków między obrządkami Kościoła katolickiego – artykuły arcybiskupa Jana Skarbka z 1714 roku." In *Polska-Ukraina 1000 lat sąsiedztwa. Studia z dziejów chrześcijaństwa na pograniczu*, edited by S. Stępień, vol. 1, 167-80, Przemyśl: Wydawnictwo Południowo-Wschodniego Instytutu Naukowego.

Gil, Andrzej, and Ihior Skoczylas. 2014. *Kościoły wschodnie w państwie polsko-litewskim w procesie przemian i adaptacji: metropolia kijowska w latach 1458-1795*. Lublin-Lwów: Wydawnictwo Instytutu Europy Środkowo-Wschodniej.

Glogier, Zygmunt. 1903. Geografia historyczna ziem dawnej Polski. Kraków: Spółka Wydawnicza Polska.

Harasimowicz, Michaele. 1862. A*nnales Ecclesiae Ruthenae gratium et communionem cum S. Sede Romana habentis ritumque Graeco-Slavicum observantis cum singulars respect ad dioeceses Ruthenas Leopoliensem, Premisliensem et Chełmensem*. Leopoli: Typis Instituti Rutheni Stauropigiani.

Hryniewicz, Wacław. 1995. Przeszłość zostawić Bogu. *Unia i uniatyzm w perspektywie ekumenicznej*. Opole: Wydawnictwo św. Krzyża.

Jabłonowski, Aleksander. 1912. *Historia Rusi Południowej do upadku Rzeczypospolitej Polskiej*. Kraków: Nakład Funduszu Nestora Bucewicza.

Jobert, Ambroise. 1994. *Od Lutra do Mohyły. Polska wobec kryzysu chrześcijaństwa 1517-1648*. Warszawa: Oficyna Wydawnicza Volumen.

Koneczny, Feliks. 1920. *O pierwotnej polskości ziemi Chełmskiej i Rusi Czerwonej*. Warszawa: nakładem autora.

Krasowski, Krzysztof. 1996. *Biskupi katoliccy II Rzeczypospolitej. Słownik biograficzny*. Poznań: Wydawnictwo Bene Nati.

Nitecki, Piotr. 1992. *Biskupi Kościoła w Polsce. Słownik biograficzny*. Warszawa: Wydawnictwo Ośrodka Dokumentacji i Studiów Społecznych.

Obertyński, Zdzisław. 1974. "Unia Ormian polskich." In *Historia Kościoła w Polsce*, edited by Bolesław Kumor, and Z. Obertyński, vol. I, part 2, 323-40. Poznań-Warszawa: Wydawnictwo Pallottinum.

Osadczy, Włodzimierz. 1999. *Kościół i Cerkiew na wspólnej drodze. Concordia 1863*. Lublin: Wydawnictwo KUL.

Osadczy, Włodzimierz. 2000. "Trzecia metropolia lwowska. Z dziejów archidiecezji obrządku ormiańskokatolickiego." In *Polacy w Armenii*, edited by Edward Walewander. Lublin: Wydawnictwo KUL.

Osadczy, Włodzimierz. 2007. *Święta Ruś. Idea prawosławia w Galicji*. Lublin: Wydawnictwo UMCS.

Osadczy, Włodzimierz. 2011. "Międzyobrządkowe małżeństwa mieszane po pograniczu polsko-ruskim w Galicji w świetle prawa kanonicznego." *Roczniki Nauk o Rodzinie* 3(58):155-62.

Osadczy, Włodzimierz. 2019. *Unia Triplex. Unia Brzeska w tradycji polskiej, rosyjskiej i ukraińskiej*. Radzymin-Warszawa: Wydawnictwo Von Borowiecky.

Pawłowski, Stanisław. 1919. *Ludność rzymsko-katolicka w polsko-ruskiej części Galicji*. Lwów: Wydawnictwo Książnica Polska.

Pulnarowicz, Władysław. 1937. *Rycerstwo polskie Podkarpacia (dawne dzieje i obecne obowiązki szlachty zagrodowej na Podkarpaciu)*. Przemyśl: Wydawnictwo „Pobudki".

Skubiś, Ireneusz. 1977. "Zagadnienie zmiany obrządku od bulli pap. Mikołaja V „Prevenit ad nos" (1448) do wydania Kodeksu Prawa Kanonicznego (1917)." *Częstochowskie Studia Teologiczne* 5:271-79.

Sobków, Michał. 1999. *Koropiec nad Dniestrem*. Poznań: Wydawnictwo Poznańskie.

S[zeptycka], Jadwiga. 1926. *W kościele i w cerkwi. Praktyczny wykład obrządków rzymskiego i greckiego*. Kraków: Nakładem Wydawnictwa Księży Jezuitów.

Śliwa, Tadeusz. 1979a. "Kościół greckokatolicki w Galicji (1815-1918)." In *Historia Kościoła w Polsce*, edited by Bolesław Kumor, and Zdzisław Obertyński, vol. II, part 1, 628-50. Poznań-Warszawa: Wydawnictwo Pallottinum.

Śliwa, Tadeusz. 1979b. "Kościół greckokatolicki w zaborze austriackim (1772-1815)." In *Historia Kościoła w Polsce*, edited by Bolesław Kumor, and Zdzisław Obertyński, vol. II, part 1, 288-301. Poznań-Warszawa: Wydawnictwo Pallottinum.

Tarnawski, Mieczysław. 1924. *Józef Bilczewski krótki rys życia i prac*. Lwów: Nakładem Tow. „Biblioteka Religijna".

Urban, Wincenty. 1984. *Szkice z dziejów archidiecezji lwowskiej i jej duszpasterstwa*. Rzym: [brak danych wydawnictwa].

Widajewicz, Józef. 1925. *Z przeszłości Buszcza*. Poznań: Wydawnictwo „Ignis".

Załęski, Stanisław. 1908. *Jezuici w Polsce. W skróceniu 5 tomów w jednym z dwoma mapami*. Kraków: Drukiem i Nakładem Drukarni W. L. Anczyca i Sp.

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PSYCHOLOGICAL EXPERTISING IN JUVENILE DELINQUENCY CASES IN POLAND: PRINCIPLES FOR EVALUATION OF PSYCHOLOGICAL OPINION

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Abstract. In the article analysed the practice of obtaining opinions of expert psychologist in juvenile delinquency cases. The choice of types of cases is premeditated, and is based on their specific character. Juvenile delinquency cases are special in terms of their subjects (children and adolescence) and aims to be achieved (the welfare of the child/adolescence). Forensic psychology expertise plays a significant part in arriving at a court ruling. Therefore, it is important to raise the quality of diagnostic procedures, expertise activities, and to establish evaluation standards for evidence from psychological expertise. The presentation of proposed psychological expertise standards should take a form of guidelines and recommendations to be met by the experts, and serve as an aid to expertise evaluation performed by courts. To reach these goals, we gathered and analyzed court records of juvenile cases in six districts (N = 253). The results of the research are related to a) the analysis of the methodological and diagnostic procedures

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used by experts in the process of psychological evaluation in juvenile cases and b) the formulation of principles for evaluating the evidence of psychological opinions for trial authorities. The research project indicates the practice of psychological experts by the court, the diagnostic procedure and the method of formulating psychological opinions. The analysis of the material showed, first of all, the diversity of the diagnostic and opinion practices of psychologists, thus confirming the lack of procedures standardizing the process of psychological evaluation. The variety of assessment tools, and method, and areas of diagnosis make difficulties in assessing of the evidentiary value of psychological-court opinions. The lack of principle for assessing level of opinions' quality may promote the practice of so-called junk science.

Keywords: juvenile delinquency; juvenile justice system; Code of Criminal Procedure

INTRODUCTION

Forensic Mental Health Assessment (FMHA) has been a matter of scientific interest of psychologists and psychiatrists for over 30 years [Heilbrun, Grisso, and Goldstein 2009; Heilbrun 2003, 167; Heilbrun, DeMatteo, and Marczyk 2004, 31; Sparta and Koocher 2006]. Practice guidelines is not a widely discussed matter in Poland, and uniform and adequate rules of psychological diagnostic procedures in terms of FMHA are rare. Due to a scarcity of knowledge about experiences of application of psychological expertise on the grounds of the Polish legal system, the Authors have decided to take up the following research. Its aim is to present the procedure of seeking out psychological opinion in juvenile delinquent cases of the Polish legal system, and its usage in diagnosis and the presentation of opinion by expert psychologists. The impact of specialists' conclusive recommendations on the final court disposition will also be examined. Problems concerning the admittance of psychological opinions by courts are widely conditioned by the discipline itself which, in contrast to other disciplines, can be charged with individual expert's error (poor education, lack of supervision, time limitations) or the lack of precise or evidence-supported standards for performing psychological assessment for legal context [Heilbrun and Brooks 2010, 219].[1] The results will constitute a starting point to the creation of, at least, basic principles derived from empirically based practice in juvenile cases in the Polish jurisdiction.

[1] National Research Council, *Strengthening Forensic Science in the United States: A path Forward*, 2009, https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [accessed: 03.01.2019].

1. JUVENILE JUSTICE SYSTEM IN POLAND

The main part of the juvenile justice system in Poland is The Act of the 9th of June 2022 on the support and rehabilitation of juveniles (Juvenile Act, JA).

According to the JA, the term "juvenile" is broadly defined and covers: a) minor (juvenile offenders) of punishable acts[2] committed after having reached 13, but before finishing 17 years of age; b) person under 18 years who shows symptoms of problematic behavior, not necessarily prohibited by criminal law, but violating social norms referred to as "signs of demoralization"; and c) person against whom educational or correctional measures are enforced until they are 18 or 21 years of age (the enforcement of particular measures on juveniles shall cease *ex lege* upon completion by them of 18 or 21 years of age).

Family court has jurisdiction in juvenile cases due to demoralisation and punishable act. The term demoralisation is a legal term, though it is not clearly defined. The law does not provide any definition. It refers to many different behaviours of children or adolescents that can be harmful for them or for others (e.g. breaking of social norms, truancy, use of drugs or alcohol, vagrancy, failure to fulfil the educational requirements etc.).

2. PSYCHOLOGICAL EXPERTISE IN POLISH JUVENILE PROCEEDING

According to Article 64(1) JA, when a need arises, court may request a professional opinion to be issued by court specialists, experts, or other specialist organisation in order to a) obtain a complex analysis of juveniles' personality, and b) determine the correct course of action with regards to a juvenile. Moreover, such an opinion is sought before assigning a juvenile to a youth care centre, state medical facility, social welfare home or a correction facility (Article 64(2) JA).

Psychiatrists, psychologists, educators/educational counselors and medical doctors may be appointed to deliver an opinion, with the precise scope determined by questions the court poses when appointing the expert. An expert opinion for the court is usually prepared by a team of experts, who provide a so called complex opinion. Opinions prepared by one expert are rare. Conditions for calling on expert opinion stipulated by JA, such as obtaining a complex analysis of juveniles' personality, and determining the

[2] For the purpose of this article the notion of "punishable act" will be replaced by a commonly recognizable universal notion of crime or offending.

correct course of action with regards to a juvenile do not determine the specific tasks or roles of individual experts. In preparing a complex opinion there are no unequivocal areas or tasks strictly assigned to each specialist. Standards for opinion in juvenile cases prepared for Court Expert Team by the Ministry of Justice (2016) indicate the content areas included in the expertise. The above mentioned Standards suggest that the evaluation should contain information about juvenile's functioning in terms of intellectual development, personality, academic abilities, and potential etiology of delinquent behaviour. An evaluation of juvenile delinquent's family is likewise recommended. The content areas of opinion might be diversified by the court referral questions. The quality of expertise must be evaluated by judge according to Article 200, 201 of Polish Code of Criminal Procedure (C.C.P.), and Article 258 of Polish Code of Civil Procedure (C.Cv.P.), which indicate that opinion should meet formal requirements, be complete and clear, and then it can serve as an opinion evidence. According to Articles 200, 201 of the criminal procedure rules of C.C.P. and Article 258 of C.Cv.P., for an expert opinion to be admissible as evidence in court, the opinion must meet formal requirements, be complete and clear, and the quality of the opinion must be evaluated by a judge.

In Poland, a psychologist who provides an expertise in juvenile cases is a forensic practitioner who is an examiner. Her/his work with the juvenile or juvenile's family is clinical in nature [Gudjonsson 1995, 59], while the key task of the psychologist conducting FMHA is to "operationalize" the legal referral questions in such a way that legal components are expressed in terms of "functional abilities", namely behaviours that a psychologist is qualified to assess [Heilbrun, Grisso, and Goldstein 2009]. Due to the fact that a juvenile is in a state of constant development, it is particularly important for an expert tasked with providing a diagnosis to have not only knowledge from a variety of different specialist fields of psychology, but also high diagnostic standards. The consistency of applied research techniques with contemporary psychological knowledge mark the quality of a diagnosis, and subsequent preparation of expert opinion, which will play an important part in court ruling. An expert opinion needs to provide the court with answers to relevant questions posed by the court (theses) which it will use to make a ruling. there are no specialist standards or guidelines for forensic psychology in juvenile court proceedings in Poland. Apart from the standards issued by the Ministry of Justice (2016), there are no other guidelines a psychologist needs to follow. This lack of precise expectations of psychological expert opinion diminishes the quality of professional practice.

3. PRESENT STUDY

The psychological assessment of minors permits translation and explanation for their behavior, thinking, etc. in a more intelligible format with legal implications. Therefore, the primary aim of the study is to analyze when (in what circumstances) family courts appoint expert psychologists in juvenile cases, as well as to describe the formal criteria formulated by family courts towards expert psychologists and their opinions. A secondary aim is to determine: (a) What referral questions are asked by the courts of expert psychologists? (b) What subject matter is found in psychological diagnosis in juvenile cases, and what tools are used by expert psychologists developing an opinion on the subject recommended by the court? (c) What evaluation prinicples are recommended for psychological expertise for judicial bodies?

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4. MATERIALS AND METHOD

The study realize on the analysis of court records in juvenile delinquency cases. The analysis was conducted in 6 randomly selected[3] inferior courts[4] to minimize the risk of receiving data from a limited set of judges proceeding in a particular court, i.e. Białystok and Szczytno (the area of the appellate court in Białystok), Zielona Góra and Września (the area of the appellate court in Poznań), Gliwice and Jaworzno (the area of the appellate court in Katowice). In each inferior court a consent was obtained from the court's president to conduct analysis of 50 court records in juvenile delinquency cases. Each of the analyzed juvenile case was to fulfil the following conditions: a) final (unappealable) judgement concluded between 2013-2015; b) forensic psychology opinion was among the evidence presented in the case. A previously prepared questionnaire that consisted of two sections (legal and psychological) was derived from a pilot study and used to conduct

[3] The random selection of inferior courts was conducted as follows: in the first step, 3 (out of 11) appellate courts in Poland were drawn – in Białystok, Poznań, and Katowice. Afterwards, in the area of each appellate court two inferior courts were selected – one located in a city which is simultaneously the location of RODK and second – which does not fulfil this requirement. The location of all inferior courts subordinate to each appellate court was collected from the Polish Ministry of Justice website. Both types of selected inferior courts were drawn separately and randomly.

[4] In Poland it is within inferior courts' jurisdiction to adjudicate in cases of juvenile delinquency.

analyses. The legal section of the questionnaire consisted of two parts. One of the parts of the questionnaire consisted of information about the court's decision to appoint an expert psychologist, namely: a) the initiative to appoint the expert (court *ex officio* or the parties), b) the type of expert appointed by the court (individual expert or an expert from an OZSS Center), c) whether the expert was indicated personally or the court identified the institution responsible for issuing the opinion, d) the number of experts appointed by the court, e) the form (written or oral) of the expert opinion requested by the court, f) the length of time in which the expert was to issue an opinion, g) the questions posed to the expert witness determining the scope of the expert's opinion.

The second part concerned basic information about the expert opinion: a) when it was issued, b) the experts' fields of expertise, c) information concerning the place and time of the diagnostic meetings, d) whether the opinion was signed by all experts involved in its preparation, e) information about the court's response to the opinion (whether the experts were interviewed in court, whether the experts requested a secondary opinion, or whether the court requested another expert to issue an opinion on the same matter).

The psychological section of the questionnaire concerned the analysis of expert psychological opinions admitted in court. It was comprised of 3 parts. The first part concerned the collection of formal data, like the type of institution requesting the diagnosis, the institution developing the opinion, the content of the evidentiary thesis (questions posed by the court to expert psychologists), case subject, and applied research methods. The second part covered: a) the occurrence of categories of areas of juvenile diagnosis in terms of family conditions, care, and educational situation; b) the occurrence of areas of juvenile diagnosis: developmental data, intelligence and cognitive abilities assessment, diagnosis of personality (emotional and motivational processes, social functioning). The third part contained a) an analysis of conclusions (answers to questions posed by the court) in scope of their concurrence with used materials and their justification, b) the occurrence of a diagnosis of the level of demoralisation and recommendations for the application of pedagogical or corrective measure, as well as directions in how to work with the juvenile.

5. SAMPLE

50 juvenile delinquency cases which included an expert opinion (N = 300) were obtained from each court. Some of the cases included in the sample were unavailable – for example requested by and sent to another court. Given the above mentioned requirements and obstacles it was possible to

obtain 253 juvenile delinquency case records from inferior courts located within areas of Appellate Courts in Białystok (N = 90), Katowice (N = 78), and Poznań (N = 85). The present sample consisted of both delinquency (N = 76), and demoralisation (N = 177) cases.

6. RESULTS

Basic information about professionals preparing psychological expertise. The analysis of expert psychological opinions prepared for court covered: professionals preparing the expertise, the subject matter of the opinion, applied research methods, as well as the information contained in the opinion.

Expert opinions on juveniles issued between 2013 and 2015 were prepared by psychologists from Family Diagnostic and Consultation Centres (RODK; 98.8%). The remaining 1.2% of opinions were prepared by court experts listed on a so called list of court experts kept by Chairmen of District Courts. Data shows that institutions involved in juvenile court proceedings are more likely to appoint RODK for preparation of an opinion. The reason may be the number of available psychologists, pedagogues, pediatricians, and psychiatrists specialized in child and adolescent psychology, allowing for efficient cooperation between various specializations within one center in determining research methods and diagnosis. There is no guideline unequivocally determining the reason behind the court directing the case to RODK and to an individual expert.

The diagnosis and preparation of an expert opinion was usually conducted by a team of experts. The diagnosis and expert opinion was performed by a single expert in only a few cases (N = 4).

Expert opinions regarding juveniles were most frequently prepared by a psychologist and a pedagogue (61,1%), and less frequently by a psychologist, a pedagogue, and a psychiatrist (13,8%), or by two psychologists (13.0%). 18 opinions were prepared by a psychologist and a psychiatrist (7,2%). The competency to describe the mechanisms underlying human behaviour is one that differentiates psychologists from other similar professions, and one that justifies the presence of a psychologist in the team of specialists tasked with the diagnosis providing expert opinion.

Subject of expert psychological opinion in juvenile cases. Diagnostic areas. The courts are obliged to make a formal decision to appoint an expert witness opinion and use it as evidence. Article 194 of the Code of Criminal Procedure lists necessary elements such decision must contain, particularly that the subject of the expertise needs to be clearly defined and, if necessary, accompanied by detailed questions posed to the expert. The subject of the expertise is defined as a specialist problem which requires an appointment

of an expert – an issue requiring specialist knowledge, and having significant impact on the adjudication of the case [Widła 2015].

In all 253 analysed expert opinions the family court have formulated specific tasks for the expert psychologist, detailing both the subject and the range of the requested opinion. Based on the questions posed by the court to expert psychologists in all 253 analysed cases, a team of competent judges (statistical measurement tool) has classified individual court theses into opinion object's overriding areas. A compliance indicator for competent judges (Kendall) was calculated to be $W = 0{,}798$.

Within the analysed sample 8 problem areas triggering the request for an expert opinion in juvenile cases were identified. These are: (1) determination of the level of demoralisation (and its intensification) (N=197); (2) signs of and reasons for demoralisation (N=75); (3) determination of a course of action which will prevent further demoralisation (N=182); (4) Complete diagnosis of the personality, emotional, social, and intellectual development of the juvenile (N=72); (5) state of juvenile's mental health (psychological disorders, addictions) (N=20); (6) family situation (parents' educational capabilities, family functioning deficiencies) (N=49); (7) change of the measures currently being applied (N=9); (8) employing therapeutic or medical measures towards the juvenile (N=14).

Juveniles are referred to psychologists for a full-scale testing assessment. The aim of the assessment referral is to provide expertise that will help the judge in preparing the final disposition decision. The authors examined the content areas of the expert opinions.

The content areas included personality assessment in 100% of cases, what is similar to Hecker and Steinberg results [Hecker and Steinberg 2002]. Family functioning and educational history constituted major areas in expertises. Intellectual abilities were seen less often (94%). Characteristics of demoralisation and criminal history were presented in only 69,5% of cases, even though this type of information should be included. Opinions contained information for which the judges did not ask. A crucial element in the quality of expertise is the extent to which the court referral questions are answered by the conclusions. In 83.8 % of analysed expertises all referral questions found conclusions, and 10.3% of expertises included conclusions in part, meaning that the specialists did not provide a response to the referring party. Moreover, 5.9% of expertises did not include the conclusions at all.

Assessment tools used in psychological diagnose. Choosing appropriate assessment tools for verification of research hypotheses is crucial for reaching conclusions and answering forensic referral questions. Setting aside the theoretical coherence of concepts with psychological explanation (way of thinking), the selection and number of testing methods alone is worth analyzing.

According to Heilbrun's guidelines for research methods [Heilbrun 2001], they should be appropriate for the court problem being analysed, standardised, reliable, objective, normalized, commonly available, scientifically validated, and account for individual reactions and answers provided by the subject.

The research methods employed by expert psychologists from the analysed sample will refer to types of tools (standardized or not), the number of tools employed in any single case. Due to the multi-area nature of psychological diagnosis, and the variety of employed research methods, the authors were unable to assess the coherence of employed method with the area delineated by court questions. This is most likely caused by an inconsistency within the procedure for developing expert opinion, which doesn't require the expert to determine the purposefulness of the employed research tools.

Table 1 presents diagnostic tools used in assessing juveniles, like an interview, documentation analysis, interviews and questionnaires, psychological projection techniques, neuropsychological techniques, as well as intellectual functions assessment tools. Information regarding capacities in referral questions were obtained from different sources, among others: court files review, clinical interview, behavioral observation, observation of relationship with parent/guardian, self-report measurement tools, collateral documents, and third-party information.

Table 1. Set of Psychological Assessment and Tests Ratings in Forensic Evaluations of Delinquency and Demoralisation Cases

	Delinquency Cases		Demoralisation Cases			
	N	%	N	%	Σ	%
Common Assessment techniques						
Clinical interview	77	30.4	153	60.4	230	90.8
Professional collateral interview	15	5.9	28	11.1	43	16.9
Observation	59	23.3	131	51.7	190	75.1
Relationship observation	27	10.7	58	22.9	85	33.6
Norm-referenced Tests (checklists. questionnaire)[a,b]						
EPQ-R	30	11.9	55	21.7	85	33.6
IVE	2	0.8	9	3.6	11	4.4
Me and my School	12	4.7	20	7.9	32	12.6
Who are you?	7	2.8	36	14.2	43	17
Parental Attitude Scale	13	5.1	20	7.9	33	13
NEO-FFI	7	2.8	8	3.2	15	6
SEG	3	1.2	14	5.5	17	6.7
SUI	4	1.6	11	4.4	15	6
Unstructered Personality Tests						
Sentence completion[c]	41	16.2	78	30.8	119	47
Lüscher Color Test	12	4.7	15	5.9	27	10.7
Projective Drawings[d]	6	2.4	18	7.1	24	9.5
Neuropsychology Tests						
Benton Visual-Motor Gestalt	8	3.2	19	7.5	27	10.7
Bender Visual Retention Test	9	3.6	13	5.1	22	8.7
DCS – Visual Learning and Memory Test for Neuropsychological Assessment by G. Lamberti. and S. Weidlich	3	1.2	8	3.2	11	4.4
Cognitive and Achievement Test						
WISC-R	5	1.9	18	7.1	23	9
Other Sources of Information						
Justice system records	20	7.9	32	12.7	52	20.6
Other records (school. curator)	18	7.1	47	21.3	72	28.4
Psychological and Pedagogical Counselling records	12	4.7	22	8.7	34	13.4

[a] More norm-referenced tests were used in the sample. but their quantities were minimal. For example: ACL (N = 2); BHI-12 (Basic Hope Inventory by Trzebiński. Zięba) (N = 4); CISS (N = 4); EAS Temperament Survey (N = 5); FCB-TI (Formal Characteristics of Behavior-Temperament Inventory by Strelau. Zawadzki) (N = 1); SES (N = 8); STAI/STAIC (N = 11).

[b] The full names of the tools in alphabetical order by acronym are as follows:
EPQ-R (Eysenck Personality Questionnaire Revised); IVE (Eysenck Impulsiveness

Questionnaire); NEO-FFI (NEO-Five Factor Inventory); SEG (Anger Expression Scale by Ogińska-Bulik. Juczyński); SUI (Interpersonal Behavior Scale by Stanik).

[c] There was used only Incomplete Sentences Blank by J. B. Rotter.

[d] The Tree-Drawing Test (N = 6); Family-Drawing Test (N = 11); The Draw-A-Person-in-the-Rain Test (DAP-R) (N = 7).

In Poland there are currently no tools which could be classified as Forensic Assessment Instruments (FAIs), and which could be used in facilitating court proceedings.[5] With regards to the here presented diagnostic methods (see Table 1), the most fundamental research methods are used most commonly: observation (75.1%), observation of relations between subjects being studied, i.e. the juvenile and his/her parent or guardian (33.6%), interview of the juvenile (32%) and persons who accompanies the juvenile during the study (20.3%) – most often it is one of the parents or a legal guardian. These results are not surprising since the specificity of the work performed by a psychologist is founded on the observation of a person, and on conducting guided interviews directed at the object of the diagnosis. What is surprising is the fact that not all of the 253 analysed expert opinions featured the above diagnostic methods, which may point to a lack of precision on part of the psychologist while formulating a written opinion. Saying that psychologist's interaction with the juvenile was limited to the latter filling in questionnaires and the former analyzing case files would be difficult to defend.

We have noticed a significant number (N = 22) of different questionnaires primarily used to rate different personality traits, featuring a diverse range of variables being measured. Questionnaires which were used most frequently are: (1) EPQ-R (33.6%) used to verify basic personality traits (neuroticism, extraversion-introversion etc.); (2) Who are you? [pl. *Jaki jesteś?*] (17%) measuring school anxiety and learning motivation (Me and my school, 12,6%); or (3) Crockett's Role Category Questionnaire [pl. *KKR*] evaluating family relations. The frequency with which the above tools were used is compatible with questions being posed by courts, which enquired about a juvenile's personality, learning motivations, and reasons for demoralisation (which often stem from the family environment), as well as what optimal measures should be taken, including the changing of family environment. Among other diagnostic tools there were also psychological projection techniques, mainly the Sentence Completion Test (47%), and select tools for intellectual and cognitive functions assessment (WISC-R, Benton, Bender and DUM, respectively). A particular source of information are case files (20.6%), Psychological and Pedagogical Counselling Offices' opinion

[5] Some researchers have adapted tools used in legal proceedings from English to Polish (J.K. Gierowski – SAVRY; M. Rode – Criminal thinking styles by G. Walters; D. Rode – The Two Houses Technique – 2 HT by W. Szyryński). These adaptations however do not meet all of the criteria of a standardised tool.

(13.4%), and other documents (28.5%) (such as curatorial files and opinions, opinions from juvenile's school, curatorial interviews in juvenile's area of residence, Police reports, juvenile's medical files). Case files analysis conducted in the present study shows that this source of information is not frequently used. It is assumed that expert psychologists do not specify the review of case files in the contents of their opinion, subsuming case files to a broader category of documentation analysis. With regards to research tools requiring a direct involvement of the juvenile, 74.3% of analysed cases featured more than one such diagnostic tool.

The most common involved using two assessment tools (23.7%, $N = 60$, $D = 2$). Surprisingly, in 18 cases (7.1%), no tool requiring a direct involvement of the juvenile was used.

CONCLUSION

According to the JA, an expert opinion may be requested by the court in case when a comprehensive diagnosis of the juvenile's personality is required. This imprecise and enigmatic legal premise is difficult to interpret for both judges and experts. It does not however, prompt judges to formulate specific requests. A closer look at the sample suggests that courts express low expectations toward expert opinions. In almost every case the court did formulate questions for the expert psychologist (in the thesis) however, in one fourth of all analysed cases the court did not indicate in what form (written or oral) the expert is required to answer court questions, and in over 40% of cases the court did not provide the expert with a deadline by which the expert was to submit his/or her opinion. No experts were summoned to be interviewed at trial. In only two cases the court required a complementary opinion from an expert witness. In no case did the court require an opinion from a different expert psychologist. When an expert testimony is required, the court simply has limited abilities to evaluate expert opinions in juvenile cases, because the psychologist has expert knowledge which the court is lacking. In other words, an expert opinion is necessary when the court is dealing with a problem that, to be solved, requires psychological knowledge. When eventually reaching a final judgement, the court is obliged to assess all evidence. This includes an expert opinion, which is based on psychological knowledge that the court lacks. Therefore, in many instances the court limits the assessment to formal aspects of the opinion, rather than its merits. That does not mean that the court is powerless when it comes to opinion assessment when the opinion rises doubts. The court is allowed to interview the expert, to request a complementary opinion or even refer to another expert. Why courts in the present sample did not refer to those measures? It can be argued, that analysed opinions were transparent, comprehensive and

fully met court expectations. This argument however seems premature, given the results of the present research and other research on expert opinions in juvenile cases [Błażek and Pastwa-Wojciechowska 2009, 157-68; Ostaszewski 2010]. On the one hand, it seems more probable that courts refrain from an in-depth analysis of expert opinions due to the fact that judges feel incompetent to challenge expert opinions. On the other hand, the courts lack standards or guidelines according to which they should assess an expert opinion – no such principles are available.

This section describes a set of principles for psychological expertising. This principles hold considerable promise for improving the quality of forensic practice. According to Heilbrun (2001) criteria for forensic mental heath assessment are organized in four steps: preparation, data collection, data interpretation and communication. Judges are not allowed to assist during expertise, therefore only the final opinion is them available. The principles for communication seem to be the most important.

Principle no 1. Professional education

Sufficient professional training, boundaries of psychologists competencies, and factual bases are important factors for forensic assessment and for the quality of psychological expertise (i.e. skills, experience, knowledge) [Heilbrun, DeMatteo, and Marczyk 2004, 31]. As was pointed out in the Introduction, in Poland there are no universal criteria or determinants of relevance and completeness for research procedures employed by a psychologist.

Research actions taken by the expert are determined by the referral questions. In the analysed opinions the evidentiary content was formulated at a general level and in principle exhaust the expectations the court may have of the expert. The main object of the study done by an expert psychologist is the determination of the level of demoralisation of a juvenile, and the formulation of recommendations regarding corrective and/or educational measures to be enforced. Occasionally the court may express certain aspects in detail, referring to the specificity of the situation. For instance: "determine if a juvenile shows signs of demoralisation through missing school and self-harm, and if so, what are the causes, and when family situation, pedagogical opinion, and environmental enquiry is considered is there a need for enforcing an educational measure (what measure)" or "in order to determine the level of intellectual and emotional level of development, the level of demoralisation of the juvenile, his personality traits, if he is addicted to video games, what is his parents position on juvenile's behavior, and to recommend appropriate educational measures." Results show a strict connection between the JA, court questions to experts, and its determination of the object and direction of the study to be performed by the expert. Neither the

Act nor court questions differentiate between juvenile cases (demoralisation, delinquency) in terms of the referral content and the object of the diagnosis. In both types of cases the main objective of the study was to determine juvenile's level of demoralisation (77.8%), and to provide recommendations further work with the juvenile, including the enforcement of educational or corrective measures (71.9%). Other problem areas found in court questions, i.e. signs and reasons for demoralisation, diagnosis of juvenile's personality and family situation, while being important factor in determining the level of demoralisation, could only be found in one third of the analysed court referrals. Although much like in other justice systems [Bonnie and Grisso 2000, 73] rehabilitation, intervention, and treatment are priorities in the Polish justice system, the questions about therapeutic or medical measures are seldom found among court referrals. Juvenile proceedings should always be guided by the welfare of the juvenile, aiming at achieving positive changes in his/her personality and behavior. In this respect, therapeutic measures (psychological, pedagogical) may help a juvenile understand himself/herself. Such practice is more in line with other countries, where the fundamental areas of juvenile's diagnosis cover the evaluation of her psychosocial maturity, stage of development, the diagnosis of risk factors for violence and recidivism, the nature, extent and character of antisocial behaviours and general dispositions, i.e. emotional, behavioural, environmental problems [Otto and Borum 2003].

Principle no 2. Assessing legally relevant behavior

Confronted by such referral questions, experts most often formulated a general research problem (like the level of demoralisation, recommended course of action to avoid further demoralisation) which was studied through an analysis of events or phenomena specified in questions regarding, for example: personality factors, intellectual and emotional development (psychological predispositions), as well as specific deficits in educational attitudes of parents/guardians, educational errors or situational and environmental conditions. The starting point for formulating an expert opinion is answering whether psychological knowledge allows for diagnosing the problem defined in the court referral and reformulating it into psychological terms. The object of the study in juvenile demoralisation cases – in psychological meaning – is their motivation – why do they behave in a certain way, what are the influencing factors, and how to counteract the demoralisation. Diagnosing motivation and its conditioning factors in juveniles is difficult because of (a) a lack of conceptualization of psychological processes and mechanisms leading to demoralisation which would meet the criteria for a coherent model of variables, accounting for their functional correlations and covering all meanings commonly associated with the concept, (b) a lack of

methodological assumptions, of an approach which would correlate with the variety of research strategies applied in juvenile motivation studies, (c) an uncooperative attitude of juveniles, attempts to manipulate the psychologist or facts, (d) a lack of unanimous classification, indetermination of research methods and techniques, and a lack of universally accepted theoretical foundations. Due to these issues, the expert psychologist "walks on a wire" between the need for method standardization on the one side (characterized by the quantitative approach, aiming at increasing the reliability of research, and so arriving at a certain repetitiveness of results), and the need to adjust the tools to the subject (characterized by the qualitative approach, looking to improving the relevance of research, and so arriving at a more accurate characteristic of the subject). When determining the course of the diagnosis, the psychologist alone decides on the assessment tools. Given the qualitative analyses of court referral questions, we can see a variety of tools being selected with regards to the object of the study. This shows a significant freedom in choosing research methods, despite the similarity in the object of the study (court referral questions). This seems to be justified by the individuality and diversity of subjects (juveniles), while at the same time there is in the Polish research practice a lack of clear requirements for determining the correctness of application of a given research tool given the court referral being analysed. The 8 problem areas in juvenile cases (regardless of case category) specified by competent judges could be the starting point for developing a general set of research tools relevant to a specific problem area. This could be helpful not only for the experts but also for judges who need to determine the value of the expert opinion.

Principle no 3. Using case-specific (idiographic assessing), nomothetic evidences and scientific reasoning in assessing clinical and functional and causal mechanisms.

In instances where there is a need to extend the diagnosis due to the object and the extent of the court referral questions, a presentation of correctness of application of other research methods would be justified. The variety of research tools used by psychologists identified in this study is similar to the results of Neal and Grisso [Neal and Grisso 2014]. This is not detrimental to the diagnoses, but rather points to specialists employing individual approaches and choosing the most appropriate tool for hypotheses verification. Conversely, a lack of normalized approach may have an impact on evaluation, causing inconsistencies in results. This elasticity in choosing research methods is troublesome also for the decision makers in the proceedings. The age of the juvenile is a significant filtering factor in the choice of research tools. For juveniles younger than 10 years, the psychologist is obliged to base their decisions on observation, and an interview with a

juvenile, and/or her parent/guardian. In some such cases projection technics are also allowed, however due to a lack of standardization and normalization of Polish versions of these techniques their results should not be admissible as part of an expert psychological opinion in court. It is worth pointing out that some tools were used rarely, in only a few cases, which may point to the specificity of the case being evaluated It is probable that the referral questions determined the scope of the juvenile's diagnosis, which extended beyond the standard evaluation of the level of demoralisation and recommended measures, and was conditioned by individual characteristics of the subject. It is reassuring to note that most of the employed research tools, apart from projection techniques, met the psychometric properties.

Principle no 4. Communication

The opinion should attributes all information about juvenile delinquents (their intellectual, cognitive and social functioning) by specific sources. It helps to keep consistency and arise the credibility the given information. The opinion should document the basis for an expert's testimony. According to Heilbrun's suggestions, the opinion should be divided into sections according to diagnostic procedure and model. It is a god practice the opinion includes sections on referral information (nature of evaluation, information concerning the juvenile delinquents, by whom it was ordered), procedures (time and date of evaluation, tests used, procedure used), sources of information, relevant history (it contains information describing areas important to the evaluation. In juvenile cases, the important area of evaluation are following (for example): intellectual and moral functioning, family problems, family experiences, current clinical functioning concerning mood, appearance (adequacy), behavior during evaluation etc., relevant functional legal capacities (e.g. level of demoralization), and conclusions.

The research results presented in this paper make it possible to recognize forensic psychological practice in the context of juvenile court proceedings in Poland, and are valuable in offering a promising outline of possible standardized guidelines for expert psychologists as well as judges. the results underscore the important relationship between courts and psychologists in Poland. Forensic psychologists contribute to better understanding of juvenile minors'/delinquents' behavior, which helps judges make appropriate legal decisions. Therefore, developing standards in forensic psychological assessments and offering guidance may contribute to the positive development of Polish expert opinion practice.

REFERENCES

Błażek, Magdalena, and Beata Pastwa-Wojciechowska. 2009. "Opiniowanie sądowo-psychologiczne w sprawach nieletnich: błędy proceduralne i merytoryczne." In *Dziecko jako ofiara przemocy*, edited by Bożena Gulla, and Małgorzata Wysocka-Pleczyk, 157-68. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Bonnie, Richard J., and Thomas Grisso. 2000. "Adjudicative competence and youthful offenders." In *Youth on trial: A developmental perspective on juvenile justice*, edited by Thomas Grisso, and Robert G. Schwartz, 73-103. Chicago, IL, US: University of Chicago Press.

Gudjonsson, Gisli H. 1995. "Psychological evidence in court." *European Journal of Psychological Assessment* 11, no. 1:59-64.

Hecker. Thomas, and Laurence Steinberg. 2002. "Psychological Evaluation at Juvenile Court Disposition." *Professional Psychology Research and Practice*33, no. 3:300-306.

Heilbrun, Kirk. 2001. *Principles of forensic mental health assessment*. New York, N.Y.: Kluwer Academic.

Heilbrun, Kirk. 2003. "Principles of forensic mental health assessment: Implications for the forensic assessment of sexual offenders." *Annals of New York Academy of Sciences* 989:167-84.

Heilbrun, Kirk, David DeMatteo, and Geoffrey Marczyk. 2004. "Pragmatic psychology, forensic metal health assessment, and the case of Thomas Johnson: Pllying principles to promote quality." *Psychology, Public Policy, and Law* 10:31-70.

Heilbrun, Kirk, Thomas Grisso, and Alan M. Goldstein. 2009. *The foundations of forensic mental health assessment*. New York: Oxford University Press.

Heilbrun, Kirk, and Stephanie Brooks. 2010. "Forensic psychology and forensic science: A proposed agenda for the next decade." *Psychology, Public Policy, and Law* 16:219-53.

Neal, Tess, and Thomas Grisso. 2014. "Assessment Practices and Expert Judgment Methods in Forensic Psychology and Psychiatry: An International Snapshot." *Criminal Justice and Behavior* 41:1406-421.

Ostaszewski, Paweł. 2010. *Opinie diagnostyczne w sprawach nieletnich*. Warszawa: IWS.

Otto, Randy, and Randy Borum. 2004. "Evaluation of youth in the juvenile justice system." In *Handbook of forensic psychology: Resource for mental health and legal professionals*, edited by William T. O'Donohue, and Eric R. Levensky, 873-95. Elsevier Science.

Sparta, Steven. N., and Gerald P. Koocher. 2006. *Forensic Mental Health Assessment of Children and Adolescents.* Oxford University Press.

Widła, Tadeusz. 2015. "Jeszcze raz o ekspertyzach pozasądowych." *Prokuratura i Prawo* 7-8:36-43.

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SELECTED MEDICAL AND LEGAL PROBLEMS OF A SURGEON'S ASSISTANT AS A NEW SPECIALITY IN THE POLISH HEALTHCARE SYSTEM

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Abstract. On 26 November 2021, a new speciality concerning surgical physician assistance (Polish: *chirurgiczna asysta lekarza*) was introduced in a regulation of the Polish Minister of Health. The term 'surgeon's assistant' refers to an independent healthcare professional authorised to perform certain medical and surgical procedures under the supervision of a specialist surgeon. Undoubtedly, the successful introduction of this new speciality depends primarily on the appropriate training process. Then, it will be necessary to change the internal procedures existing at medical facilities, to ensure that the work of surgeon's assistants is organised properly and enables their effective co-operation with other qualified practitioners. The introduction of a new speciality is a great challenge for hospitals, surgeons and society in general. It requires taking many additional legal and organisational measures by hospitals as well as at the national level.

Keywords: Polish healthcare system; physician assistant; surgeon's assistant; supervision of a specialist surgeon

INTRODUCTION

On 26 November 2021, the Regulation of the Minister of Health of 10 November 2021[1] amending the Regulation on Specialities in Fields Related to Healthcare, came into force.[2] Pursuant to this amendment, a new speciality concerning surgical physician's assistance was introduced. This newly introduced area of speciality applicable to health professionals provoked heated discussion and strong opposition from parts of the medical

[1] Journal of Laws of 2021, item 2131 (the "Amended Regulation").
[2] Regulation of the Minister of Heath on Specialities in Fields Related to Healthcare of 13 June 2017, Journal of Laws of 2022, item 342 as amended (the "Speciality Regulation").

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community.[3] It was pointed out that the introduction of this speciality is not the right direction for changes serving as a solution to the growing problem of a shortage of surgeons.[4] However, according to hospital representatives, the above change was necessary due to the growing problem of too few specialist doctors, and that the Polish Ministry of Health should have gone further and created the profession of physician assistant.[5] In addition, during the discussion, the issue of the surgeon's supervision over an assistant who is not a doctor was raised. According to the medical community, patients should be operated on by surgeons, with any assistance being provided by resident physicians. The Ministry of Health referred to experience from other countries as justification for the new speciality. In addition, the Ministry of Health argued that the introduction of a new speciality is intended to enrich the healthcare system with specialist medical staff, which will help relieve the burden on surgeons.[6]

As part of this study, the authors attempt to analyse some medical and legal problems related to the introduction of surgical assistance to a physician.

1. MEDICAL ASPECTS OF SURGICAL ASSISTANCE TO A MEDICAL EXPERT

The Supreme Medical Council reports that [as of 1 June 2022] there are 9,535 general surgeons in Poland, of which 8,910 practiced. About 50% of surgeons are actively operating. The most worrying thing is that the average age of a surgeon is 60, and 25% of them are over retirement age.[7] According to the data provided by Eurostat, in 2018, in Poland there were 54.2 surgeons per 100,000 inhabitants; for comparison, in Germany that number is 119.[8] The average time needed to educate a fully independent surgeon is about 10-12 years (after six years of speciality training in general surgery,

[3] See https://nil.org.pl/aktualnosci/5777-nowa-specjalizacja-chirurgiczna-asysta-lekarza [accessed: 01.10.2022].

[4] See https://pulsmedycyny.pl/chirurgiczna-asysta-lekarza-recepta-na-brak-chirurgow-lekarze-sa-innego-zdania-1123732 [accessed: 01.10.2022].

[5] See https://www.prawo.pl/zdrowie/asystent-lekarza-dlaczego-potrzebuja-ich-chirurdzy-kiedy-i-gdzie,509731.html [accessed: 01.10.2022].

[6] See https://www.prawo.pl/zdrowie/specjalizacja-chirurgiczna-asysta-lekarza,515317.html [accessed: 01.10.2022].

[7] The Supreme Medical Council, *Summary of doctors and dentists by field and degree of specialization*, 2019, https://nil.org.pl/uploaded_files/1574855455_za-pazdziernik-2019-zestawienie-nr-04-1.pdf [accessed: 01.10.2022].

[8] European Commission. Eurostat, 2018, https://ec.europa.eu/eurostat/statistics-explained/images/e/e3/Physicians%2C_by_speciality%2C_2018_Health20.png#xd_co_f=NDg4ZmVmMTMtZjdhNi00YTczLWJjNTktMzkwMDkwYTEzMDE0~ [accessed: 01.10.2022].

a surgeon becomes independent after about four to six years of practice). The Ministry of Heath has already noticed these disturbing data and has recognised general surgery as a priority speciality. In the spring session of 2022, out of 2,000 resident places, 97 places were allocated for general surgery, and only 35 doctors chose this speciality (there were no applicants for almost two-thirds of the vacancies). In 2015, the Supreme Medical Council reported that, the number of surgeons in Poland would decrease by 15% by 2025 and decrease by 30% by 2035.[9]

An aging society, an increasing number of highly specialised operations, a constantly decreasing number of surgeons and increasing work costs mean that the Polish healthcare system is facing an organisational problem, the consequences of which will undoubtedly affect patients. It has been known for several years that there is a growing shortage of medical staff in Poland, especially surgeons, making it necessary to take effective action for the benefit of future patients. In order to maintain the standard, efficiency and cost-effectiveness of treatments, the Ministry of Health has introduced a new medical speciality – a surgeon's assistant. This has existed as a medical profession in the United States of America since 1965 (it is modelled on the existing Physician Assistant (PA) role) and was introduced in response to a shortage of doctors [Perry, Detmer, and Redmond 1981, 132-37].

In the USA, the term 'PA' is defined as an independent healthcare professional authorised to perform certain medical and surgical procedures under the supervision of a specialist physician. The responsibilities of a surgeon's assistant include a physical and subjective examination of a patient, conducting diagnostics and therapy, as well as active participation in surgical operations. It should be emphasised that surgeon's assistants must work under the supervision and responsibility of a surgeon, and that their duties and rights are strictly regulated by national law [Hooker and Cawley 2021, 498-504].

The success of the profession of surgeon's assistant in the USA meant that Western European countries began to introduce the US model, seeing it as an opportunity to improve their own healthcare systems, as well as to fill the gap, i.e. a lack of surgeons. This process started in 2001 in the Netherlands [van den Brink, Driesschen, and Elfering 2021], in 2003 in Canada, in 2005 in Germany, in 2006 in Scotland, in Argentina, Brazil and Chile in 2007 and in 2010 in the UK [Hains, Strand, and Turner 2017]. The introduction of the surgeon's assistant position in these countries has relieved surgeons from some of the burden of their duties, and the achieved financial results (effective cost reduction [van den Brink, Hooker, van Vught, et al. 2021]) have

[9] Supreme Medical Council, *Demography 2015*, https://nil.org.pl/uploaded_images/1575630138_zalacznik-1-do-demografia-2015-v-0704.pdf [accessed: 01.10.2022].

resulted in estimates that demand for this type of speciality will increase by 30% in the coming years [Hooker and Cawley 2021, 498-504].

Teamwork is especially important in growth-oriented fields such as medicine, and surgery in particular. In Article 6(1) of the Act on Patients' Rights and the Patients' Rights Ombudsman of 6 November 2008,[10] it is stated: "The patient has the right to health services corresponding to the requirements of current medical knowledge," and the doctor providing the medical service is required to exercise due diligence.[11] Article 8 of the Code of Medical Ethics states: "The physician should perform diagnostic, therapeutic and preventive activities with exactitude and appropriate allocation of time." Hence, if the doctor does not have time or skills, they should not perform a given procedure. "If any aspect of caring for the patient is beyond the capacity of a physician, the physician must consult with or refer the patient to another appropriately qualified physician or health professional who has the necessary capacity. This does not apply to emergencies and serious conditions, where a delay may threaten the patient's health or life."[12] Taking into account the regulations cited above, it should be stated that the introduction of the surgeon's assistant speciality in the Polish situation will require many organisational and legal changes to prevent the sharing and overlapping of powers and responsibilities.

Despite many doubts, there is certainly a "safe place" for a surgeon's assistant in large surgical centres where complex, highly specialised operations are performed involving a multi-person team, where three or four individuals stand at the operating table (the surgeon and two or three assistants). The position of surgeon's assistant should be first introduced in large surgical centres where there is the possibility of direct supervision, as well as the conditions and experience necessary to carry out training in this field. In addition, centralisation and the narrow speciality of surgical teams in a highly specialised centre is associated with better treatment outcomes. Analyses show that performing surgery in a specialist centre is associated with a better prognosis and fewer complications [Wroński 2007, 305-11].

In surgical treatments, good results depend on cautious patient qualification for the procedure, proper preoperative preparation and, subsequently, superior technical performance and proper guidance of the patient in the post-operative period. A mistake may occur at any of these stages, so compliance with the appropriate professional standards to avoid complications, is mandatory. Situations where only the surgeon and a surgeon's assistant are present at the operating theatre should be avoided. In an emergency

[10] Journal of Laws of 2020, item 849 as amended (the "Act on Patients' Rights").
[11] Article 8 of the Act on Patients' Rights.
[12] Article 10(2) of the Code of Medical Ethics.

situation, e.g. when the surgeon faints, there would be no other person capable of continuing the operation on their own.

2. SPECIALISED PHYSICIAN'S SUPERVISION OVER SURGEON'S ASSISTANTS

According to the explanatory memorandum to the draft Amended Regulation, the introduced speciality in the field of surgical physician assistance would enable a nurse or paramedic who has obtained qualifications after completing a speciality training programme to relieve a doctor (in particular a general surgeon) in pre-operative procedures, as well as at the operating table and after surgical procedures. A surgeon's assistant, after completing speciality training and obtaining the title of a specialist, would therefore be qualified to participate in the diagnostic, therapeutic and surgical processes as an active assistant in surgical procedures.[13] When assisting, a surgeon's assistant with speciality qualifications would be able to participate in preparing the patient for surgery, perform basic diagnostic procedures according to the indications for emergency surgical treatment and procedures required for minor surgical interventions on an outpatient basis, as well as manage patients after surgery by giving them appropriate basic care.[14] A detailed scope of responsibilities of a surgeon's assistant will be defined in the internal procedures of a healthcare institution, as neither the Speciality Regulation nor the Speciality Programme define in detail their professional competencies. Due to the nature of this speciality, it should be assumed that, as a rule, a surgeon's assistant performs procedures independently. "*Independence, in fact, implies full responsibility for actions or omissions*."[15]

Supervision over the performance of assisted surgical procedures is to be performed by a specialist physician.[16] Neither the wording of the Speciality Regulation nor the laws constituting the basis of the healthcare system explicitly include the duty of supervision or control of the physician over individuals assisting at the operating table or performing pre- or post-operative procedures. However, the duty of supervision arises from the function performed by the specialist physician during the surgery, i.e. the primary surgeon or the leader of the operating room team. The surgeon or leader of the operating room team can be compared to the captain of a ship who takes responsibility for the entire operation [Malicki and Malicka-Ochtera

[13] Speciality training programme for the surgeon's assistant profession, Warsaw 2022, 3, approved by the Minister of Health on 7 February 2022, the "Speciality Programme").

[14] Ibid.

[15] See https://www.prawo.pl/zdrowie/blad-w-sztuce-medycznej-a-odpowiedzialnosc-odszkodowawcza,237156.html [accessed: 01.10.2022].

[16] The Speciality Programme, 3.

2017, 63; Siemaszko 2020, 59]. Internal procedures in healthcare institutions setting out the rules governing operations performed by a team of individuals should specify who is responsible, and the extent of their supervision or control over the actions of other team members. Therefore, it is necessary to carry out a legal analysis of the possible liability of the specialist physician for a medical error made by their assistant.

In doctrine and jurisprudence, there are a number of definitions of "medical error" that are similar in meaning [Zieliński 2016, 181-94; Nawrocki 2018, 206-209; Wolińska 2013, 19-35]. The purpose of this publication is not to analyse this concept, but to establish the scope of the assistant's possible liability – alone or together with the supervising specialist physician – in the event of such an error. It should be emphasised that it is possible to distinguish between civil, criminal and professional liability for medical malpractice caused by an error. Based on well-established case law, medical malpractice is an act or omission of a doctor during the diagnosis or treatment of a patient that deviates from accepted standards of practice in medicine to the extent available to the doctor. A doctor's negligence with regard to the duty to give care to the patient and to organise the safety of hygiene and care of the patient does not constitute medical malpractice.[17] Thus, the determination of medical malpractice depends on the answer to the question of whether, in the specific situation, and taking into account all of the circumstances existing at the time of the procedure, and in particular the information available to the doctor at the time, the doctor's conduct complied with the requirements of current medical knowledge and medicine, as well as generally accepted medical practice.[18]

A medical error by medical staff assisting the team leader, consisting of a breach of procedures and duties in the procedures performed, should be approached in an appropriate manner [Marczewska and Kopański 2012, 15]. Obviously, the role of the specialist physician still remains predominant in the process of treating the patient, but the correctness of the treatment depends on the cooperation of the physician with the medical staff, i.e. other physicians, anaesthesiologists [Wąsik and Sygit 2017, 33], nurses, paramedics, laboratory diagnosticians and surgeon's assistants. Consequently, any decisions made by the attending physician are a result of cooperation/collaboration of all those involved in the surgery or the diagnostic and therapeutic process. In the case of irregularities at the stage of diagnosing or treating a patient, it is therefore not possible to speak only of "medical malpractice" or "medical error" – as this would imply the attribution of guilt

[17] Judgment of the Supreme Court of 1 April 1955, ref. no. IV CR 39/54, OSNCK 1957, No. 1, item 7.

[18] Judgment of the Supreme Court of 8 September 1973, ref. no. I KR 116/72, OSNKW 1974 No. 2 item 26.

and legal responsibility for the consequences of a medical error committed or a breach of the standards of ethics exclusively to the attending physician [Puch, Nowak-Jaroszyk, and Swora-Cwynar 2020, 616]. Increasingly, the doctrine and jurisprudence is rightly moving in the direction of individualising the responsibility of each member of the medical team for their act or omission and the fault on their part [Siemaszko 2020, 60].

Surgeries are carried out by a surgeon – a licensed physician with a surgical speciality. In very few cases, a surgeon is assisted only by a nurse, and more often one or more other licensed physicians are involved in a surgical operation, i.e. physicians as assistants at surgery. There is no doubt that performing surgery carries an enormous risk. However, in addition to the standard situations, it may happen that the patent suffers much more serious and unpredictable injury as a result of the surgery, e.g. by a retained foreign body left in the operation site.

The correct performance of the operation is not possible without the participation of other individuals, in addition to the specialist doctor, whose involvement is related to the division of responsibilities among the individuals with different specialities. The division of responsibilities is based on specific medical procedures developed in accordance with current medical knowledge. Unfortunately, common law does not define the concept of an "operating team" [Siemaszko 2020, 56] nor the role or scope of supervision of the doctor who is the leader of the team. Thus, it should be assumed that the legislator leaves these issues to be regulated in the internal procedures of healthcare institutions. Such internal procedures should enhance the safety of both the patient and those people participating in the operating team. Furthermore, if a medical error occurs, they should facilitate the identification of the person or people to blame for such an adverse medical event. This provides the medical team leader (surgeon) with certain guarantees that they will not be held professionally, criminally or civilly liable for every occurrence of a medical error. Naturally, this does not exclude their liability in the event of a failure to exercise due diligence in supervising the work of the entire team. In such a situation, there should be not a medical malpractice case, but negligence in the performance of a specific function by the specialist doctor as team leader.[19]

At this point, it should be noted that Polish legislation, despite the introduction of supervision into the terminological grid of the law, has not defined this concept in a sufficiently clear manner. The term "supervision" also appears in many laws constituting the basis of the healthcare system, but without a clear definition. Supervision is a broader concept than control.

[19] Judgment of the Supreme Court of 17 February 1967 ref. no. I CR 435/66, OSNC 1967, No. 10, item 177.

Supervision always involves control activities, whereas the exercise of control is not always, or rather rarely, combined with the right to use supervisory measures. In practice, control is limited to comparing the actual state of affairs with the required state, i.e. the state defined by the legal framework, technical and economic standards or requirements arising from medical knowledge. In practice, many terms are used in this respect, i.e. words that are close to each other or used interchangeably, i.e. control, supervision. These are concepts that are close to each other, but there are important differences between them [Borodo 1997, 215-16]. Supervision in administrative law means "the examination of the activities of a given administrative entity (control) combined with the possibility of assisting, influencing and also modifying those activities, carried out by an organisational or functional superior body in order to ensure the lawfulness of those activities and, in specific cases, compliance with certain specific values (also defined in law)" [Boć 2002, 236]. The Constitutional Tribunal understands supervision as "specific procedures giving the relevant state bodies, endowed with the relevant powers, the right to ascertain the facts as well as to correct the activities of the supervised body."[20] Thus, the supervision of a specialist doctor over an assistant would prevent the assistant from performing medical procedures independently.

Extensive case law and doctrinal views have been expressed regarding the supervision over a resident doctor. The rules of residency and the legal status of a resident doctor are set out in the Act on the Professions of Physician and Dentist of 5 December 1996[21] and the Regulation of the Minister of Health on the Specialities of Physicians and Dentists of 31 August 2020 issued on its basis.[22] A physician undergoes medical speciality training within the framework of a residency or in other forms indicated in the Act on the Professions of Physician and Dentist. Pursuant to Article 16h(1) of that act, a resident doctor undergoes speciality training on the basis of an employment contract concluded with an entity providing speciality training for a period specified in the speciality programme. It should be pointed out that the Act on the Professions of Physician and Dentist does not restrict a resident from practising medicine. Thus, residents can – like other doctors – provide healthcare services in the forms permitted by law. However, a resident doctor undergoing speciality training "remains under the supervision of the head of speciality training." The supervision of the head of the speciality training over the resident physician's performance of diagnostic,

[20] See the grounds for the resolution of the Constitutional Tribunal of 5 October 1994, ref. no. W 1/94, OSS 1994, No. 4-5, item 157.

[21] Journal of Laws of 2021, item 790 as amended (the "Act on the Professions of Physician and Dentist").

[22] Journal of Laws of 2020, item 1566 (the "Speciality Regulation").

therapeutic and rehabilitation procedures is obligatory until the physician has acquired the ability to perform the supervised procedures independently. Within the scope of supervision, the head of the speciality training should, among other things: draw up a detailed plan of the speciality training; consult and assess the diagnostic tests proposed and performed by the doctor and offer an interpretation, diagnosis of the disease, forms of treatment, prognosis and recommendations for the patient; supervise the doctor's performance of diagnostic, treatment and rehabilitation procedures included in the speciality programme; and participate in the doctor's surgical procedure or the applied method of treatment or diagnosis posing an increased risk for the patient, until the doctor acquires the ability to perform or apply them independently.[23] It is up to the head of the speciality training to assess the resident's ability to perform the procedures assigned to them independently. However, during the period when the resident doctor does not yet have the capacity to perform independently, the head of the speciality training or the doctor in charge of the training is liable for the procedures performed under their supervision, unless the resident doctor has clearly contributed to the injury to the patient by not exercising due diligence in performing the entrusted task.[24] Consequently, a resident doctor may be found to be in breach of Article 160(3) in conjunction with Article 160(2) of the Criminal Code of 6 June 1997[25] regardless of the responsibility of the supervising doctor.

As in the case of a resident doctor, the qualification to practice surgical assistance requires the completion of a speciality in accordance with the Speciality Programme, followed by the successful completion of the National Speciality Examination in the field of healthcare.[26] During the course of speciality training in surgical assistance, the applicant for speciality training is supervised by the head of speciality training.[27] The scope of supervision includes, among other things, establishing detailed conditions for the conduct of speciality training in such a way that the applicant acquires the theoretical knowledge and practical skills specified in the speciality training programme.[28] It is also up to the head of the speciality training to assess the assistant's ability to perform the assigned procedures independently. Thus, after completing the speciality training and passing the examination, the assistant becomes independent in performing certain medical procedures.

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[23] See Article 16m(7) of the Act on the Professions of Physician and Dentist.

[24] See https://www.prawo.pl/zdrowie/jak-samodzielny-jest-lekarz-rezydent-jaka-odpowiedzialnosci,262120.html [accessed: 01.10.2022].

[25] Journal of Laws of 2022, item 1138.

[26] See Articles 4, 8, 10, 11, 12, 29, 33, 37 and 43 of the Act on the Award of the Title of Specialist in Fields Related to Healthcare of 24 February 2017, Journal of Laws of 2021, item 1297 (the "Specialities Act").

[27] Ibid., Article 19(1).

[28] Ibid., Article 19(6).

CONCLUSIONS

Developments in medicine are making operations more and more complicated, and their performance requires the cooperation of multi-person operating teams consisting not only of doctors of various specialties, but also of highly specialised support staff. This may result in "limiting" the duties of a particular doctor and excluding supervision over other people in the team, e.g. a surgeon's assistant.

Considering the analysis above, the legal status of a surgeon's assistant should be assessed individually due to the scope of this speciality and considerable independence in performing procedures in the diagnostic and therapeutic process. Therefore, it cannot be included by analogy with other people who are support staff present at the operating table, e.g. nurses, instrument attendants, etc. The role of the person providing surgical assistance to the physician will be similar to that of the anaesthesiologist, who is also a staff member of the operating theatre. However, it should be emphasised that, when starting to perform professional procedures, the assistant should have the appropriate knowledge and skills. These, in turn, are acquired through a speciality training.

The success of the new speciality will depend primarily on the appropriate training process. It will be necessary to introduce appropriate changes to the internal procedures of medical facilities in order to ensure the proper organisation of the assistants' work and their cooperation with specialist doctors. Creating the right work organisation will reduce the risk of medical errors resulting from organisational errors. Supervision from a specialist doctor over an assistant should focus on those of their procedures that go beyond their skills or competence as an independent member of the medical team [Rejman 1983, 55-71]. The development of medical science and the narrowing the duties of a specialist surgeon to solving a specific medical problem excludes the possibility of supervision over an assistant who is part of the team. Constructing the possibility of liability on the basis of supervision over team members who are also specialists in their field has been aptly criticised in the doctrine [Malicki and Malicka-Ochtera 2017, 9]. The doctrine rightly emphasises that as the team grows in size, the instrumentation is more extensive, the procedure is more complicated and team members, e.g. assistants, have to be specialists in their field. In that case, the role of the manager comes down to making fundamental, key decisions, like whether to operate and what method to use [Siemaszko 2020, 60].

The introduction of a new surgeon's assistant speciality forces medical facilities to adopt appropriate work organisation and treatment procedures with the participation of assistants in such a way that ensures no harm is done to patients. This obligation results from the general rules of hospital

operation and is specified in a number of rules on conducting medical activity, such as hospital services, i.e. the fault in the organization.

To sum up, the introduction of a new speciality – surgeon's assistant – is a great challenge for hospitals, surgeons and society as a whole. It requires many additional legal and organisational solutions at the hospital level as well as at the central level.

REFERENCES

Boć, Jan, ed. 2002. *Prawo administracyjne*. Wrocław: Kolonia Limited.

Borodo, Andrzej. 1997. *Samorząd terytorialny. System prawno-finansowy*. Warszawa: Wydawnictwa Prawnicze PWN.

Hains, Toni, Haakan Strand, and Catherine Turner. 2017 "A selected international appraisal of the role of the Non-Medical Surgical Assistant." *Journal of Perioperative Nursing* 30, no. 2. Article 2. Doi: 10.26550/2209-1092.1015

Hooker, Roderick S., and James F. Cawley. 2021. "Physician assistants/associates at 6 decades." *Am J Manag Care* 27 (11):498-504. Doi: 10.37765/ajmc.2021.88777

Malicki, Andrzej, and Anna Malicka-Ochtera. 2017. "Odpowiedzialność karna kierownika zespołu operacyjnego w przypadku pozostawienia ciała obcego w polu zabiegu." *Medyczna Wokanda* 9:63-71.

Marczewska, S., and Zbigniew Kopański. 2012. "Błąd medyczny związany z wykonywaniem zawodu pielęgniarki." *Journal of Public Health, Nursing and Medical Rescue* 4:14-21.

Nawrocki, Mariusz. 2018. "Błąd – ujęcie interdyscyplinarne." *Acta Iuris Stetinensis* 1(21):195-212.

Perry, Henry B., Don E. Detmer, and Elinor L. Redmond. 1981. "The current and future role of surgical physician assistants. Report of a national survey of surgical chairmen in large U.S. hospitals." *Annals of surgery* 193 (2):132-37. Doi: 10.1097/00000658-198102000-00002

Puch, Elżbieta A., Monika Nowak-Jaroszyk, and Ewelina Swora-Cwynar. 2020. "Błąd medyczny w teorii i praktyce. Przegląd najważniejszych zagadnień." *Medycyna Pracy* 71(5):613-30.

Rejman, Genowefa. 1983. "Odpowiedzialność karna personelu medycznego działającego w zespole." *Palestra* 27/10(310):55-71.

Siemaszko, Patryk. 2020. "Odpowiedzialność cywilna chirurga operatora w zespole medycznym za pozostawienie ciała obcego w polu operacyjnym." *Medyczna Wokanda* 15:55-65.

Van den Brink, Geert, Quinten Driesschen, and Lian Elfering. 2021. "The Netherlands Physician Assistant." *Social Innovations Journal* 8 (July). https://socialinnovationsjournal.com/index.php/sij/article/view/1000

Van den Brink, Geert, Roderick S. Hooker, A. J Van Vught, et al. 2021 "The cost-effectiveness of physician assistants/associates: A systematic review of international evidence." *PLoS ONE* 16(11):e0259183. Doi: 10.1371/journal.pone.0259183

Wąsik, Damian, and Bogusław Sygit. 2017. "Odpowiedzialność za narażenie pacjenta na niebezpieczeństwo utraty *życia* lub zdrowia a procedury anestezjologiczne." *Prokuratura i Prawo* 2:32-56.

Wolińska, Magdalena. 2013. "Odpowiedzialność karna lekarza za błąd w sztuce lekarskiej." *Prokuratura i Prawo* 5:19-35.

Wroński, Konrad. 2007. "Total gastrectomy is a typical highly specialized procedure." *Współczesna Onkologia* 11(6):305-11.

Zieliński, Piotr. 2016. "Kilka słów o pojęciu oraz rodzajach błędu medycznego." *Medyczna Wokanda* 8:181-94.

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STATEMENT OF THE POLISH EPISCOPAL CONFERENCE AND POLISH BISHOPS ON THE COVID-19 PANDEMIC. AN OUTLINE

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Abstract. Under canon law, both the Holy See, the Polish Episcopal Conference as well as individual diocesan bishops, issued many appeals, guidelines, decrees and dispensations in which they adhered to the safety rules introduced by the Polish government during the pandemic. The article discusses the statements of competent ecclesiastical authorities concerning the pandemic circumstances.

Keywords: religious freedom; State-Church relations; bishops' conference; diocesan bishop

INTRODUCTION

According to the teaching of the Second Vatican Council, "It is very important, especially where a pluralistic society prevails, that there be a correct notion of the relationship between the political community and the Church, and a clear distinction between the tasks which Christians undertake, individually or as a group, on their own responsibility as citizens guided by the dictates of a Christian conscience, and the activities which, in union with their pastors, they carry out in the name of the Church. […] The Church and the political community in their own fields are autonomous and independent from each other."[1] The principle of Church-State independence and autonomy is incorporated also in the Polish normative acts, especially: the 1997 Constitution of the Republic of Poland[2] and the Concordat between the Holy See and the Republic of Poland of 1993.[3]

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[1] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio Pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025-115, no. 76.

[2] "The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good." See Article 25(3) of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

[3] "The Republic of Poland and the Holy See shall confirm that the State and the Roman Catholic Church are, each in its domain, independent and autonomous, and shall undertake

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It is the obligation and inherent right of the Church – independent of any human authority – to preach the Gospel to all peoples. For this purpose, the Church can even use its own means of social communication [Sitarz 2021, 339]. It should be noticed that especially in extraordinary conditions, such as the Covid-19 pandemic, the Church and State (which are there to serve people), should guarantee citizens and the faithful the exercise of their rights.

This article will address the appeals and guidelines issued be the Polish Episcopal Conference as well as decrees issued by individual diocesan bishops during pandemic circumstances.

1. COMPETENCES OF THE CONFERENCE OF BISHOPS

In promulgating the 1983 Code of Canon Law,[4] in Canon 447 the legislator says, "A conference of bishops, a permanent institution, is a group of bishops of some nation or certain territory who jointly exercise certain pastoral functions for the Christian faithful of their territory in order to promote the greater good which the Church offers to humanity, especially through forms and programs of the apostolate fittingly adapted to the circumstances of time and place, according to the norm of law."[5] The conference of bishops contributes to the realization and development of the spirit of collegiality among members of the same Episcopate.

Pursuant to the Directory for the pastoral ministry of bishops *Apostolorum Successores*,[6] "through the Conference, the Bishops fulfil certain pastoral functions jointly for the faithful of their territory. Such action corresponds to the need, particularly evident today, for Bishops to provide for the common good of particular Churches through an agreed and well coordinated policy" (no. 28). The Conference fulfils its competences in all kinds of pastoral areas through: 1) the joint regulation of certain pastoral matters via

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to fully respect this principle in mutual relations and cooperation for the growth of the human being and the common good." See Article 1 of the Concordat between the Holy See and the Republic of Poland done at Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

[4] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [hereinafter: CIC/83].

[5] Lat. "Episcoporum conferentia, institutum quidem permanens, est coetus Episcoporum alicuius nationis vel certi territorii, munera quaedam pastoralia coniunctim pro christifidelibus sui territorii exercentium, ad maius bonum provehendum, quod hominibus praebet Ecclesia, praesertim per apostolatus formas et rationes temporis et loci adiunctis apte accommodatas, ad normam iuris."

[6] Congregazione per i Vescovi, Direttorio per il ministero pastorale dei vescovi *Apostolorum Successores* (22.02.2004), Libreria Editrice Vaticana, Città del Vaticano 2004 [hereinafter: AS].

general decrees, binding both the Bishops and the faithful of the territory; 2) the transmission of the doctrine of the Church in a more incisive way and in harmony with the particular character of a nation and circumstances of life of its Christian faithful; 3) the coordination of individual efforts through common initiatives of national importance in apostolic and charitable fields; 4) a channel for dialogue with the political authority common to the whole territory; 5) the creation of valuable common services, which many dioceses are unable to provide alone (ibid.).

2. COMPETENCES OF THE DIOCESAN BISHOP

In Canon 381 para. 1 CIC/83 the highest legislator says, "A diocesan bishop in the diocese entrusted to him has all ordinary, proper, and immediate power which is required for the exercise of his pastoral function except for cases which the law or a decree of the Supreme Pontiff reserves to the supreme authority or to another ecclesiastical authority.[7]" Furthermore, "It is for the diocesan bishop to govern the particular church entrusted to him with legislative, executive, and judicial power according to the norm of law" (Canon 391 para. 1),[8] but he exercises legislative power himself (Canon 391 para. 2).

The Congregation for the Bishops says that "the meaning of legislative power does not consist solely in the local enforcement or application of juridically binding norms issued by the Holy See or the Episcopal Conference, but it extends also to the regulation of any pastoral matter in the diocesan forum that is not reserved to the supreme authority or to some other ecclesiastical authority" (AS 67). In exercising the legislative function, the diocesan bishop should keep in mind that the norms always respond to a real pastoral necessity.

3. APPEALS, GUIDELINES AND DECREES ISSUED BY ECCLESIASTICAL AUTHORITIES IN POLAND

On 20 March 2020, the Minister of Health issued a regulation declaring the state of epidemic in the territory of the Republic of Poland.[9] During pan-

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[7] Lat. "Episcopo dioecesano in dioecesi ipsi commissa omnis competit potestas ordinaria, propria et immediata, quae ad exercitium eius muneris pastoralis requiritur, exceptis causis quae iure aut Summi Pontificis decreto supremae aut alii auctoritati ecclesiasticae reserventur."

[8] Lat. "Ecclesiae universae unitatem cum tueri debeat, Episcopus disciplinam cunctae Ecclesiae communem promovere et ideo observantiam omnium legum ecclesiasticarum urgere tenetur."

[9] See Journal of Laws, item 491. More about the state restrictions see Stanisz, Wadowski,

demic circumstances, both the Chair of the Polish Episcopal Conference,[10] the Presidium of the Conference[11] and the Commissions of the Conference,[12] issued many appeals, guidelines, as well as decrees and dispensations issued by the individual diocesan bishops,[13] in which they adhered to the safety rules introduced by the Polish government during the pandemic [Sitarz 2021, 343].[14]

The Chair of the Polish Episcopal Conference in a letter of April 15, 2020 to the Prime Minister of the Republic of Poland, requested a more coherent and fair system of limiting the number of people in public space, including in temples. Archbishop Stanisław Gądecki emphasized that the Catholic Church in Poland respectfully accepts the activities of the Polish State, aimed at protecting the health and life of Poles in a pandemic situation. Furthermore he pointed out the need for a more consistent, proportionate

Szulich-Kałuża, et al. 2022, 4-5.

[10] See i.a. *Komunikat Przewodniczącego Konferencji Episkopatu Polski* [Communiqués the Chair of the Polish Episcopal Conference] of: February 28, 2020; March 10, 2020; March 13, 2020; March 24, 2020; April 3, 2020; May 14, 2020; May 27, 2020; June 9, 2020; June 26, 2020; August 7, 2020; October 16, 2020; February 10, 2021. See https://episkopat.pl/dokumenty-na-czas-epidemii-koronawirusa/ [accessed: 30.09.2022].

[11] For example: *Wskazania dla biskupów odnośnie do sprawowania czynności liturgicznych w najbliższych tygodniach* [Indications of the Episcopate's Presidium for bishops regarding liturgical activities in the coming weeks] of March 21, 2021. See https://episkopat.pl/dokumenty-na-czas-epidemii-koronawirusa/ [accessed: 30.09.2022].

[12] For example: *Komunikat Komisji Kultu Bożego i Dyscypliny Sakramentów KEP ws. Komunii Świętej na rękę* [Announcement of the Commission of Divine Worship and the Discipline of the Sacraments of the Polish Episcopate regarding Holy Communion in the hand] of October 3, 2020. See https://episkopat.pl/dokumenty-na-czas-epidemii-koronawirusa/ [accessed: 30.09.2022].

[13] For example, see: Guidelines of the Diocesan Bishop of Włocławek: https://wloclawek.orione.pl/zarzadzenie-biskupa-wloclawskiego-w-zwiazku-z-wprowadzeniem-stanu-epidemii-w-polsce/ [accessed: 30.09.2022]; Guidelines of the Diocesan Bishop of Rzeszów: https://diecezja.rzeszow.pl/wytyczne-bp-jana-watroby-w-zwiazku-ze-stanem-epidemii/ [accessed: 30.09.2022]; Guidelines of the Diocesan Bishop of Sandomierz: https://diecezjasandomierska.pl/zasady-obowiazujace-w-zwiazku-z-nowa-fala-pandemii-koronawirusa/ [accessed: 30.09.2022].

[14] Documents issued by the Polish Episcopal Conference during the coronavirus epidemic are available on the website: https://episkopat.pl/dokumenty-na-czas-epidemii-koronawirusa/ [accessed: 30.09.2022]. Moreover, documents issued by the Holy See are also available on that website, i.e. Congregation for Divine Worship and the Discipline of the Sacraments, Decree featuring guidelines for the celebration of the Paschal Triduum in affected places (19.03.2020) amended as of 25 March 2020; Congregation for Divine Worship and the Discipline of the Sacraments, Note On Ash Wednesday Distribution of Ashes in Time of Pandemic (12.01.2021), Prot. N. 17/21; Decree of the Apostolic Penitentiary, The gift of Special Indulgences is granted to the faithful suffering from Covid-19 disease, commonly known as Coronavirus, as well as to health-care workers, family members and all those who in any capacity, including through prayer, care for them (20.03.2020). More about the message of Pope Francis in time of pandemic see Pérez-Martínez 2022.

and fair criterion for limiting the number of faithful in churches, as is the case with other entities. In addition, restrictions should not apply to people outside the sacred building, to whom general rules on maintaining a safe distance apply.[15]

Some diocesan bishops issued dispensations (cf. Canon 85 CIC[16]). For example, the Diocesan Bishop of Legnica stated: "Until further notice, I maintain the dispensation from the obligation to participate in the Sunday Holy Mass for all faithful of the Diocese of Legnica and other people who are staying in its area at that time.[17]" It should be pointed out, that in this context, H. Parish in her article entitled *The Absence of Presence and the Presence of Absence. Distancing, Sacraments, and the Virtual Religious Community during the COVID-19 Pandemic* wrote about "expansion of the virtual Church community" [Parish 2020].

The Chair of the Polish Episcopal Conference in a statement of May 27, 2020 on dispensation from participation in Sunday Masses encouraged bishops to revoke dispensations from participating in Sunday Masses. The Archibishop suggested that the dispensation may be maintained for the elderly, for people with symptoms of infection and for people who are afraid of being infected.[18]

It should be also noticed that the Chair of the Expert Team of the Polish Episcopal Conference for Bioethics in a statement of April 14, 2021 expressed express "serious moral objection" to AstraZeneca and J&J Covid vaccines.[19] "The production of AstraZeneca and Johnson&Johnson vaccines

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[15] *Przewodniczący KEP apeluje o proporcjonalne kryterium ustalania liczby wiernych w kościele* [The Chair of the Polish Episcopate calls for a proportional criterion for determining the number of faithful in the Church], https://episkopat.pl/przewodniczacy-kep-apeluje-o-proporcjonalne-kryterium-ustalania-liczby-wiernych-w-kosciele/ [accessed: 30.09.2022]. In this context see the statement of Bishop Edward Kawa (auxiliary bishop of the Roman Catholic Archdiocese of Lviv) inquired: "Is the virus so pious that it goes to church but avoids supermarkets?" See https://pch24.pl/bp-edward-kawa-pobozny-wirus-ktory-chodzi-do-kosciola-ale-omija-supermarkety/ [accessed: 30.09.2022].

[16] "A dispensation, or the relaxation of a merely ecclesiastical law in a particular case, can be granted by those who possess executive power within the limits of their competence, as well as by those who have the power to dispense explicitly or implicitly either by the law itself or by legitimate delegation."

[17] Guidelines of the Diocesan Bishop of Legnica Zbigniew Kiernikowski of April 22, 2020 on ministry during pandemic circumstances, https://www.legnica.fm/wiadomosci/wiadomosci-diecezja/32917-najnowsze-zarzadzenia-biksupa-na-czas-pandemii [accessed: 29.09.2022].

[18] Statement of the Chair of the Polish Episcopal Conference of May 27, 2020 on dispensation from participation in Sunday Masses https://episkopat.pl/en/komunikat-przewodniczacego-konferencji-episkopatu-polski-ws-dyspens-od-udzialu-w-niedzielnych-mszach-swietych/ [accessed: 29.09.2022].

[19] See: https://episkopat.pl/en/stanowisko-przewodniczacego-zespolu-ekspertow-konferencji-episkopatu-polski-ds-bioetycznych-w-sprawie-korzystania-ze-szczepionek-przeciw-covid-19-

uses cell lines created from biological material collected from aborted foetuses.[20]" However, the faithful who do not have the option of choosing a different vaccine and are obliged by existential or professional circumstances to use AstraZeneca and Johnson&Johnson, can do so without moral fault (obligation to protect the life and health of others).[21]

CONCLUSIONS

In conclusion, during pandemic circumstances the relevance and adequacy of the measures were assessed by a team of experts – both by competent state and Church authorities – whose competence cannot be challenged. This article addressed the selected guidelines issued by the Polish Episcopal Conference as well as the decrees issued by individual diocesan bishops.

REFERENCES

Sitarz, Mirosław. 2021. "The Right of Christ's Faithful to the Holy Sacraments during Pandemic Conditions." *Teka Komisji Prawniczej PAN Oddział w Lublinie* XIV, no. 1:337-44. Doi: 10.32084/tekapr.2021.14.1-28

Stanisz, Piotr, Dariusz Wadowski, Justyna Szulich-Kałuża, et al. 2022. "The Catholic Church in Poland, Her Faithful, and the Restrictions on Freedom to Practise Religion during the First Wave of the COVID-19 Pandemic." *Religions* 13, no. 12:1228. Doi: 10.3390/rel13121228

Parish, Helen. 2020. "The Absence of Presence and the Presence of Absence: Social Distancing, Sacraments, and the Virtual Religious Community during the COVID-19 Pandemic." *Religions* 11, no. 6:276. Doi: 10.3390/rel11060276

Pérez-Martínez, Víctor Manuel. 2022. "The message of Pope Francis in time of pandemic: Engagement and sentiment on Twitter." *Church, Communication and Culture* 7, no. 1:196-219. Doi: 10.1080/23753234.2022.2040372

-firm-astrazeneca-i-johnsonjohnson/ [accessed: 29.09.2022].

[20] Ibid.

[21] Ibid.

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THE INFLUENCE OF COVID-19 ON THE ACTIVITIES OF LAW FIRMS

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Abstract. The subject of this study is the analysis of the functioning of law firms during the Covid-19 pandemic. The lockdown introduced by the legislator resulted in the closure or limitation of the functioning of public administration bodies, including courts and related institutions, especially law firms (advocates or legal advisers). As a consequence, law firms significantly limited their activities and, moreover, were forced to equip their offices with ICT tools allowing for remote work and IT training for their employees. As a consequence, law firms experienced a drop in income, which was confirmed by the results of a survey conducted by the Supreme Bar Council. However, positive aspects of the changes caused by the pandemic should also be noted, including introducing flexible forms of work, greater use of ICT tools.

Keywords: pandemic; law firms; ICT tools; work organization; income of law firm

INTRODUCTION

Epidemics are a phenomenon which has accompanied human being from the earliest times [Sitek 2020, 389-99; Sáez 2016, 218-21]. The Covid19 pandemic broke out during deep social and economic changes caused by yet another event, namely the extremely dynamic development and wide application in practice of ICT devices, the range of which is constantly expanding.[1] Hence, the pandemic contributed to the massive use of ICT devices on an unprecedented scale, thanks to which it was possible to continue the work of public institutions, enterprises, educational units, as well as courts and law firms, despite the initially introduced restrictions on activity, and then the introduction of a lockdown.

The pandemic, and implemented administrative restrictions, forced law firms to introduce many changes in the organization of work, especially in

[1] These devices are a set of cooperating IT devices and software ensuring processing and storage, as well as sending and receiving data via telecommunications networks using a terminal device appropriate for a given type of network the article 3, point 3 of the Act of 17th February 2005 on the computerization of the activities of entities performing public tasks (Journal of Laws of 2021, item 670).

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the area of communicating with clients and public authorities. In addition, the organization of the office's work has become more flexible, consisting in the introduction of remote work.

The subject of the study is to look for answers to the following questions: What has COVID-19 changed on the legal services market? What did the epidemic give to employees and clients of law firms, and what did it take? What fears and anxieties has the pandemic aroused in lawyers?

1. THE IMPACT OF ANTI-CRISIS LEGISLATION ON THE WORK OF LAW FIRMS

The extraordinary health situation in the world and in Poland caused by the Covid-19 pandemic forced the legislator to issue a number of legal acts referred to as anti-crisis legislation, also referred to in the doctrine as anti-crisis shields. The restrictions on the functioning of public bodies introduced therein also affected the judiciary and their environment, including law firms [Lara Ortiz 2020, 105-120].

The provisions introduced by the Act of 31st March 2020 amending the Act on special solutions related to preventing, counteracting, and combating COVID-19, other infectious diseases and the resulting crisis situations and some other acts, known as the anti-crisis shield 2[2] were of first importance for the activities of law firms during the COVID 19 pandemic. On the basis of this act, amendments were introduced to change the Act of 2nd March 2020 on special solutions related to the prevention, counteraction and combating of other infectious diseases and crisis situations caused by them, known as the anti-crisis shield 1.[3] In the article 1 of the Anti-Crisis Act Shield 2, the Article 14a(1) has been added to the Shield 1 Act, in which the legislator provided for a complete cessation of activities by common or military courts due to a pandemic. Only in urgent cases, the president of the Supreme Court, at the request of the president of the Court of Appeal, could appoint another equivalent court, possibly located in the area of a neighboring appeal, as competent to hear urgent cases belonging to the jurisdiction of the court which ceased its activities [Książek 2020, 349].

A similar decision was provided for the functioning of administrative courts, but the power to appoint another Provincial Administrative Court rested with the president of the Supreme Administrative Court. As a consequence, the courts quickly suspended the dossiers to hear ordinary cases. Of course, further restrictions concerned the functioning of other bodies

[2] Journal of Laws of 2020, item 568.

[3] Journal of Laws of 2020, item 374 and 567.

related to the administration of justice, including the penitentiary system and law firms.

In turn, in the Article 24(21) of the anti-crisis act of 15th May 2020, called Shield 3,[4] the legislator introduced the possibility of e-hearing to civil and administrative court proceedings for the duration of the state of epidemic threat or state of epidemic. For this purpose, technical devices were to be used, enabling the conduct of court hearings at a distance with the simultaneous direct transmission of image and sound. The legislator also allowed the possibility of a session of the judging panel with the use of electronic means of communication, with the exclusion of the chairman. In this way, the courts could, to some extent, continue their work without endangering the health of the participants in the proceedings.

In turn, in Article 39(2) in Shield 4,[5] the legislator added to the article 100(10) to the Code of Criminal Procedure, in which the model of solutions adopted in the article 151(2) of the Code of Civil Procedure, provided for the possibility of conducting meetings in criminal proceedings in a hybrid mode – it means the possibility of participation of some participants in the proceedings using remote contact tools was allowed. Persons taking part in a remote hearing with the simultaneous direct transmission of image and sound are considered to be present at the delivery of the judgment.

Apart from limitations in the operation of common and administrative courts, further limitations mainly concerned court procedures related to the activities of enterprises. First of all, the limitation periods for civil law claims or the time limits for submitting pleadings have been suspended. Moreover, in the Article 3 of the first anti-crisis act (Shield 1), the legislator allowed the employer to organize the performance of work for a specified period of time outside the place of its permanent performance. Remote work could therefore be organized by the employer, regardless of whether the employer was a public or private institution. This solution also had a negative impact on the functioning of law firms, especially their income.

The anti-crisis regulations adopted by the legislator did not solve all the problems that the world of law firms had experienced in that period. The situation of creditors and debtors has deteriorated as a result of the pandemic. Postponing online hearings due to the failure of ICT devices reduces the prospect of obtaining an enforcement title and thus satisfying creditors' claims. The situation did not change after the restoration of ordinary court

[4] The Act of 14 May 2020 amending certain acts in the field of protective measures in connection with the spread of the SARS-CoV-2 virus (Journal of Laws of 2020, item 875).

[5] The Act of 23 June 2020 on interest subsidies for bank loans granted to enterprises affected by COVID 19 and on simplified proceedings for approval of an arrangement related to the occurrence of Covid-19 (Journal of Laws of 2020, item 1086).

sessions, as the courts often dropped due to health reasons of judges [Kowalczuk-Kędzierska 2021]. In the anti-crisis acts, the legislator did not provide the courts with appropriate legal instruments enabling the acceleration of the pursuit of claims.

2. THE NEGATIVE IMPACT OF THE PANDEMIC ON THE ACTIVITIES OF LAW FIRMS

The restrictions introduced by the legislator in connection with the Covid-19 pandemic in the operation of courts or judicial institutions, such as law firms, and restrictions on the movement of citizens had to have an impact on the effectiveness of the operation of law firms. Some law firms quickly adapted to the use of new technological solutions, but not all of them. The speed of law firms' adaptation to the new organizational situation in the work of courts and the degree of use of new ICT technologies depended on the predisposition of leaders and employees to accept changes. The specialization of individual law firms was also quite important. Undoubtedly, it was easier for law firms with a wide range of cases, i.e., conducting civil, economic, criminal, administrative or family law cases simultaneously within the same office. Law firms specializing only in narrow areas could encounter numerous difficulties and limitations also in terms of acquiring new clients and thus the funds necessary to maintain the office.

Regardless of the size of the law firm or the range of cases conducted, the pandemic caused a decrease in the law firm's income with a simultaneous increase in expenses, for example, for the purchase of new ICT tools or training of employees in the use of new technologies.

The Supreme Bar Council in mid-2020 conducted a survey among lawyers about the economic effects of the pandemic.[6] The data obtained at that time is quite meaningful not only for lawyers, but also for other legal corporations, including legal advisers. The data obtained from the survey show that in 87% of the surveyed cases the law firm's revenues decreased. However, the level of this decline varied. For 45% of the surveyed lawyers, the decrease was more than 50%. 24% of the surveyed attorneys stated that their

[6] The authors of the survey were advocate Anisa Gnacikowska, deputy secretary of the Polish Bar Council and advocate Sławomir Ciemny, chairman of the Bar's Higher Audit Committee. The research sample was 1549 advocates. Almost 90% of the respondents are attorneys working in small law firms. 47% of the respondents performed own work in large cities with over 500,000 inhabitants. See: *Wyniki ankiety nt. sytuacji adwokatów w związku z COVID-19*, "Adwokatura Polska" (02.07.2020), https://www.adwokatura.pl/z-zycia-nra/wyniki-ankiety-nt-sytuacji-adwokatow-w-zwiazku-z-covid-19/ [accessed: 28.11.2021].

revenues decreased by a quarter. Symptomatic is the fact that 18% of respondents stated a complete loss of income.[7]

As the cause of economic troubles for law firms, the respondents indicated the complete or partial closure of courts (90%) and the lack of a clear state policy to restore the normal functioning of the courts (80%). Many lawyers also pointed to irregularities in the operation of the post office (50%).[8]

A consequence of the economic troubles of law firms was taking measures to protect them against their closure (approx. 50%). Some of the attorneys we interviewed intended to change their profile and office services (13%). For these reasons, advocates, as well as other lawyers, including legal advisers, reached for support from anti-crisis funds [Irytowska 2020].

It should be realized that the above data concern the assessment of the legal market during the first wave of Covid-19, it is in the period of complete surprise for the public. Repeated testing would probably have yielded different results.

3. POSITIVE IMPACT OF THE PANDEMIC ON THE ACTIVITIES OF LAW FIRMS

The pandemic, apart from undoubtedly negative effects for law firms, also brought about positive phenomena. For a long time now in Poland, as in Western countries and in the United States [Siarkiewicz 2020, 42-46; Glich 2020, 7-8; Duran 2020, 1-34] there is a lot of writing about the dynamically progressing process of digitization including the digitization of business. It is worth noting that the concept of digitization is not clearly defined normatively or by doctrine. Hence, one can come across many definitions. According to the program – Digital Poland, the digitization can mean: a broadband structure enabling access to high-speed Internet, it can also be projects which increase the pool of public services available electronically, and finally it can be a process of encouraging people to use the Internet. In turn, digitization is also understood as digital form of reality. Therefore, it is a process aimed at the most faithful representation of the object by the description of metadata [Kłosińska 2016, 78-85; Mussur 2005, 5-13].

The process of digitization of society accelerated by the pandemic forced, among others, the phenomenon of improving technological and digital skills. This process also applies to lawyers in law firms, legal advisers, attorneys-at-law, judges, prosecutors, and bailiffs, as well as legal service

[7] Ibid.
[8] Ibid.

employees working in law offices and courts. The initial skepticism in this regard was quickly replaced by the belief that there is a need to implement rapid technological, mental, and organizational changes.

It has been noticed a long time ago that computerization of law firms brings numerous benefits, including flexibility and increase of work efficiency, automation of repetitive activities, improvement of the quality of communication with clients and courts, including acceleration of information exchange. Hence, the doctrine calls for an amendment to the Articles 22 and 29 of the Labor Code by introducing a new type of contract, which is remote work [Mitrus 2020, 3-10].

In the professional literature, it is assumed that labor productivity, or productivity at work, is the value of production made in a given period by one employee. Remote work undoubtedly saves time spent traveling from home to the office. This time an employee can use for housework, and consequently becomes more efficient in the period of her or his availability to the employer. An employee can correlate his or her professional work to his or her other tasks and duties, for example – family. The effect of his or her work is the implementation of the entrusted task, most often defined by the deadlines of cases. Remote work undoubtedly creates some tangible benefits for a law firm. It allows you to save, among other, expenses for utilities such as electricity, water, and heating. In this way, the employee and the employer can demonstrate a higher level of job satisfaction, which is important for the operation of any law firm [Paliga 2021, 14].

Automation of repetitive activities is to lead to the improvement of the operation of every institution, including law firms. Therefore, it is not about the automation of interpersonal relations between law firm employees or a lawyer and a client, but about improving the performance of internal office activities and activities with the institutional environment, for example – courts or state administration bodies, which are repetitive. Such activities include sending an e-mail, filling out the mailing book, automatically assigning signatures to new cases, keeping a calendar, monitoring payments, including generating an invoice and automatic preparation for shipment to the customer, or sending payment reminders. All ICT devices such as computers, smartphones, tablets are used to automate repetitive activities.

Appropriate software is required to use these devices. At the moment, there are many such software on the market, including Kleos or mecenas. it. Their functionalities are similar, and the differences most often lie in the development of individual modules. These programs allow you to document the history of proceedings, generate reports, coordinate the activities and work of the team, and share documents within the office (workflow). A huge help for the office is undoubtedly the introduction of full digitization of documentation, it means entering by scanning to the computer memory

on a regular basis all traditionally printed or handwritten documents. As a result of digitization, lawyers and employees of the law firm can only use documents in electronic form. It is also important that when preparing documents remotely, their credibility and authenticity are guaranteed at the same level as documents drawn up in traditional form [Rott-Pietrzyk 2020, 48].

The pandemic brought with it one more benefit, namely a rethinking of communications within the firm's team. In the case of on-site work, specific habits, and procedures for the exchange of information have been developed, in particular, sending between employees the templates of letters or files with documents of cases conducted by the office. In a pandemic situation, when some employees switched to remote work, it became necessary to rework internal and external communication systems. An example of an internal messenger is Slack, and for external and internal communication, such communicators as Google Hangouts, Microsoft Teams, ClickMeeting and Zoom Video Communications can be used. The use of these tools for communication is necessary due to the need to build a system which allows the functioning of the team based on a clear message. Efficient transmission of messages facilitates work and speeds it up. In a good-quality organizational and tool environment, it is easier to spot any errors or provide advice within the team.

4. DEMATERIALIZATION OF LAWYERS' WORK IN THE POST-COVID ERA

For at least three decades, humankind has been accompanied by the phenomenon of the dematerialization of human labor. The human being not only produces products or provides services, but most of all uses abstractions and ideas. Of course, the creations of the human mind can then take a materialized form, for example, the design of a modern building will eventually be constructed. The dematerialization of work is also visible in the relations between employees and their environment as well as in the interactions which take place between them. Thus, the traditional boundaries related to time and space disappear. The work leaves factories and offices and enters private or public space. Today, it is no longer surprising that there are numerous cafes where many people spend hours and hours doing specific work. The boundary between working and non-working time disappears. The development of the labor dematerialization process significantly accelerated precisely during the pandemic [Rojek-Adamek 2017, 235; Jamka 2013, 137-61]. It also applies to the work of lawyers, especially solicitors and advocates.

During the pandemic, no uniform changes in the organization of work in law firms could be noted, but only some similarities. Moreover, it should be noted that possible changes in the activities of law firms usually depend on the size. In small offices, with one or several people, the pandemic has generally not affected the current work system. Some changes can be noticed in the work of larger law firms, employing more than 10 people, having large premises and financial resources. In these offices, the work on the spot was not completely terminated, but was largely performed remotely. Most often, employees performed their work in shifts so that there were only people necessary to perform current tasks in the office.

Looking at the activities of law firms after a period of more than a year from the end of the pandemic, a question arises, namely is it possible for law firms to completely switch to remote work? Theoretically, it is possible, due to the existence of huge resources in databases containing legal provisions (lex, legalis), electronic comments and databases which aggregate case law. In addition, law firms are supported by IT programs enabling the coordination of administrative work and programs supporting the management of cases conducted by the law firm. Anyway, in the relationship between a lawyer or a petitioner and the court, computerization has taken place quite a long time ago, allowing for some evidence activities in civil proceedings to be performed online [Kościółek 2010, 253-66].

It should not be forgotten that personal contact plays an extremely important role in the work of a lawyer, primarily within the office group itself. It is essential in deciding how to solve specific legal problems. In decision-making processes, it is often necessary to consult external specialists and analysts in related fields, for example: in the field of construction, environmental protection, aviation, or the latest information technologies. It is not possible for a lawyer to have specialist knowledge of each case that he or she is deciding legally.

The relationship with clients is the second level of lawyers' contacts. In many cases, especially in family or personal matters, the client prefers direct contact with a lawyer. Only during a meeting in the real world is it possible to build a relationship based on trust, which in turn will allow to provide the lawyer with the information necessary to conduct the case. Such contacts cannot be provided by tele-information devices for remote connection.

To conclude this point, it should be stated that the progressing automation process has undoubtedly been accelerated due to the pandemic. It brings numerous benefits, such as quick decision-making, the ability to perform work virtually anywhere and at any time. However, there are areas of legal activity that cannot be replaced with cybernetic tools or artificial intelligence. The boundary between legal activities performed in the real world and those performed in the virtual world is variable and will undoubtedly

be shifted towards the enlargement of the field of the virtual world [Chandra, Gupta, and Agarwal 2020, 344-50].

FINAL CONCLUSIONS

The Covid-19 pandemic, due to the protection of human health and life, resulted in the need for the legislator to introduce numerous restrictions on the activities of state bodies, society, and the economy, including law firms. As a consequence, law firms switched to remote work. As a result of the introduction of a lockdown, which means statutory, limitation of interpersonal contacts and the necessity to spend money on the purchase of computer programs for remote work, the office's income decreased. These and other negative effects of the pandemic were shown, inter alia, in a survey conducted by the Supreme Bar Council in 2020. The anti-crisis acts introduced by the legislator, also known as anti-crisis shields, only partially supported the activities of law firms.

The pandemic also had a positive impact on the legal services market. Legal offices have started to use IT tools to a much greater extent than before, and the process of digitization of office work has gained momentum. Thus, the process of dematerialization of human work is taking place quickly, also in law firms. There are also positive changes in the organization of the office's work. It can also be assumed that in the post-pandemic period, law firms well equipped with ICT equipment will do better on the market also in the post-pandemic period. The current post-pandemic situation forces law firms to look for new areas of services and new ways of acquiring clients. For this reason, law firms still need to develop the competences of their employees. This, in turn, will cause many law firms to modify their offer or seek business partners to provide complementary services.

To sum up, it should be stated that the Covid-19 pandemic, apart from causing negative effects, forced the introduction of many changes to the organization and operation of law firms. New IT technologies will be permanently used by law firms. This does not mean, however, that all the activities of law firms will move to the virtual world. In many areas, law firms will continue to operate in a traditional manner, although these areas will be continuously reduced.

REFERENCES

Chandra, Geetanjali, Ruchika Gupta, and Agarwal, Nidhi. 2020. "Role of artificial intelligence in transforming the justice delivery system in covid-19 pandemic." *International Journal on Emerging Technologies* 11(3):344-50.

Duran, Mesut. 2020. "ICT and Digitization in the United States: Research, Trends, and Issues." *The Education Systems of the Americas* 1-34.

Gilch, Harald, et al. 2020. "Survey on the Status of Digitization at German HEI, European." *Journal of Higher Education IT* 1:7-8.

Irytowska, Katarzyna. 2021. "Jak pandemia koronawirusa wpłynęła na funkcjonowanie kancelarii prawnych?" Warszawa: Wolters Kluwer (29.07.2020). https://www.lex.pl/funkcjonowanie-kancelarii-prawnych-a-pandemia-koronawirusa,12668.html [accessed: 28.11.2021].

Jamka, Beata. 2013. "Scenariusze rozwoju zarządzania zasobami ludzkimi w reakcji na przemiany otoczenia zewnętrznego." *Myśl Ekonomiczna i Polityczna* 4:137-61.

Kłosińska, Katarzyna. 2016. "Czy cyfryzacja to digitalizacja?" *Poradnik Językowy* 1:78-85.

Kościółek, Anna. 2010. "Informatyzacja czynności dowodowych w postępowaniu cywilnym." *Przegląd Prawa i Administracji* 82:253-66.

Kowalczuk-Kędzierska, Marta. 2021. "Pandemia nie służy wierzycielom, zwłaszcza w sądzie." *kancelarie.rp* (28.05.2021). https://kancelarierp.pl/pandemia-nie-sluzy-wierzycielom-zwlaszcza-w-sadzie/ [accessed: 28.11.2021].

Książek, Daniel. 2020. "Tarcza antykryzysowa 1.0-3.0. Szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych. Komentarz." red. Krzysztof Baran, 349. Warszawa: Wolters Kluwer.

Lara Ortiz, and Maria Lidon. 2020. "Restrictions on freedom of movement and residence in the European Union due to Covid-19." *Journal of Modern Science* 45(2):105-20. Doi: 10.13166/jms/130707

Mitrus, Leszek. 2020. "Praca zdalna de lege lata i de lege ferenda: zmiana miejsca wykonywania pracy czy nowa koncepcja stosunku pracy? Część 2." *Praca i Zabezpieczenie Społeczne* 61, no. 11:3-10.

Mussur, Katarzyna. 2005. "Digitalizacja." *Fides. Biuletyn Bibliotek Kościelnych* 20-21:5-13.

Paliga, Mateusz, et. al. 2021. *Satysfakcja z pracy i wydajność pracowników. Relacja (nie) oczekiwana*. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Rojek-Adamek, Paulina. 2017. "De (materializacja) pracy i „wolność" zawodu projektanta." *Kultura i Edukacja* 1(115):234-43.

Rott-Pietrzyk, Ewa, et al. 2020. "Czynności notarialne online–podstawy de lege lata i uwagi de lege ferenda." *Forum Prawnicze* 4(60):38-56.

Sáez, Andres. 2016. "La peste Antonina: una peste global en el siglo II dC." *Revista chilena de infectología* 33(2):218-21.

Siarkiewicz, Piotr. 2020. "Cyfryzacji nie trzeba się bać: dlaczego digitalizacja to must have organizacji." *Personel i Zarządzanie* 12:42-46.

Sitek, Bronisław. 2020. "Pestis Antonini. Reakacja Marka Antoniusza na globalną starożytną epidemię." *Teka Komisji Prawniczej PAN Oddział w Lublinie* 1:389-99.

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STRENGTHENING THE EFFECTIVENESS OF THE CORPORATE COMPLIANCE SYSTEM IN A GROUP OF COMPANIES – AFTER THE AMENDMENT OF THE CODE OF COMMERCIAL COMPANIES IN 2022

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Abstract. The aim of the article is to discuss the changes adopted in the Code of Commercial Companies in 2022, which are the most significant since its adoption, i.e., since 2000. The changes not only regulated the functioning of the group of companies, but also made it possible to establish a corporate compliance system in the group of companies, aimed at strengthening the effectiveness of counteracting many negative phenomena, including corruption. The publication is another part of the Authors' research in the area of compliance and corporate governance, the results of which were partially used in the work of the Corporate Governance Reform Committee introducing the abovementioned changes to the Code of Commercial Companies.[1] Finally, the publication also presents the theoretical and practical aspects of establishing a corporate compliance system in a group of companies.

Keywords: compliance; corporate governance; corporate law; capital group; supervisory board

INTRODUCTION

In Poland, there are no solutions based on generally applicable provisions of law obliging to establish a corporate compliance system in a capital company or group of companies.[2] According to the authors, the latter legal form

[1] PhD Robert Lizak was a member of the expert Team for Increasing the Efficiency of Supervisory Boards operating under the Corporate Supervision Reform Committee established in 2020 to amend the Commercial Companies Code.

[2] There are regulations that may indirectly indicate the need for a legal entity to establish

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in particular deserves attention. According to a statutory definition, a group of companies is a parent company and a company or subsidiaries, which are capital companies, following the resolution on participation in a group of companies by a common strategy in order to implement a common interest (interest of the group of companies), justifying the parent company exercising uniform management over a subsidiary or subsidiaries. The definition referred to above appeared in 2022, following the amendment to the Act of September 15, 2000, Code of Commercial Companies,[3] which followed the adoption of the Act of February 9, 2022 amending the Act – Code of Commercial Companies and some other acts.[4] The new regulations will apply from October 13, 2022. Until the abovementioned regulations came into force, the establishment of a corporate compliance system in the group of companies was significantly difficult, as the provisions of the Commercial Companies Code did not in practice regulate the functioning of groups of companies. The Act on Amending the Commercial Companies Act regulated not only the functioning of the group of companies, but also made it possible to establish a corporate compliance system in the group of companies aimed at strengthening the effectiveness of counteracting many negative phenomena, including corruption, to which the Authors devoted special attention in this publication.

Pursuant to Article 1(3a) of the Act of June 9, 2006 on the Central Anticorruption Bureau, corruption is an act involving: a person, in return for an act or failure to act in the performance of his or her functions, benefits, in return for an action or failure to act in the performance of its function, 3) committed in the course of economic activity, including the performance of obligations towards the public authority (institution), consisting in promising, proposing or handing directly or indirectly to the person managing a non-credited entity to the financial sector in public or working in any capacity for such an entity, any undue benefits, for itself or for the benefit of any other person, in return for an act or omission of an act that violates its obligations and constitutes a socially harmful reciprocity, 4) committed in the course of business involving the performance of obligations towards the public authority (institution), consisting in requesting or accepting, directly

such a system. See Article 38 of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2022, item 1360 as amended [hereinafter: CC], pursuant to which a legal person acts through its organs in the manner provided for in the Act and in the statute based on it, or Article 9c(1)(4) in relation with section 2 of the Act of 29 August 1997, the Banking Act, Journal of Laws of 2021, item 2439 as amended.

[3] See Article 4(1)(5[1]) of the Act of 15 September 2000, the Code of Commercial Companies, Journal of Laws of 2022, item 1467 as amended [hereinafter: CCC].

[4] See Act of 9 February 2022, amending the Act – Code of Commercial Companies and some other acts, Journal of Laws of 2022, item 807 as amended [hereinafter: Act on amending the Act on Commercial Companies Code].

or indirectly, by a person managing an entity not included in the public finance sector or working in any capacity for such an entity, any undue benefits or accepting a proposal or promise such benefits for himself or for any other person, in return for an act or omission that violates his or her duties and constitutes a socially harmful reciprocity.[5]

Counteracting the phenomenon of corruption is not limited only to preventing the occurrence of a criminal act consisting in giving and accepting benefits. Corruption should also be understood as unfair behaviour towards the need to behave in accordance with the ethical and legal norm, which in fact is the essence of compliance. According to the authors, in the era of an increasing corruption risk, especially resulting from the growth of international business ties and political instability, the market position and a competitive advantage of companies and groups of companies may depend on the effectiveness of the compliance systems.

As a result of the above, there were three reasons for which the authors took up the subject defined in the title of this article. Firstly, there has been a significant change in the provisions of the Commercial Companies Code, including those that are directly related to counteracting corruption in commercial companies. Secondly, the publication is another portion of the Authors' research conducted in the area of compliance and corporate governance, the results of which were partially used as part of the work of the Corporate Governance Reform Committee introducing the aforementioned changes to the Commercial Companies Code [Lizak and Skuza 2017a, 195-208; Lizak and Skuza 2017b, 549-65; Lizak and Skuza 2018, 51-63; Lizak 2019, 29-31; Lizak and Skuza 2021, 355-68]. Thirdly, the aim of the publication is to present the possibility of creating a structure in groups of companies that will allow for solving compliance problems, including counteracting corruption.

1. THE BASIS FOR ESTABLISHING AN ANTI-CORRUPTION COMPLIANCE SYSTEM IN A GROUP OF COMPANIES, TAKING INTO ACCOUNT ITS INTERESTS

The capital group is a common form of business in the conditions of a market economy, in particular among entities with a large scale of business [Gajewski 2005; Koładkiewicz, 2013; Postuła 2013]. The key factor determining the creation of a capital group is at desire to increase the effectiveness of the business, which makes it easier to achieve the assumed goal. It is not important whether this goal is a profit maximization or securing the

[5] See Act of 9 June 2006, the Act on the Central Anti-Corruption Bureau, Journal of Laws of 2021, item 1671 as amended.

public interest in the case of entities oriented at the implementation of the public mission.[6] Regardless of the ownership structure, as well as the basic purpose of the operation of individual entities, the capital group can contribute to the improvement of operations in almost all areas, in particular management, organizational, operational, financial and legal.

The act amending the Commercial Companies Code covers private and legal relations between the parent company and its subsidiaries.[7] The explanatory memorandum to this act indicates that a group of companies is a "qualified" relationship of dominance and dependence between certain companies that make up the group of companies, as these companies are guided by a common economic strategy that allows the parent company to exercise uniform management over the company or subsidiaries.[8] The rules governing the group of companies can be divided into two categories. The first category is to facilitate the efficient "management" of a group of companies by the parent company in connection with the implementation of the group's common economic strategy.[9] The second category of regulations is to ensure the protection of specific interest groups occurring in the case of a group of companies, primarily a subsidiary belonging to at group of companies, the parent company, and indirectly the entire group of companies.[10] The second category of regulations is to ensure the protection of specific interest groups occurring in the case of a group of companies, primarily a subsidiary belonging to at group of companies, the parent company, and indirectly the entire group of companies.[11]

The review of the applicable provisions of the Commercial Companies Code, as well as those introduced by the Act on the amendment of the Commercial Companies Code, does not directly indicate that the bodies of a capital company are legally obliged to establish a corporate compliance system, so the question arises in the company and the group of companies whether, despite the lack of a statutory basis, the company's authorities subsidiary and parent should establish a corporate compliance system in the company and group of companies? The answer to this question justifies paying attention to several important aspects.

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[6] See Article 1(8) of the Act of 16 December 2016, the Act on the Principles of Managing State Property, Journal of Laws of 2021, item 1933 as amended.

[7] See justification for the act amending the Act on CCC.

[8] Ibid.

[9] See Article 1 the act amending the Act on CCC.

[10] Ibid.

[11] According to Article 21^2(1) CCC, the parent company may issue a binding instruction to a subsidiary participating in a group of companies (binding instruction), if it is justified by the interests of the group of companies and special provisions do not stipulate otherwise.

The role of the management board of a joint-stock company comes down to managing the company's affairs, i.e. making economic decisions in any of its areas.[12] In the judgment of July 24, 2014, the Supreme Court adopted that running the company's affairs consists in managing its assets, managing its current affairs and representing it, and that when making decisions regarding the conduct of the company's affairs, a management board member should be guided solely by its interests.[13] In the judgment of July 24, 2014, the Supreme Court adopted that running the company's affairs consists in managing its assets, managing its current affairs and representing it, and that when making decisions regarding the conduct of the company's affairs, a management board member should be guided solely by its interests.[14] Related to the management board's duty to act in the interests of a joint-stock company is linked to another obligation, namely the duty to protect its assets. The literature indicates that while the obligation to act in the interest of the company is positive, as it refers to ensuring its profitability and competitiveness, the obligation to protect the company's assets is its negative reflection, i.e., preventing the depletion of its assets, preventing the company from suffering damage [Płonka 1994, 225]. The above leads to the conclusion that acting in the interests of the company is nothing more than making decisions in such a way as to increase the company's value and generate profits, on one hand, and on the other hand, to prevent and facilitate the avoidance of losses, i.e. to protect the company's assets or its good name.

Hence, in accordance with the general clause in Article 483 of the Commercial Companies Code, a member of the management board of a joint-stock company is liable to the company for the damage caused by an act or omission contrary to the law or the provisions of the company's articles of association, unless they are not at fault. Moreover, they are obliged to exercise due diligence resulting from the professional nature of the administrator's activity. This means that the management board of a joint-stock company is burdened with additional restrictions on account of performing the function, because the legislator has specified in the generally applicable provisions of law that the measure of diligence in relation to a person conducting business activity is higher than in comparison to ordinary activity, because due diligence of a person conducting business activity is defined as taking into account its professional nature [Kwaśnicki 2005, 287].[15] The term "due diligence resulting from the professional nature of the activity" is un-

[12] According to Article 368(1) CCC, the management board manages the affairs of the company and represents the company.

[13] Judgment of the Supreme Court of 24 July 2014, ref. no. II CSK 627/13, Lex no. 1545031.

[14] Judgment of the Supreme Court of 5 November 2010, ref. no. I CSK 158/09, OSNC 2010, No. 4, item 63.

[15] Judgment of Appeal Court in Łódź of 16 April 2014, ref. no. ACa 1157/13, Lex no. 1500811.

derstood as standards of conduct in trade, adequate to the scale and nature of the business activity [Opalski and Oplustil 2013, 21].

Prima facie it seems that the concept of diligence included in Article 483(2) of the Commercial Companies Code is a criterion of guilt and its fulfilment does not release from the obligation to separately establish the unlawfulness of the actions of a management board member.[16] Illegality should be demonstrated by indicating a specific legal provision or provisions of the company's articles of association or its articles of association. *A contrario*, in the doctrine one can meet with the position that the negligent conduct of the company's affairs or careless supervision contrary to the wording of Article 483(2) of the Commercial Companies Code, constitutes an unlawful act, and as a consequence, it is not necessary to additionally prove that a management board member has violated separate provisions of law [Opalski and Oplustil 2013, 11-23].

Thus, answering the question whether the establishment of a corporate compliance system falls within the ordinary management of a joint-stock company should depend on the risk assessment, including corruption, adequate to the scale and nature of the business conducted by the company or group of companies. Hypothetically, assuming that in the case of a joint-stock company operating in the territory of another country, where the corruption risk is extremely high, and the lack of an assessment of corruption risk and failure to establish a corporate compliance system would be the main reason for the company's bankruptcy, it justifies the belief that due diligence was not respected, and what for hence, it may constitute grounds for bringing to justice the members of the management board of a joint-stock company.

The role of the supervisory board is to exercise permanent supervision over the company's operations in all areas of its operations, which in practice means making factual findings and seeking to obtain information about the actual condition of the company, and ultimately presenting this information to the owner. Exercising continuous supervision should include designing, implementing and maintaining an adequate and effective system of three lines of defence, monitoring its effectiveness, as well as periodically evaluating it and adjusting it to current needs. *Summa summarum*, the essence of the functioning of the supervisory board of each company is to strive for establishing the material truth in the shortest possible time. Hence, the following are an essential support in exercising constant supervision by the supervisory board: audit, compliance and internal control, which are

[16] According to Article 483(2) CCC, a member of the management board, supervisory board and liquidator should, in the performance of his duties, exercise due diligence resulting from the professional nature of his activity.

elements of the three lines of defence model [Lizak and Skuza 2018, 54-55]. The supervisory board in the company acts as a kind of superior compliance unit. In view of the above, a special role is played by the chairman of the supervisory board of the subsidiary and, respectively, the parent company in a group of companies. Moreover, the above actually results from the provision of Article 217(1) of the Commercial Companies Code, according to which the supervisory board of the parent company exercises permanent supervision over the implementation of the interests of the group of companies by the subsidiary participating in the group of companies, unless the agreement or the Articles of association of the parent company or subsidiary provide otherwise.

2. EXTENDING THE BAN ON HOLDING POSITIONS IN COMPANY GOVERNING BODIES FOLLOWING A CONVICTION FOR CORRUPTION OFFENSES IN THE PUBLIC SECTOR

In order to introduce the provision of Article 18 of the Commercial Companies Code, the possibility of performing the function of a member of the management board, supervisory board, audit committee, liquidator or proxy is limited in the event of a total of three conditions: 1) being a natural person, 2) having full legal capacity, 3) no conviction for the offenses specified in the provisions of chapters XXXIII-XXXVII of the Penal Code and in Article 587, Article 590 and Article 591 of the Commercial Companies Code. For the purposes of this publication, attention has been focused on the third of the abovementioned premises. For its occurrence, it is necessary to issue a final conviction for at least one of the abovementioned offenses, without the need to separate a ruling on the prohibition of performing a function, because this type of prohibition occurs by operation of law upon the validation of the conviction.[17] Importantly, conviction for offenses other than those mentioned in Article 18(2) of the Commercial Companies Code, does not exclude the possibility of holding a function in the company, unless separate regulations provide otherwise.

The ban on performing functions in the bodies of commercial companies was introduced in order to protect the proper functioning of economic transactions. This protection consists in preventing the performance of a specific function by persons who do not guarantee reliability and honesty, and thus the proper performance of their duties. In the opinion of the drafters of the act amending the Commercial Companies Code, it was justified to extend the catalogue specified in Article 18(2) of the Commercial

[17] Judgment of the Court of Appeal in Warsaw of 22 February 2019, ref. no. VII AGa 1850/18, Lex no. 2668814.

Companies Code, for offenses stipulated in Article 228-231 of the Act of June 6, 1997 Criminal Code.[18]

The essence of the crimes specified in Article 228-231 of the Penal Code comes down to the protection of the proper functioning of state institutions and local government, as well as public institutions in other countries and international organizations. The protection of proper functioning should be understood, on the one hand, to maintain the loyalty of persons performing public functions towards the abovementioned institutions and the state, and on the other hand, their disinterestedness towards clients. Unfortunately, there are cases of accepting personal and property benefits by persons performing public functions. A property benefit is a gain in material goods. A benefit has a material character when it has an economic value, that is, the value of which can be expressed in money, and also when a given good can satisfy a specific material need. It can be expressed as an increase in assets, i.e. an increase in property or a decrease in property liabilities, meaning a reduction in burdens or the avoidance of losses. On the other hand, a personal benefit is a benefit which is not of a material nature, i.e. it cannot be counted into money. In many cases, it is not easy to distinguish between material and personal benefits. Some benefits meet both tangible and intangible needs (e.g. taking a position on the company's management board or supervisory board).[19] In view of the above, the legislator sanctioned the acceptance of personal or property benefits by persons performing public functions (Article 228 of the Penal Code), as well as giving them the abovementioned benefits by anyone (Article 229 of the Penal Code). Criminal sanctions also apply to persons accepting benefits and claiming influence, even if they do not actually exist (Article 230 of the Penal Code), granting benefits to persons claiming influence (Article 230a of the Penal Code), and finally persons who are public officials who exceed their powers or failing to fulfil obligations act to the detriment of public or private interests (Article 231 of the Penal Code). Thus, there are a number of criminal law norms which, on the one hand, protect the proper functioning of economic transactions and, on the other hand, the proper functioning of state institutions and local government. So, the question is how to extend the catalogue of crimes stipulated in Article 18(2) of the Commercial Companies Code, for offenses specified in Article 228-231 of the Penal Code, which in fact are to protect the proper functioning of state institutions and local government, is to contribute to strengthening the proper functioning of commercial companies and economic transactions?

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[18] Act of 6 June 1997, the Criminal Code, Journal of Laws of 2022, item 1138 as amended.

[19] Anti-corruption guidelines for officials, Central Anti-Corruption Bureau, Warsaw 2014, p. 10.

In the Authors' opinion, the right example justifying the extension of the catalogue of crimes specified in Article 18(2) of the Commercial Companies Code is to prevent a situation in which a person holding a public function accepts an advantage in connection with performing this function from a representative of a specific commercial company, where the benefit is to appoint that company to the supervisory board in the future, in exchange for dealing with a specific case for the benefit of this company. It is not difficult to cite examples of this type of case, e.g., issuing a concession, license, consent, awarding a public contract, or enabling the entry into force of a legal act or a specific legal provision. It seems that establishing and recalling statistical data how many people convicted of crimes under Article 228-231 of the Penal Code, were appointed to the bodies of commercial companies in connection with the commission of these crimes, it would only be of an illustrative nature and would not reflect the essence of the problem, as it is highly risky for business transactions to bring about an immediate risk of causing damage. Moreover, it is reasonable to say that in the case of the crimes specified in Article 228-231 of the Penal Code, the number of cases is less important, and the scope of potential damage is greater, for example, the area of critical infrastructure of the state, constituting real and cybernetic systems (facilities, devices or installations) necessary for the minimum functioning of the economy and the state. The Supreme Court aptly put it in its decision of October 25, 2007, I KZP 33/07, which ruled that the inadmissibility – by operation of law – of performing functions in the bodies of commercial companies is a solution characteristic of the Commercial Companies Code, and no criminal record as a condition for performing the function is a kind of statutory qualification criterion to be active in a specific area and constitutes a restriction of subjective rights due to important public interest.[20]

Another argument in favour of extending the prohibition contained in Article 18(2) of the Commercial Companies Code is more prosaic, namely it prevents the performance of managerial functions that have a real impact on shaping the company and economic turnover by people who do not guarantee honesty and integrity, regardless of whether they operate in the public, private or public-private sector. According to P. Ochman, the provision of Article 18(2) of the Code of Commercial Companies and Partnerships is primarily aimed at preventing the committing of subsequent crimes of a specific type while using the performed function or simply preventing the perpetrator of a specific type of crime from performing a function (particularly from the point of view of the functioning of commercial companies) in connection with a final conviction for a crime [Ochman 2012, 69-96].

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[20] Judgment of the Supreme Court of 25 October 2007, ref. no. I KZP 33/07, Lex no. 310369.

Finally, extending the directory with Article 18(2) of the Commercial Companies Code is important in that it prevents any participant in any possible configuration of the corruption mechanism, including a person holding a public function receiving the benefit and the person granting it, the person receiving the benefit, from performing the function of a member of the management board, supervisory board, audit committee, liquidator or proxy and claiming influence and the person granting its benefit, and finally a public official accepting the benefit and acting to the detriment of public or private interests. In the justification of the judgment of 17 February 2016, III CSK 107/15, the Supreme Court indicated that the purpose of the prohibition in question is to exclude from participation in trade persons whose conduct justifies concerns about the reliability of economic tasks and may harm other participants trading.[21]

Following the entry into force of the extended catalogue of offenses specified in Article 18(2) of the Commercial Companies Code for offenses under Article 228-231 of the Penal Code, for persons convicted of these crimes, their mandate in the company's governing body shall expire definitively. The prohibition ceases to exist in the fifth year after the conviction becomes final, unless the conviction has been expunged earlier. After the statutory deadline or earlier expungement of the conviction, the rights of a natural person to perform a function in a given body of a capital company are not reactivated, only the possibility of reappointment of a given natural person to the company's bodies appears. In addition, from October 13, 2022, in relation to candidates for company governing bodies, for which information about the conviction under Article 228-231 of the Penal Code and there are no grounds for lifting the prohibition (e.g., five years after the conviction becomes final), registry courts should dismiss an application for entry in the National Court Register of a convicted person as a candidate for one of the functions listed in Article 18(2) of the Commercial Companies Code [Wajda 2018, 22-27].

3. CHAIRMAN OF THE SUPERVISORY BOARD OF A PARENT COMPANY IN A GROUP OF COMPANIES AS CHAIRMAN OF THE BOARD OF JOINT CHAIRMEN OF SUPERVISORY BOARDS OF SUBSIDIARIES

In the justification to the act amending the Commercial Companies Code, point 5.9., *Emphasizing the importance of the function of the chairman of the supervisory board and the duty of activity of the supervisors of*

[21] Judgment of the Supreme Court of 17 February 2016, ref. no. III CSK 107/15, Lex no. 2048971.

this body, which indicated that the practice of trading, and in particular the commonly known cases of improper shaping of internal corporate governance, indicate the need to regulate the role of the chairman of the supervisory board as a person responsible for proper organization of work at the statutory level. this authority. Often, the effectiveness of internal supervision in a capital company depends on the activity and diligence in exercising the powers by the chairman of the supervisory board. The justification also clarified that the indicated person should set the schedule and the scope of the work of the body, and not be a passive executor of the management board's requests for issuing the expected decisions by the supervisory board or strive to implement the minimum activities of the supervisory board imposed by law, disregarding the actual internal needs of the company.[22]

In the authors' opinion, the chairman of the supervisory board of a parent company in a group of companies is the most important link in the corporate governance chain responsible for the parent company and the entire group of companies remaining in compliance with the mission, vision, values, strategy, business challenges, risk management and the supervisory and internal control system.

The existing provisions regulating the essence of duties and activities of the chairman of the supervisory board of a parent company were not too extensive and basically did not distinguish between the chairman of a parent company in a group of companies and the chairman of a subsidiary. The Code of Commercial Companies only stipulates that the chairman of the supervisory board, regardless of the company's status, convenes the meeting, decides in the event of an equal number of votes and opens the general meeting. The lack of differences between the chairmen of parent companies and subsidiaries resulted from the lack of regulations regulating the functioning of groups of companies, which results from the fact that each of the companies in the group of companies was, in fact, a separate legal entity. After the review of the new regulations in the Commercial Companies Code, adopted in 2022, the situation looks different.

Firstly, the supervisory board of a parent company in a group of companies is obliged to learn to understand and be guided, in addition to the company's interests, to the interests of the group of companies, as well as to exercise permanent supervision over the implementation of the interests of the group of companies by a subsidiary participating in the group of companies.

Secondly, the scope of supervision of the supervisory board of a parent company in a group of companies includes the issuing of binding orders by the parent company to the subsidiary regarding the management of the

[22] See justification for the act amending the Act on CCC.

company's affairs, if it is justified by the interests of the group of companies and special provisions do not provide otherwise.

Third, the supervisory board of a parent company may require the management board of a subsidiary participating in a group of companies to provide its books and documents and to provide information.

Fourth, the supervisory board may establish an ad hoc or permanent supervisory board committee consisting of supervisory board members to perform specific supervisory activities (supervisory board committee). An *ad hoc* or standing committee of the supervisory board may be established by the supervisory board of the parent company in the group of companies.

Fifth, if the articles of association so provide, the supervisory board of the parent company may adopt a resolution to examine, at the company's expense, a specific matter relating to the company's operations or its assets by an selected adviser (adviser to the supervisory board). As before, the advisor may be appointed by the supervisory board of the parent company.

From the above, it can be concluded that the scope of new rights and obligations of the supervisory board of the parent company in the group of companies whose work is managed by the chairman has significantly expanded, which means that he has become not only the chairman of the board of joint chairmen of supervisory boards of subsidiaries, but also a full he is the role of a kind of superior compliance officer in a group of companies. This may also be determined by the fact that the management board of a parent company operating in the banking sector should ensure that its operations comply with corporate law, generally applicable national and international law, and the law of other countries (e.g., FCPA, Bribery Act, FATCA). In addition, a company of this type should operate in accordance with the guidelines of at least 18 market regulators in Poland and abroad, for example the Polish Financial Supervision Authority, ESMA, FCA, SEC. The role of the supervisory board of the parent company is to assess the interests of the group of companies in all areas of its activity, and the example cited above actually refers to only one of them - the legal one.

Despite the separation of the management and supervisory functions in capital companies, the activities of the management board and the supervisory board remain closely related, and harmonious cooperation determines the good condition of the company, hence it is so important to maintain the state of partnership and cooperation. There is no doubt that the chairman of the parent company's supervisory board will now largely be formally responsible for this harmonious cooperation of management boards with supervisory boards in the group of companies.

Finally, the authors wish to renew the *de lege ferenda* postulate of introducing full-time remuneration for chairmen of supervisory boards of parent

companies, first of all in large and complex groups of companies. The authors fully agree with the results of research by T. McNulty, A. Pettigrew, G. Jobome, and C. Morris, which indicate that factors such as time commitment, greater experience and knowledge about the company and group of companies [McNulty, Pettigrew, Jobome, and Morris 2011, 93]. On the other hand, the research using the questionnaire of the questionnaire conducted by the authors among the chairmen of supervisory boards of parent companies shows that it is legitimate to discuss the introduction of full-time remuneration for the chairman of the supervisory board of the parent company, and the amount of remuneration could depend on the size of the group of companies measured by turnover, employment or market share or a combination of these factors: 1) the remuneration of the chairman of the supervisory board of the parent company could fluctuate between 50-75% of the remuneration of members of the parent company's management board, 2) the remuneration could be in line with the regulation contained in the Act of 9 June 2016 on remuneration of persons managing certain companies, 3) remuneration should be determined by the general meeting, and its amount should oscillate around 10% of the remuneration of a management board member [Lizak and Skuza 2021, 363].

4. ANTICORRUPTION COMPLIANCE SYSTEM IN A GROUP OF COMPANIES IN THE BUSINESS INTELLIGENCE FORMULA

The anti-corruption compliance system in the group of companies is multidimensional, as it covers many issues, such as, for example, values, rules and procedures; training and communication; management of third parties, protection of whistle-blowers, register of benefits, etc. In each of the abovementioned areas, huge amounts of data and information are generated. So, the question is how to effectively, efficiently and holistically manage these areas? Using the example of third party management, let us pay attention to the data and information needed to collect, for example, the legal basis for their collection and the tool for processing the data and information in question.

The anti-corruption compliance system should take into account the risk of relations with third parties, especially in terms of the profile and area of activity, as well as the nature of relations of third parties, including their representatives, consultants, intermediaries, advisers and distributors. A third party, or contractor, may be a natural or legal person or an organizational unit without legal personality that is a party to the contract or the entity providing the service.

Before establishing business relations with contractors and signing the contract giving rise to the obligation, it is reasonable to verify the credibility

of contractors in order to minimize or eliminate the risk of establishing cooperation with contractors operating in violation of the law, good manners and commercial practices, in particular those involved in corruption. In commercial transactions, the process of verifying the credibility of the contractor is referred to in the English-language due diligence return, which is a limitation to the "bona fide" principle. According to the caveat emptor principle, the party establishing the relationship should verify everything possible to determine the risks on their own, and the other party cannot consciously and deliberately hide these risks. In Polish law, the definition of "due diligence" can be distinguished from the wording of Article 355 of the CC, according to which due diligence is the diligence required in a given type of relationship. This means nothing more than adopting a pattern of behaviour consisting in maintaining the appropriate level of accuracy, caution and caution appropriate to specific cases and situations.[23]

In the era of globalization of economic processes, the assessment of external partners before concluding transactions in international trade is actually a sine qua non condition. The entity should make sure that the third party actually exists, the terms of the contract with the third party detail the services to be performed, the third party actually provides such services, and the value of the contract subject is commensurate with the work performed in this industry and geographic region.

While determining whether a third party has established an anti-corruption compliance system and, consequently, whether it is able to detect certain types of undesirable patterns of behaviour that are characteristic of a profile and area of activity, should be taken for granted, a range of internal third party business processes. The process of security verification and ensuring security only then, when it covers such as:

- business interests (assessment of business conditions as well as business perspective and risk, including, for example, in the field of registration data, capital and personal ties),
- financial (assessment of securing an account, including, for example, Swiss fund, money, money and medicine financing),
- law (assessment of the legal status and remedial security for breaches of obligations, in connection with the obligation to undertake criminal and civil legal proceedings),
- tax (assessment of the correctness of the settlement of public-law burdens, including, for example, operating in the shadow economy or participating in tax avoidance or evasion),

[23] Judgement of the Supreme Court of 21 September 2007, ref. no. V CSK 178/07, Lex no. 485896.

- technical (assessment of the condition of assets and products),
- environmental (natural resource impact assessment),
- corporate social responsibility (assessment of interests and environmental protection, as well as business relations),
- security (evaluation of the anti-corruption compliance system, including the so-called red flags, an example of the second solution of the warning system).

The due diligence process is carried out on the basis of information provided by a third party, remaining in the resources of the organization undertaking the cooperation, obtained from external entities and from open sources. Access to relevant information, its collection and analysis should be preceded by the consent of a third party.

Due diligence analysis is a process usually related to the commencement of new projects, such as the formation of a consortium, signing a contract or making a decision on a merger or acquisition, but it should be mentioned the need for ongoing monitoring of business processes by organizational units responsible for the anti-corruption compliance system and entities directly involved in the core business, especially with high-risk business partners or public authorities. Examples of areas that should be monitored include wholesale and retail purchase and sale of goods and services, sponsorship, leasing, franchising, donations, leases and rentals, as well as HR and payroll areas, conflict of interest management, information and data security, and finally relationships investor.

One of the important tools for counteracting corruption are electronic registers of contracts concluded with third parties, employment contracts and civil law contracts. The scope of registration should include at least such data as: contract identification number, type, date of conclusion, data identifying the parties to the contract, value and its subject, validity and payment period. Importantly, this data can be used not only to counteract corruption, but also to assess the quality and timeliness of contract performance on an ongoing basis, create algorithms for how to proceed in the event of defects being found, exceed deadlines, claim payment of contractual penalties, create a specific type of reliability rating of third parties, especially those involved in purchasing and sales procedures, and finally support in the management of supply chains.

Finally, it is worth mentioning the verification of information in the area of HR and public affairs in the field of representing the organization outside and risk management in relation to persons holding positions with an increased risk of corruption, especially in order to counteract competitive activity or a conflict of interest. Positions with an increased risk of corruption include at least persons: authorized to incur liabilities, authorized to

perform legal actions, participating in purchasing and sales procedures, public procurement and tenders, participating in administrative decisions, and finally authorized to represent the organization outside, especially for contacts with contractors and public authorities.

As can be seen, the amount of data needed to collect is not insignificant at all, but is their scope an obstacle to constant supervision over the company's activities in all areas of its activity? First, the amended provisions of the Commercial Companies Code provide a legal basis for the supervisory board of the parent company to exercise permanent supervision over the implementation of the interests of the group of companies by a subsidiary participating in the group of companies. Secondly, the supervisory board of the parent company may require the management board of a subsidiary participating in a group of companies to provide its books and documents as well as information for the purpose of supervision. Third, it is crucial to establish a system of coordination and exchange of data and information from subsidiaries for the supervisory board of the parent company. In the Authors' opinion, when creating this type of system, it is reasonable to take into account a number of important factors [Lizak and Skuza 2017, 205-206].

Counteracting the pathology of social life, which is corruption, is based on four functions, i.e., identification, detection, evidence and prevention [Sławik 2003, 21-26]. For each of them, information and its analysis play a fundamental role, which together are to provide the knowledge that is the basis for taking specific actions.

Technological progress and the process of globalization, on the one hand, have complicated the method of collecting and analysing data and information, and, on the other hand, have provided tools for more and more efficient acquisition of knowledge [Konieczny 2012, 3-16]. In order to effectively and efficiently use the collected data and information, the group of companies has developed a wide category of applications and technologies for acquiring, collecting, analysing and delivering data, which is referred to as Business Intelligence (BI).

The basic goal of Business Intelligence is to enable quick access to knowledge by building a centralized data warehouse collecting data from various and dispersed resources, and then using DSS (Decision Support Systems) decision support systems, Q&R (Query and Reporting) systems based on this warehouse, Online Analytical Processing (OLAP) systems, static analysis systems, forecasting and data mining (Data Mining) [Liautaud and Hammond 2003, 28]. Despite the fact that the evaluation of BI solutions shows many advantages (for example, the reduction of analysis and decision-making time) and disadvantages (for example, the disadvantages of BI include the high cost of user training), it is a review of the literature that allows for

a conclusion that such an analysis can significantly improve and make counteracting corruption more effective.[24] BI enables conducting various analyses and forecasts, data mining, including servicing many users in the company and outside it, handling distributed data, as well as providing the desired knowledge to potential users using data visualization techniques [Thierauf 2001, 3-4].

REFERENCES

Gajewski, Dominik. 2005. *Opodatkowanie holdingów i grup kapitałowych*. Warszawa: Dom wydawniczy ABC.

Koładkiewicz, Izabela. 2013. *Rady nadzorcze – dobre praktyki ładu korporacyjnego. Doświadczenia polskie i zagraniczne*. Warszawa: Wydawnictwo Poltext.

Konieczny, Jerzy. 2012. "Kryzys czy zmiana paradygmatu kryminalistyki." *Państwo i Prawo* 67, no. 1:3-16.

Kwaśnicki, Radosław L. 2005. *Spółka z ograniczoną odpowiedzialnością*. Warszawa: C.H. Beck.

Liautaud, Bernard, and Mark Hammond. 2003. *e-Business Intelligence: od informacji przez wiedzę do zysków*. Warszawa: Premium Technology.

Lizak, Robert. 2019. "Compliance to nie 31." *Radca prawny* 182:29-31.

Lizak, Robert, and Sebastian Skuza. 2017a. "Propozycje ograniczenia nadużyć w VAT z wykorzystaniem rozwiązań Business Intelligence. Autorskie propozycje wniosków de lege ferenda." In *Monografie Prawnicze. Międzynarodowe Unikanie Opodatkowania. Wybrane Zagadnienia*, edited by Dominik Gajewski, 195-208: C.H. Beck.

Lizak, Robert, and Sebastian Skuza. 2017b. "The supervision issues over the activity in the entities of the capital group. De lege lata and the lege ferenda." In *The financial law towards challenges of the XXI century*, edited by Michal Radvan, Jolanta Gliniecka, Tomasz Sowiński, et al., 549-65. Publications of the Masaryk University, Conference Proceedings.

Lizak, Robert, and Sebastian Skuza. 2018. "Regulations and corporate governance principles strengthening the effectiveness of internal control, compliance and audit in the capital group." *Financial Law Review* 12, no. 4:51-63. Doi: 10.4467/22996834FLR.18.021.10002

Lizak, Robert, and Sebastian Skuza. 2021. "The Activity of the Parent Company Supervisory Board Chairman in Terms of Truth, Time and Cooperation." *Teka Komisji Prawniczej PAN Oddział w Lublinie* 14, no. 1:355-68. Doi: 10.32084/tekapr.2021.14.1-30

[24] OECD, Advanced Analytics for Better Tax Administration. Putting Data to Work, 2016. https://doi.org/10.1787/9789264256453-en [accessed: 01.08.2022]; Canada Revenue Agency. October 1, 2014 to March 31, 2017. *A strategy for data-centric innovation. Business Intelligence Strategy*, https://www.irs.gov/pub/irs-soi/statscanadapresentation.pdf [accessed: 01.08.2022].

McNulty, Terry, Andrew Pettigrew, Greg G. Jobome, and Clare Morris. 2011. "The role, power and influence of company chairs." *Journal of Management and Governance* 15:91-121. Doi: 10.1007/s10997-009-9119-4

Ochman, Piotr. 2012. "Z problematyki zakazu pełnienia funkcji piastuna organu w spółkach handlowych – uwagi na marginesie przepisu art. 18 § 2 k.s.h." *Rejent* 12:69-96.

Opalski, Adam, and Krzysztof Oplustil. 2013. "Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych." *Przegląd Prawa Handlowego* 3:11-23.

Płonka, Ewa. 1994. "Odpowiedzialność odszkodowawcza członków zarządu spółki kapitałowej wobec spółki (art. 292 i 474 k.s.h.)." *Kwartalnik Prawa Prywatnego* 9:207-27.

Postuła, Igor. 2013. *Nadzór korporacyjny w spółkach Skarbu Państwa*. Warszawa: Wolters Kluwer Polska SA.

Sławik, Karol. 2003. *Kryminalistyka w związkach z procesem karnym, kryminologią i wiktymologią*. Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego.

Thierauf, Robert J. 2001. *Effective Business Intelligence Systems*. Westport, Connecticut and London: Quorum Books.

Wajda, Dominika. 2018. "Prawomocne skazanie za przestępstwa określone w art. 18 § 2 k.s.h. a pełnienie funkcji w organie spółki kapitałowej." *Przegląd Prawa Handlowego* 2:22-27.

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CHILDREN'S RIGHTS IN THE DIGITAL ENVIRONMENT UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD

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Abstract. The aim of this paper is to explain, based on the 1989 Convention on the Rights of the Child and its General Comment No. 25, how States Parties should implement the Convention in relation to the digital environment and provide guidance on appropriate legal, policy and other measures to ensure full compliance with their obligations under the Convention and its Optional Protocols in view of the opportunities, threats and challenges of promoting, respecting, protecting and fulfilling all children's rights in the virtual environment. The author points out the current main threats in the execution of children's rights in the digital environment and the challenges faced in this regard by the state authority, governmental and non-governmental organizations and the private sector.

Keywords: child; rights; cyberspace; digital environment; Convention on the Rights of the Child; danger

INTRODUCTION

The number of sources of threats to children's rights from cyberspace is labile. The emergence of drastically fast successive threats or evolving from the existing ones results in an increasing effort to make the public aware of them. This is particularly evident in the youngest generations, who by virtue of their "primordial" trust, so to speak, become easy victims of abuse by other users of the digital environment, and because of the lack of a real possibility for parents or legal guardians to control the successively emerging threats on the Internet, of which not only the quantity, but also their global content can be a major problem in the context of effective protection of children's rights. The proliferation of online social platforms, applications, websites, transferring more and more matters of previous offline life to online life without introducing legal regulations, is very likely to lead to problems with the proper understanding of the nature of threats and the subsequent legal regulation of cyberspace, respecting human rights, especially children's rights, and limiting the main types of threats. On the other hand, it should be kept in mind that even the best law cannot protect a person

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from the threat of another person in the real world, or in cyberspace, when one is not aware of the dangers of individual-initiated actions in the process of globalization and the technological revolution. All authorities of the State Parties under the United Nations Convention on the Rights of the Child of November 20, 1989,[1] are obliged to take measures aimed at making the law a good and effective tool to combat such threats, but they are limited only to enacting increasingly harsh criminal laws [Broniatowski 2017]. Virtual violence, on the other hand, has become a much more difficult phenomenon to trace than real-world violence.

Given the above and the need to take into account that digital reality becomes the main reality in most aspects of children's lives (education, services, commerce, etc.) this has provided new opportunities to exercise children's rights, but also created the risk of their violation or abuse. The United Nations Committee on the Rights of the Child[2] drafted General Comment No. 25[3] to the United Nations Convention on the Rights of the Child of November 20, 1989, addressing the challenges as well as the risks based on consultations with both children and experts, reports from States Parties, jurisprudence of human rights treaty bodies, recommendations of the Human Rights Council, to provide States Parties to the Convention with a tool to properly understand its provisions in a world that is changing around us.[4]

The aim of this paper is to explain, based on the Convention on the Rights of the Child and its General Comment, how States Parties should implement the aforementioned Convention in relation to the digital environment and provide guidance on appropriate legal, policy and other measures to ensure full compliance with their obligations under the Convention and its Optional Protocols in view of the opportunities, threats and challenges of promoting, respecting, protecting and fulfilling all children's rights in the virtual environment.[5] The paper uses the method of document research as well as analysis and literature criticism (sources). A scientific research technique in the form of observation and document study was also used.

1. CYBERSPACE AND THREATS

Cyberspace is defined in the subject literature as all links of a virtual nature ("non-spatial" in the physical, intangible and geographical sense),

[1] Convention on the Rights of the Child of 20 November 1989, Journal of Laws of 1991, No. 120, item 526 [hereinafter: Convention].

[2] Hereinafter: CRC.

[3] General comment No. 25 (2021) on children's rights in relation to the digital environment, Committee on the Rights of the Child, CRC/C/GC/25, United Nations, March 2, 2021.

[4] Ibid., p. 1-2.

[5] Ibid., p. 2.

which were created and function thanks to their physical guarantors (computers, telecommunications infrastructure) [Madej 2009, 28]. In summary, it can be stated that cyberspace represents "all of the interrelationships of human activity involving ICT (Information and Communication Technology)" [Bógdał-Brzezińska and Gawrycki 2003, 37].

Referring to the definition of a child, the one expressed in Article 1 of the 1989 Convention on the Rights of the Child, which stipulates that a child is a human being before the age of 18, unless he or she attains majority earlier in accordance with the law relating to the child, should be considered the most universal. The Convention, by virtue of the fact that the date of its enactment is 1989, does not contain provisions that directly refer to the protection of children from the threats of cyberspace, which is obviously due to the fact that the Internet and the virtual world were not yet as developed and widely available as they are today.

Threats that are currently identified in various aspects are: infoholism/dataholism, cyberholism, video game addiction, computer addiction, FOMO (Fear of Missing out) and others. Being "logged" into the digital world all the time, as well as its sudden withdrawal, also impinges on the mental and physical spheres, which is expressed in feelings of loneliness, psychomotor restlessness, experiencing fear, nausea, dizziness, abdominal pains and general discomfort, which may cause identity disruption of the growing child in the future. On the other hand, children, even more so in infancy, preschool age tend to become victims of their own parents' activities (sharenting), which involves regularly posting detailed information (photos, videos and other content) about their children on social media. Sharenting should be distinguished from the activity of parents called troll parenting, which means sharing content that directly embarrasses or shames children or shows difficult moments for them [Chrostowska 2018, 59]. It is also important not to forget the long-standing problem of creating, storing and sharing child pornography, the underlying nature of which has changed significantly with the development and use of ICT [Eneman 2004, 29]. Despite the existence of several momentous international legal acts mainly of a European nature,[6] it is their provisions that are, in principle, directed to protect children from exploitation by adults (as well as numerous public and private entities), leaving individual states freedom to regulate any sexual activities

[6] These include the following legal acts: Lanzarote Convention of the Council of Europe of 25 October 2007 on the Protection of Children against Sexual Exploitation and Sexual Abuse (Journal of Laws of 2015, item 608); Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA (OJ EU.L.2011.335.1 of December 17, 2011); Council of Europe Convention on Cybercrime, drawn up in Budapest on 23 November 2001 (Journal of Laws of 2015, item 728).

between minors if they are undertaken with their mutual consent, or specify what activities related to new technologies and the development of information systems its signatories are to criminalize in their legal systems. However, these are not sufficient dispositions in such a sensitive social group as children, especially taking into account the incredibly dynamic area that is the digital environment.

2. GENERAL PRINCIPLES OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN RELATION TO THE DIGITAL ENVIRONMENT

From a socio-legal point of view, it is a truism nowadays to say that the rights of every child must be respected, protected and exercised in every corner of the world. The same applies in the digital environment as well, especially as cyberspace can be an instrument to help violate human rights [Schutlz 2008, 94]. Innovations in digital technologies affect children's lives and their rights in broad and interdependent ways, even if children themselves have no or limited access to the Internet. Significant access to digital technologies can support children in exercising the full range of their civil, political, cultural, economic and social rights.

The Convention, being the main international legal regulation on the safety of children and adolescents in the digital environment, despite its nature as a legal act having worldwide application in very different social, economic and political conditions, is a very important tool for the protection of children's rights, defining these rights and instructing States Parties to take multifaceted measures aimed at implementing the realization of these rights. It contains general provisions (see, e.g., Articles 19 and 34) that provide a legal basis for the introduction of regulations in national legal systems related to the protection of children and adolescents in cyberspace.

In order to facilitate a proper understanding and identification of the measures needed to guarantee the exercise of children's rights in relation to the digital environment, attention should be paid to the four basic general principles expressed in the Convention, i.e., the principle of non-discrimination (Article 2), the principle of the best interests of the child (Article 3), the right to life, survival and development of the child (Article 6), and respect for the views expressed by the child (Article 12).

The principle of non-discrimination under General Comment No. 25 resonates in that children can be discriminated against being excluded from the use of digital technologies and services – 1.3 million children do not have access to the Internet [Mizunoya, Avanesian, et al. 2020] – or receiving hateful messages or unfair treatment as a result of using these technologies. Other forms of discrimination can occur when automated processes that

result in information filtering and collection, profiling or decision-making are based on biased, partial or unfairly obtained data about a child. An important non-discriminatory factor to implement is overcoming digital exclusion among children, which includes providing free and safe access for children in designated public places and investing in policies and programs that support affordable digital access and knowledge-based use for all children in educational institutions, communities and homes.

The principle of the best interests of the child, as a dynamic concept expressed in the Convention in the context of children's rights protection in cyberspace, imposes on States Parties that the best interests of every child are to be prioritized in all activities concerning the provision, regulation, design, management and use of the digital environment involving national and local authorities overseeing the execution of children's rights in such activities.

The right to life, survival and development involves risks associated with the conduct of users online or with the content provided, which include, but are not limited to, such as violent and sexual content, cyberbullying, gambling, and various types of exploitation and abuse, including sexual exploitation and abuse, and the promotion or incitement of suicide or life-threatening activities, including by criminals or terrorist/extremist groups. States Parties and their appointed authorities should identify and respond to emerging threats faced by children in various contexts. The Committee emphasizes that the use of digital devices should not replace personal interactions between children or between children and parents or guardians. States Parties should pay particular attention to the effects of technology in the earliest years of life, when flexibility of the brain is at its maximum and the social environment, particularly relationships with parents and caregivers, is crucial in shaping children's cognitive, emotional and social development. Training and advice on the appropriate use of digital devices should be provided to parents, caregivers, teachers and other relevant actors, taking into account research on the impact of digital technologies on children's development, especially during the neurological growth spurts of early childhood and adolescence.

In the context of the last principle, i.e., respect for the child's views, which should be taken into account and viewed through its prism for the execution of all the children's rights contained in the Convention regarding the digital environment, it should be pointed out that children have a positive perception of the virtual world, as it provides them with opportunities to have their voices heard on issues that affect them, which undoubtedly helps children's participation in initiatives at various levels, from local to international. In this regard, the Committee indicates that States Parties should already involve children in legislative work, listen to their needs and give

due weight to their views (according to the maturity they present). However, it is not only public authorities that have a role to play in respecting children's views, as digital service providers should also actively cooperate with children, using appropriate protections, and giving due consideration to the views of underage users when developing products and services. It should be noted that the digital environment is the most accessible environment to connect people in a timely manner and convey necessary information.

The use of the digital environment should also be in the field of activating minors in cooperation with civil society, which is undoubtedly a major challenge for both the public and private sectors that should systematically involve children in cooperation with civil society, through education, development, implementation, monitoring and evaluation of laws, policies, creation of plans and programs adapted to the different developmental phases of the child regarding the deepening of children's rights awareness.[7]

3. DIGITAL ENVIRONMENT AND SELECTED CIVIL RIGHTS AND FREEDOMS

Digital Human Rights (DHR), is now an extension of basic human rights to secure digital data linked to a person's identity and behavior in the physical or virtual realm. Digital data is a multifaceted tool, with enormous political and economic power. For state actors, cyberspace and digital data are used as a tool that provides a way to guarantee public safety and protect national security interests. For human rights advocates, digital data is inextricably linked to personal identity. It should be protected as a fundamental human right by all who produce, store and use it [Dowd 2022, 249].

A key aspect of effective Internet and digital safety involves beginning education (primarily learning to read) in this area in the early years, as safety can be related to the level of understanding the Internet among young children according to their social and cultural context. In particular, this refers to research suggesting that older children adapt the Internet to the perceptual dimensions of the technologies they use when participating in a variety of online activities [Edwards, Skouteris, et al. 2016, 43].

The proper exercise of children's rights and their protection in the digital environment requires a wide range of both legislative, administrative and preventive measures. For this purpose, the Committee points out that they should be updated on an ongoing basis so that legislation remains up-to-date in the context of technological advances as well as emerging practices and potential risks.[8] On the other hand, any legislative measures must be

[7] General comment No. 25 (2021) on children's rights…, p. 7.
[8] Ibid., p. 8.

complemented by permanent education of skillful and safe use of cyberspace, as without education, it seems, it will not be possible to ensure children's safety in cyberspace [Sitek and Such-Pyrgiel 2019, 212].

The digital environment also provides children with an unprecedented opportunity in the history of the world to exercise their right of access to information (Articles 13 and 17 of the Convention) through information and communication media. In doing so, States Parties should ensure that children have access to information in this digital environment and that the exercise of this right is limited only when provided for by law and necessary for the purposes set forth in Article 13(2) of the Convention, which states that the exercise of this right may be subject to certain limitations, but only those that are provided for by law and that are necessary: (1) to respect the rights or reputation of others; or (2) to protect national security or public order, or public health or morals. The Comment also points out to digital service providers, on their initiative, to take steps for the use of concise and understandable labeling of content potentially directed at children, for example, in terms of age appropriateness or content credibility emphasizing that content moderation and control should be balanced with the right to be protected from violations of children's other rights, in particular their rights to freedom of expression and privacy.

States Parties should respect the child's right to freedom of thought, conscience and religion in the digital environment in accordance with Article 14 expressed in the Convention. An important requirement of the Committee is to introduce or update (depending on the state of legislation in a given country) data protection laws and standards that identify, define and prohibit practices to manipulate or interfere with children's right to freedom of thought and belief in the digital environment, for example, through emotion analysis or inference. It should be noted that it is already possible to draw conclusions about a child's mental state using artificial intelligence. They should ensure that these automated systems or information filtering systems are not used to influence children's behavior or emotions leading to a limitation of their capabilities or proper development. Access to the Internet is, of course, access to information, regardless of what people think about the content (good or bad). To prohibit this access is to deny every citizen the opportunity to exercise their right to express themselves [Guinchard 2010, 8].

The Committee also emphasized that the digital environment and what it offers can enable children to shape their identities in many ways and participate in connected communities and public spaces for debate, cultural exchange, social cohesion and diversity, while realizing freedom of association and peaceful assembly in the digital environment. At the same time, it pointed out the undoubtedly positive aspect that "public visibility" and

networking opportunities in the digital environment can also support and create activism for underprivileged children, socially and enabling them to communicate freely with each other, defend their rights and form associations, thus making them human rights defenders.[9]

Another right relevant to the digital environment is the right to privacy (Article 16 of the Convention). The processing of children's personal data is usually motivated by offering educational and health benefits. However, some data may contain information on children's identity, activities, location, communication, emotions, health and relationships, among others. Some combinations of this personal data, including the increasingly popular biometric data, can uniquely identify a child, which directly violates the right to privacy, especially if identity theft occurs as a result of inadequate security. Threats can also come from children's own actions and those of family members, peers or others, such as by parents sharing photos online or strangers sharing information about a child. On the other hand, the protection of a child's privacy in the digital environment may be inadequate when parents or legal guardians pose a threat to the child's cybersecurity, which happens very often when they are in conflict, such as in determining custody of the child. In this aspect, reasonable control of data by the child's legal and actual guardians is of great importance. As the Committee highlights, interference with a child's privacy is permissible only if it is not arbitrary or unlawful. Therefore, any such interference should be provided for by law, intended to serve a legitimate purpose, uphold the principle of data minimization, be proportionate and designed with the best interests of the child in mind, and must not interfere with the laws, purposes or objectives of the Convention.[10] Electronic surveillance currently practiced by most countries around the world violates an individual's right to privacy, a fundamental right enshrined in Article 17 of the International Covenant on Civil and Political Rights. In many cases, electronic surveillance is a prelude to censorship. State censorship, which includes suppression of banned content and possible sanctions against the user, is the next step in the chain of digital surveillance. Censorship can violate an individual's right to freedom of thought, expression and association, but like privacy, it can be suspended to "protect public safety, order, health or public morals, or the fundamental rights and freedoms of others"[11] [Perry and Roda 2017, 64-65].

[9] Ibid., p. 12.

[10] Ibid., p. 13.

[11] International Covenant on Civil and Political Rights opened for signature in New York on 16 December 1966 (Journal of Laws 1977, No. 38, item 167).

CONCLUSIONS

It is necessary to be aware that there are always two sides to every coin – along with the benefits of the Internet and other digital tools, there are also new and evolving threats, such as exposure to inappropriate content, vulnerability to offline violence, concerns about overuse and time-killing, as well as countless data protection and privacy issues. As recent advances in technical and non-technical fields have made it really difficult to draw a contrast between the online and offline worlds, it has become increasingly necessary to analyze how this drastic change affects children's well-being, development and rights[12] [Sahoo 2016, 37]. Some countries and governing entities have been implementing general regulatory measures to address individual data privacy management, data collection and analytical practices, but these measures are partial, adapted to current technical capabilities, and do not take into account the techniques and learning capabilities of artificial intelligence and intelligent data collection, the potential framework of which has not been determined. Until then, it is crucial to raise the issues about the functioning of effective child protection in the digital environment [Willson 2021, 323].

One of the most important measures that need to be taken to exercise children's rights in the digital environment is the issue of orderly and clear collection of personal information/data that anyone, at any time, will be able to review and possibly refuse to disclose to specific entities. This is one of the main challenges in actively protecting children's rights in a properly managed digital environment.[13]

Taking Poland as an example, it is possible to note that the legal regulations in Poland relating to the safety of children and adolescents in cyberspace, indicate a clear predominance of provisions of a criminal law nature, which means that the role of the law mainly comes down to the imposition of sanctions, determining what actions will be prosecuted and punished by the justice system while pursuing the well-known functions of criminal law, which are the protective, guarantee and compensation functions [Giezek 2020, 30-33]. On the other hand, the problem of punishment of minors arises. In the science of law, for example, there is an ongoing dispute over the permissibility of the non-statutory counter-type of "chastisement of minors," if it serves an educational purpose and is intended to protect the welfare of the child [Jedlecka 2020, 97].

As has been pointed out, even the best provisions of criminal law, by itself, are not able to ensure that such acts are not committed. Thus, it would

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[12] See Claude and Hick 2000, 231; Schutlz 2008, 94-97 and the literature cited there.

[13] General comment No. 25 (2021) on children's rights…, p. 12-13.

be naive to believe that even the best laws, will be able to protect children and adolescents from the threats of cyberspace. All States Parties under the Convention on the Rights of the Child are obliged to take steps aimed at making the law a good and effective tool to combat such dangers, but not heading towards enacting ever harsher criminal laws, rather than educating both parents, caregivers and minors from their earliest years of life [Broniatowski 2017; Mackintosh 2019; Claude and Hick 2000, 231; Schutlz 2008, 94-97]. On the other hand, the increasingly emerging restrictions on freedom of expression in cyberspace focus on blocking access instead of creating and moderating expression. This raises the debate on human rights, including children's rights to access expression.

REFERENCES

Bógdał-Brzezińska, Agnieszka, and Marcin Gawrycki. 2003. *Cyberterroryzm i problemy bezpieczeństwa informacyjnego we współczes*nym świecie. Warszawa: Oficyna Wydawnicza ASPRA-JR.

Broniatowski, Krzysztof. 2017. "Bezpieczeństwo dzieci i młodzieży w cyberprzestrzeni – regulacje w prawie polskim i unijnym." Warszawa: Kancelaria Sejmu. Biuro spraw senatorskich. https://www.senat.gov.pl/gfx/senat/userfiles/_public/bss/dokumenty/new/171002/bezpieczenstwo_dzieci_i_mlodziezy_wersja_ostateczna.pdf [accessed:14.09.2022].

Chrostowska, Bożena. 2018. "Sharenting – skala i wielowymiarowość zjawiska (nierozważnego) ujawniania przez rodziców informacji o dzieciach w mediach społecznościowych." *Problemy Wczesnej Edukacji* 4, no. 43:58-68.

Claude, Pierre R., and Steven Hick. 2000. "Human Rights Education on the Internet: Its Day Has Come." In *Human Rights and the Internet*, edited by Steven Hick, Edward Halpin, and Eric Hoskin, 225-37. London: Palgrave Macmillan.

Dowd, Rebekah. 2022. *The Birth of Digital Human Rights: Digitized Data Governance as a Human Rights Issue in the EU*. Switzerland: Palgrave Macmillan.

Edwards, Susan, Helen Skouteris, et al. 2016. "Young children's internet cognition." In *Understanding digital technologies and young children. An international perspective*, edited by Susanne Garvis, and Narelle Lemon, 38-45. New York: Routledge.

Eneman, Marie. 2004. "The New Face of Child Pornography." In *Human rights in the digital age*, edited by Andrew Murray, and Mathias Klang, 27-40. London: Routledge.

Giezek, Jacek. 2020, "Pojęcie i funkcje prawa karnego." In *Prawo karne materialne. Część ogólna i szczególna*, edited by Marek Bojarski, 30-33. Warszawa: Wolters Kluwer.

Guinchard, Audrey. 2010. "Human Rights in Cyberspace." *Society of Legal Scholars Conference (SLS). SSRN Electronic Journal.* 1-13. Doi: 10.2139/ssrn.1694483

Jedlecka, Wioletta. 2020. "Zakaz stosowania kar cielesnych a kontratyp karcenia wychowawczego." *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* CXX/2, no. 3978:97-108. DOI: 10.19195/0137-1134.120.55

Mackintosh, Eliza. 2019. "Special Report. Finland is winning the war on fake news. What it's learned may be crucial to Western democracy." Atlanta: CNN. https://edition.cnn.com/interactive/2019/05/europe/finland-fake-news-intl/ [accessed: 11.09.2022].

Madej, Marek. 2009. "Rewolucja informatyczna – istota, przejawy oraz wpływ na postrzeganie bezpieczeństwa państw i systemu międzynarodowego." In *Bezpieczeństwo teleinformatyczne państwa*, edited by Marek Madej, and Marcin Terlikowski, 17-40. Warszawa: Polski Instytut Spraw Międzynarodowych.

Mizunoya, Suguru, Garen Avanesian, et al. 2020. "How many children and young people have internet access at home? Estimating digital connectivity during the COVID-19 pandemic." New York: UNICEF. https://data.unicef.org/resources/children-and-young-people-internet-access-at-home-during-covid19/ [accessed: 14.09.2022].

Perry, Susan, and Claudia Roda. 2017. *Human Rights and Digital Technology.* London: Palgrave Macmillan

Sahoo, Anshuman. 2016. "Children's rights in the cyberspace." *International Journal of Research and Analysis* 4, issue 2:36-45.

Schutlz, William. 2008. "Human Rights and Cyberspace." *New Perspectives Quarterly* 19, no. 2:94-97. Doi: 10.1111/0893-7850.00509

Sitek, Magdalena, and Małgorzata Such-Pyrgiel. 2019. "Influence of cyberculture on human rights." *Journal of Modern Science* 39(4):201-15. Doi:10.13166/jms/101510

Willson, Michele. 2021. "Digital Predictions: Children's Futures, Opportunities and Obstacles." In *Young Children's Rights in a Digital World. Play, Design and Practice. Children's Well-Being: Indicators and Research Volume 23*, edited by Donell Holloway, Michele Willson, Karen Murcia, et al. 313-26. Switzerland: Springer.

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THE WORLD OF VALUES IN THE AGE OF LIQUID MODERNITY (CRISIS OF HUMANITY)

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Abstract. The author, presenting his reflections on the world of human values in the era of fluid modernity, points at the crisis of humanity. He emphasizes that we all bear responsibility for the current reality, because it is not only a legal category but also a moral, religious and political one. However, the basic understanding of responsibility has a clear ethical tinge. Ideologists call for building a new, free world, a world devoid of old values, moral principles, cultural and political rules – negating Christian humanism and its forms. The ideologists create different visions of man questioning the essence of humanity. The battle for truth and our identity continues. Living in the world of: post-truth, post-humanism, post-secularism, post-democracy, post-politics, post-modernity, information society, a reality is being created where the values expressed in the psychological and spiritual construction of man should be preserved.

Keywords: values; fluid modernity; ethics; democracy; IT worldview

INTRODUCTION

Reflecting on the issue outlined in the title, an analysis and critique of the literature was undertaken.

The new 21st century creates a globalizing world. The basis for this community that is the world is primarily the realm of culture and values, not just political and economic needs. The world in the cultural sense appears as an ever-changing idea consisting of a multiplicity of worldviews, philosophies, religions, ideologies, theories, ways of perceiving people and reality. The world will continue to undergo changes and remain under new conditions. Modern Europe as a cultural community is a beneficiary of the achievements of previous generations, but it does not just mean a space where people use only one cultural code. Gustav Radbruch, who writes that culture is, in fact, "a value-oriented reality" is right [Radbruch 1938, 3].

It becomes legitimate to ask what values make up the Christian heritage? In Christian thought, which has been developing for more than two thousand years, we notice an infinite number, threads of ideas, currents,

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philosophies. It seems that it is enough to point out the fundamental value that distinguishes it from other traditions and namely the content of "good news" (gospel), the commandment to love your neighbor, from which a list of universal and absolute values can be derived. John Paul II, in the European Act of Santiago Compostela promulgated in 1982, listed the values: dignity of human person, justice, freedom, family love, tolerance, respect for life, diligence, spirit of initiative, desire for cooperation and peace [Śpiewak 2000, 86]. Focusing on the commandment to love your neighbor, Christianity embraces and combines its own tradition with the heritage of Judaism, Greek philosophy and ancient Roman thought [Eliot 2000, 22-33].

The union of Europe and Christianity according to H. Seton-Watson is "a historical fact and not even obvious sophistry can change it" [Seton-Watson 2000, 39-41].

Arthur Schopenhauer wrote "if we try to encompass the whole of the human world with a single glance, we will see everywhere an incessant struggle, an overwhelming intensification – with the exertion of all bodily and spiritual forces – for life and existence, in the face of dangers and misfortunes of all kinds that threaten and constantly afflict us" [Schopenhauer 1995, 50]. The struggle occurs in various forms both military and non-military. Within the non-military variant, there is a special type of struggle: a battle of words, i.e. dispute, conflict. Other types of struggle include: psychological warfare, information warfare, cyber warfare, commercial competition, sports games, struggle for the choice of a decent lifestyle, etc. Thus, the struggle is over certain values. By "value" we mean "something that arouses the evaluative appreciation of a person" [Tatarkiewicz 1978, 60-73; Wolniewicz 1998, 163-85]. Henry Elzenberg distinguished between useful values and perfect values [Elzenberg 2005, 15-19].

Richard Rorty sees an analogy between understanding truth as a norm, as the goal of science, and understanding morality as a process leading to ideal morality (moral law). According to him, moral progress is to develop the ability to sympathize and not to harm, care and respect others [Rorty 1999b, 82-83].

We must realize that norms and values have no meaning outside the social context.

1.

In order to understand the relevant and important dimensions of contemporary culture here, the thoughts expressed by some authors are of profound importance. Karol Wojtyła notes that "the word «culture» is one of those that are most closely associated with man, that define his earthly existence

and, in a way, point to his very essence. Man is the one who creates culture, who needs culture, who through culture creates. Culture is a set of facts in which man expresses himself again and again more than in anything else. He expresses himself for himself and for others. Works of culture that last longer than man bear witness to the spiritual life about him – and the human spirit lives not only by being in control of matter, but lives in itself with contents that are only available to him and have meaning for him. Thus, he lives with truth, goodness and beauty – and is able to express this inner life outwardly and objectify it in his works. Therefore, man as a creator of culture gives special testimony to humanity" [Wojtyła 1964, 1154].

The axiological aspect of culture is particularly emphasized by H. Rickert, according to whom it contrasts with nature "either as something created by man, who acts according to goals of recognized value, or – if it is something pre-existing – as cultivated because of the values attributed to it. In all cultural phenomena some man-recognized value is embodied."[1] Włodzimierz Stróżewski, on the other hand, stresses that "to the essence of culture belongs the state of embodiment of certain values, which entitles to the realization of the values of others, but always in some order higher than the found" [Stróżewski 1964, 121-22, 827]. He points out at the same time that „new situations demand new values. The moment of "demanding" is thus contained not only in values, but also in concrete situations, indeed, in reality, which "demands," as it were, to be valuable, to be "screened" by value. This is, in any case, the *sine qua non* condition of all human reality, whether individual or social. In particular: the necessary and sufficient condition of all culture" [Idem 1991, 126].

Of course, from the point of view of the issues addressed, norms will be referred to as axiological norms. "Axiological norm, as Czesław Znamierowski states, establishes the indications of conduct, guided by the value of the act, the theistic norm derives its rationale from the acts of will of some acting subject" [Znamierowski 1924, 77]. To the essence of these norms belongs the reference to the value in which they find their justification.

Human life, and with it the man himself, is a part of reality functioning within a certain value system. Values require actions and are related primarily to them, and to a lesser extent to feelings. When something is important, valuable to a person, he implements actions despite different emotional states. A person is a bio-, psycho-, social-spiritual entity, and is a value because he has personal dignity. Values are one of the determinants of goals and life plans of a person, who is both a creator and a recipient of values. Values have a long-term impact on human functioning, behavior

[1] Rickert 1915, 19-20; after: Kłoskowska 1983, 61.

and attitudes, shaping short- and long-term goals and life plans, as well as actions directed towards their realization.

Postmodernism generally denies the existence of an ontologically fixed human nature, which is evident in the views of Richard Rorty, who captures the individual human being as a "network of beliefs and desires" [Rorty 1996, 28], a set of emotions beyond which there is no foundation, human nature [Idem 1999a, 312; Idem 2005, 57-58, Październiora 2006]. Thus, there is clearly a turbulence in the understanding of man, his essence and view of reality resulting from different theoretical and philosophical approaches. However, as M. Rokeach writes, values are prescriptive orders or proscriptive prohibitions. He defines values as […] enduring beliefs that a certain course of action or end state is personally or socially preferable to the opposite course of action or end state [Rokeach 1993, 5]. He distinguishes ultimate values by including beauty, equality, freedom, convenience of life, exciting life, happiness, permanence of family, internal harmony, equality, peace, love, national security, pleasure, salvation, self-validation, social recognition, friendship, wisdom, and instrumental values: ambition, caring, honesty, creative imagination, ability to forgive, intellectualism, logicality, obedience, politeness, self-reliance, self-control [ibid., 5-7].

Different approaches to values are presented in the literature, which are understood differently from the point of view of their sources and functions. Thus, in the behavioral approach, values are reduced to positive and negative reinforcements. As P. Oleś notes, the reduction of values to reinforcements and the promotion of the model of man as a reactive individual contradicts the concept of values, which is inextricably linked to the autonomy of the person subjectivity and purposeful behavior [Oleś 1989, 26]. In the humanistic approach, a holistic view of the human being finds expression in a multifaceted consideration of values and their importance in the functioning of the person. Values in this approach are identified with what a person considers good and evaluates positively, what desires, what feels as pleasant, what expresses in duties or what chooses and realizes. In the psychoanalytic approach, the value system is linked to the super ego and the ideal ego. J. Cieciuch points out that five formal characteristics of values have been identified in the literature on which, according to S.H. Schwartz, there is consensus among many authors: […] they are concepts or beliefs; they concern desirable goals, describing ultimate states of affairs or behavior; they transcend concrete situations; they guide the selection and evaluation of behavior and events; and they are ordered by importance [Cieciuch 2013, 22-26]. S.H. Schwartz argues that it is necessary to analyze, not individual values, but their types. In presenting his concept, he considered ten types of values: conformity (limiting own aspirations and actions that could harm others or violate social norms, obedience, self-discipline,

respect for elders); tradition (acceptance and respect for the rituals and ideas of own culture or religion); universalism (concern for the welfare of all people, concern for environmental protection, justice, wisdom, peace); benevolence (concern for the welfare of loved ones, family, friends, acquaintances, friendship, love); self-direction (independence in thought and action, creativity, freedom, autonomous choice of own goals); stimulation (seeking novelty, striving for an exciting and varied life); achievement (personal success achieved through demonstration of competence according to social standards); hedonism (pursuit of pleasure, satisfaction of own needs); power (social status and prestige, control and domination over other people and resources); security (harmony, social order, personal, family and national security)[2]. In the scientific analysis of values, S.H. Schwartz used M. Rokeach's catalog of values in his research and analyzing the results using multidimensional scaling introduced the thesis of circular structure of values.

The thesis of S.H. Schwartz's theory according to J. Cieciuch can be formulated: "the structure of human values is in the shape of a universal, motivational, circular continuum" [Cieciuch 2013, 37]. J. Cieciuch reports that as a result of statistical analyses, the author came to the conclusion that the proposed catalog of ten values does not contain any obvious deficiencies [Idem 2010, 25-38], which has been confirmed by numerous studies conducted in many countries [Idem 2009, 48-72]. The regulatory functions of values in the structure of Self were pointed out by B. Wojciszke. He stresses that they play an important role in understanding own person and current situation, and at the same time they are guidelines telling how to act, and which courses of action to choose. Contained in the value system, attributional schemas are not just an abstract representation of desired qualities and states. Like all schemas, they are cognitive procedures and thus not so much ready-made and immutable representations, but tools for generating ideas, desired goals of own person in the course of orientation and behavioral regulation processes [Wojciszke 1986, 49-50].

Mass culture can sometimes be destructive to human consciousness, because it plants and grows out of the excessive realization of lower values, unconstrained by rational frameworks. The drive to satisfy low needs is intertwined in the practice of mass culture with the facade realization of some elements of higher values, which in the practice of everyday life means settling for a trivialized, vulgarized content of them. Mass culture inhibits the creative potential inherent in man, thereby destroying the ability to develop own view of the world. It does this by suppressing spontaneous feelings and emotions, replacing original mental acts with the feelings, thoughts

[2] Schwartz 2006, 929-68; after: Cieciuch 2009, 50-51.

and desires of others (a person reflects himself in the mirror of the crowd, duplicating the gestures of idols), through an overly elaborate information policy, for which what counts are unreflectively multiplied facts. Mass culture gives rise to a particularly dangerous, because deceptive (the person is delusional, disposing of his own will), insane activity aimed at acquiring more material goods – by stimulating appetites and threatening to take away prestige [Fromm 2000, 222ff].

As early as the mid-20th century, various experts predicted that spirituality would slowly but inexorably disappear. When people are provided with material goods in abundance, they will simply stop thinking about God. Unfortunately, the experts were wrong. Ronald Laing says that the essence of the crisis of individual is ignoring the inner sphere of man and, speaking the language of ancient Greece, the lack of concern for the soul (*paidea*), and this means abandoning stubborn and lofty humanism as an old-fashioned travesty. Man has become alien to the true "Self." He notes that we are creatures gone mad in retreat from the spiritual world, who have built civilization on profaning humanity [Laing 2005, 54-56ff]. The belief recognizing that all life forms including human life are solely the product of blind forces of nature is a philosophical view known as "materialism" or "naturalism" or "metaphysical naturalism." Most scientists follow materialism by believing that the physical world is the only reality. Everything else not excluding thought, feeling, mind and will is explained in terms of matter and physical phenomena, leaving no doubt that religious and spiritual experiences are purely illusions. It is assumed that the mind is a mere illusion resulting from brain function. Some proponents of materialism even believe that terminology suggesting the existence of the mind should not be used. In contrast, modern neuroscience allows to enter the realm of spirituality and makes it possible to study it. It is now noted that human spirituality takes on a wide variety of forms, and all over the world its development is taking place.

We must be aware that the existence and moral essence of a democratic nation, state should be based on a personalistic concept. This concept is not originally based on religion, on race, on ethnic group, on class, but on humanitas, which unites the citizens of all and which requires its establishment in terms of freedom and responsibility. The ontological basis is the real and concrete person with his duties and rights, which determine the value, tension for human fulfillment on the plane of coexistence regulated by the legal system and directed by authority towards the common good. Unfortunately, the negative phenomena of mass culture, forming a virtual community of transgressions and opinions makes it difficult to overcome the crisis of reality.

More than structural, the crisis of modern and multidimensional democracy is primarily a crisis of meaning, a crisis of ethics. Therefore, its solution

should not be sought at the level of institutional and procedural reforms, creating new ones adapted to the context of globalization process. Above all, it is necessary to start from the integral experience of the person from his dignity and freedom, in other words, from the anthropological plane. The responsible person is called upon to engage at levels of life, other than the reform of the rules of game, more decisive for the future of democracy. In the first place, it is necessary to take action on the plane of truth concerning man, his freedom, his transcendence and society. Without the ability to even imperfectly reach ontological truth and personal ethics, moving from the phenomenon to the fundamentals, all consideration of democracy and its values will be superficial.

As a concrete and universal category, human dignity should become a unifying element in political and religious pluralism and as the last reason for valuing and evaluating cultural differences. The primary genesis of personal and social life should be a guideline in reflections linking democracy with ethics and religion. In contrast, agnosticism at its core heralds a rift between spiritual and cultural families, while secularism that is consciously anti-religious may prove to be a danger to democracy.

Zbigniew Stawrowski notes that "In the midst of the prosperous West, elegant Huns have sprung up, who in the happy belief that they are paving the way for progress, are destroying the foundations of Western civilization […] in the circle of our culture there is a struggle over how to understand freedom, and thus over who will ultimately define the identity of the Western world" [Stawrowski 2012, 71]." There is a devaluation of truth and absolutization of freedom leading (through political correctness) to the creation of the ethos of the European world according to Orwell's vision of "equal and more equal," the dictatorship of the minority against the majority, the use of all kinds of linguistic fortes to blur the proper hierarchy of values in the ambivalent norms of social life. So-called political correctness is advancing by removing from the public space anything that might be associated with valuing cultures, customs and beliefs. Any criticism of worldviews, attitudes, beliefs, lifestyles, practices or local customs is unacceptable. Piotr Sztompka points out that "Terms suggesting inferiority and superiority, something that is inferior and superior, backward and progressive, primitive and developed, barbaric and civilized – have no right to exist in the vocabulary of the proponents of so-called political correctness and are replaced by the single term "other." Moreover, not only the evaluation but also the presentation of each culture must ensure their equal treatment" [Sztompka 2012, 304].

Michal Heller points out that "Rationality is a life attitude that prompts to solve the problems we face by appealing to reasoned arguments and experience, rather than by indulging in passions and emotions. An important

part of this attitude is the willingness to listen critically to the arguments of the other side" [Heller 2015, 104].

With regard to reason and nature, Benedict XVI said: "Where positivist reason considers itself the only sufficient culture, reducing all other cultural realities to the level of subcultures, it diminishes man and threatens humanity. I say this precisely with a view to Europe, where numerous groups try to consider only positivism as a common culture and a common basis for law-making, reducing all other beliefs and other values of our culture to the level of subculture, and thus Europe stands in the face of other world cultures without any culture, and extremist and radical cultures are revived."[3]

2.

In the further course of these reflections, I would like to develop some thoughts on the concepts contained in the title of this paper.

The ethics of modernity begins in the 18th century and its social background and basis is the Industrial Revolution while its intellectual expression is the philosophy of the Enlightenment. Beginning with Baruch Spinoza, modern thinking begins to be governed by naturalistic opinion and in the world of values, the question of happiness and virtue, the concepts of truth and falsity have exactly the same application as in mathematics or natural science. The universal principles of reason bind in the same way in all fields of cognition. We are free beings and therefore we can make a choice whether we submit to these principles or not. In general, the Enlightenment and other philosophical traditions of modernity found a solution to this problem in Cartesianism [Safranski 1999, 155]. Derived from it, the compulsion of logic and truth, as R. Safranski defines it, acquired an all-encompassing character.

The term "postmodernism" appeared in 1934. It was used primarily by literary critics and art theorists. It was popularized and given a modern meaning only by J.F. Lyotard. This intellectual current was a response to a fundamental change in social reality, including the domination of social life by consumerist attitudes, the increasing diversity of personalities and attitudes to life and tolerance of all forms of difference, and finally the unprecedented role of the media, which took on the role of the main creator of reality of everyday life, and finally the decentralization of culture [Szahaj 2003, 41ff].

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[3] See Benedictus PP. XVI, *Serce rozumne. Refleksje na temat podstaw prawa. Przemówienie w Bundestagu 22.09.2011*, "L'Osservatore Romano" (Polish edition) 10-11 (2011), p. 40-41.

The object of postmodern criticism became Cartesianism, which is the foundation of modern thinking. Postmodernism appeared to be intellectually committed to critiquing the constructs built by other theories rather than creating its own.

Culture as a whole creates the conditions for human development and for a variety of human communities that subordinate and shape reality, thus influencing the development of all people. In the era of civilization development, the image of modern man has become "disturbed" and is the cause of humanistic, ethical and legal problems. Modern society, called since the 1990s the information society [Lubacz 1999; Ito 1991, 3-12], perpetuates the tendency to describe phenomena in terms of information. The human mind is likened to an information-processing system (cognitivists), the ability and development of living organisms is explained by the properties of the DNA code. The universe is compared to a giant computer. These measures introduce into our culture on an ever-widening scale, an informationist world-view, i.e., an information-established view of the world of liquid modernity. Living in a computerized society strongly stimulates various questions about the typical dangers of the information age [Lubacz 1999, 100-23]. Man of today seems to be constantly threatened by what is his own creation, what is the result of the work of his hands, the work of his mind, the aspirations of his will. This state of threat to man from the creations of man himself has different directions and different degrees of intensity characterized for many years by an erroneous vision of man. Any conception of life as L. Kołakowski notes is "A question of our choice between all possible languages" [Kołakowski 1990, 123]. We live in a world of post-truth, post-humanism, post-secularism, post-politics, post-democracy, post-modernity in an information society, in a risk society. It is not Christians today who create culture, but secular culture that determines how Christians think and how they perceive the meaning of their lives and missions. The most human value of man as a rational and moral being has always been, is and will always be freedom and maintenance of the human will with the will of spirit.

Therefore, the 21st century has the task of taking a special approach to the protection of values, expressed in such a psychological and spiritual construction of man, so that his image is true, so that it provides the other with balance in mutual contacts and enhances mutual trust, fraternity, solidarity, responsibility. These are the values, according to many philosophers, that constitute our humanity.

As John Paul II wrote in the Encyclical *Centesimus annus* about the state of mind and hubristic people that lead to totalitarian politics, "When people think they have possessed the secrets of perfect social organization that eliminates evil, they also think they can use any means including violence

or lies to make it a reality. Politics then becomes a secular religion that deludes into thinking it is building a paradise on earth." The growing crisis of Western civilization, which is undergoing programmed secularization, can only be stopped by a civilization of love based on such universal values as goodness, truth, beauty, freedom, peace, justice, solidarity and above all love. It is also about social love in the modern world.

Undoubtedly, we live in the age of knowledge, information, which is the source of new forms of power very often anonymous. We are experiencing an increase in wealth and productivity, but growing inequality, corruption, exclusion; appeals to work for the common good but also a turning away from ethics; motivation for global security, with aggression, violence and fears continuing to escalate. We are also experiencing changes of a cultural, political, social, religious nature, which are reflected in various attacks on religious freedom, individualism, secularization, fundamentalism, indifference, relativism, disillusionment, cultural imperialism, a return to totalitarianism. Many of us feel overwhelmed by all this. A form of danger is androgenic risk, which determines psychological, cultural and social factors. They involve the abandonment of traditional cultural patterns, the negation of previously learned and recognized values, or the dilemma of will as to the wisdom of making decisions [Kiepas 1996, 11-21; Wust 1995, 10ff].

As we need to be aware, the globalization process in the cultural dimension brings with it, in addition to many positive negative phenomena, the harmful impact of which is commonly downplayed. One of the areas where such phenomena are revealed is mass culture. Konrad Lorenz, addressing the problem of individuality as one of the greatest threats to the modern world, notes that a particularly alarming fact is the autoimmunity of science. Science ceases to be elitist, it becomes a mass precedent blunting individualism, instead promoting thinking according to prescribed patterns. "There are too many who refuse to see the germination of new thoughts. Autoimmunization of scientific views can lead to the total disappearance of cognition" [Lorenz 1986, 147]. Currently, non-materialist neuroscience is booming, despite the many limitations imposed by widespread misunderstanding, it is leading research toward spiritual brain science and the current results are extremely interesting and show promising cognition [O'Leary and Beauregard 2011]. What is at stake in the biotechnology revolution is the meaning of man and human nature, the self-understanding of human species. The consequences have and will continue to have a profound and, for now, difficult to predict impact on the shape of civilization [Fukuyama 2004; Habermas 2003]. K. Lorenz wrote that in the present era, the prospects for the future of humanity are exceptionally sad, if it does not die from nuclear weapons or environmental poisoning, it is threatened by the gradual regression of all the qualities and achievements that constitute its humanity.

He believes that the mind becomes the enemy of the soul and leads to perdition. He writes: "Today's youth is in a particularly critical position. In order to avoid the threatening apocalypse, it is necessary to reawaken among the young the sense of value, beauty and goodness, suppressed by scientism and technomorphic thinking" [Lorenz 1986]. The phenomenon of humanity regression is incredibly complex and complicated.

Now is the time of testing for man, whether and what values he professes and embodies in this world? There has been a time of polarization of attitudes toward authentic versus contrived values, which has been going on for many years. Thus, it can be said that the battle continues between good and evil for truth and our identity. There has been a great spiritual depression evident in Europe, including Poland, and the construction of a world without the family, which produces a sick society including the bad fruits of behavior, passions, emotions.

A component of the new human consciousness in the age of globalization should be pacifism, solidarity, brotherhood, love, truth, goodness. Otherwise, globalization will become a fiction. Therefore, there should be such theories of the law of nature that point to the value of peace as a legal-natural one, derived from the recognition of human life as a fundamental value and respect for personal dignity. A society that is to develop must have the necessary ideals, i.e., the higher values towards which it seeks to strive. The relevance of the theory of the law of nature in the era of liquid modernity is all the greater because it is fused with the view that ethics and law rather than the economic factor play a determining role. Liquid modernity, the current reality does not guarantee human freedom and personal character. John Paul II, in Evangelium vitae, points out the acceptance of "degenerate and despicable human freedom: with its recognition as absolute power over and against others." He presents a theoretical mechanism for such thinking and acting: "Whenever freedom, desiring to extricate from all tradition and authority, closes itself even to the primary, most obvious monuments of objective and universally recognized truth, which is the basis of personal and social life, then man no longer accepts the truth about good and evil as the only and unquestionable reference point for his decisions but is guided solely by his subjective and changeable opinion or simply by his selfish interest and whim. This conception of freedom leads to a profound distortion of social life. If the promotion of own self is conceived in terms of absolute autonomy, it leads inevitably to the negation of the other; he is seen as an enemy to be defended against."[4] This, in turn,

[4] Ioannes Paulus PP. II, Littera e encyclicae de vitae humanae inviolabili bono *Evangelium vitae* (25.03.1995), AAS 87 (1995), p. 401-522, no. 19-20.

serves to create ideologies that function in the public space, often referred to as "theories in service."

The freedom a person could achieve requires a high degree of knowledge and criticism, a conscious choice of values, and the courage to rely on oneself and be responsible. Which means high intellectual and rational and spiritual qualities. If these criteria are not met, a person remains alone with his insecurity, then seeking contact with other people gives rise to conformist tendencies, various types of phobias, addictions, escapes into virtual reality, tying to information and communication technology, which gives him the feeling of belonging to a relatively safe environment. Thus, he does not bind to a community that requires certain moral behavior and adherence to a hierarchy of values. Consequently, an IT worldview has emerged, which stands for a certain type of pre-philosophical views that have as their basis information and a strong belief that various IT concepts such as data, algorithm, program, calculability and incalculability play a key role in describing the world and human-world relations. Of the many different ones, two are also exposed: that the human mind is an information-processing system (which is why it should be modeled with information systems), and secondly, the (computational) complexity of problems in the world is constantly growing [Marciszewski and Stacewicz 2011, 223]. This worldview is built, shaped according to the way of experiencing the world. Therefore, a certain consciousness is created, which has its technological dimension, related to the knowledge of information technology and the ability to use its products, but also a non-technological dimension, related to the understanding that IT concepts and models can be used effectively to describe non-technical phenomena (such as the development of organisms, human mental activity, or economic processes). It is this second dimension that fosters the formation of an IT worldview [ibid., 211-15]. For many people and especially young people without experience, it can be a great pitfall to recognize in time what a threatening ideology hides behind mere words. It is also a threat to the average media viewer, who when subjected to technology manipulation, may lose their common sense [Jaroszyński 2007, 122].

Klaus Schwab points to the fourth industrial revolution that is taking place nowadays, which is digital in nature [Schwab 2016]. It is characterized by the ubiquity of the Internet, ever smaller and more efficient sensors, artificial intelligence and machine learning. All of these factors are having a decisive impact on the economy, the nature of work, employment, consumer expectations, security, information management, governance, climate, identity, social inequality, morality and community. Experts today no longer speak of "change" but of "breakthrough." They emphasize that this great transformation is already taking place and will continue even if we ignore it.

Nebulosity is one of the characteristic features of postmodernity. The term is taken from W. Kalaga [Kalaga 2001], as this author applies to the text – in its postmodern understanding [ibid., 234ff]. The emphasis on textuality is close to legalistic thinking, in which the linguistic plane is considered one of the basic ones. What is nebulous is thus rather fluid, changeable, interpenetrating, vague. Nebulosity is close to what Zygmunt Bauman calls the "fluidity" of the modern version of modernity [Bauman 2006, 5-25], to define the essence of the concept of text as nebulous and to distinguish it from the competing vision of text which is movement, center, periphery. Lech Kołakowski writes that increasingly postmodern modernity is post-Enlightenment, in the sense that it is an Enlightenment that has turned against itself: the loss of reason as a result of the triumphant victory of Reason over the Unreason of archaic mentality [Kołakowski 1996, 108].

Nicola Abbagnano has shown that the postmodernism paradigm is a delegitimization of knowledge and a negation of the objectivity of knowledge and truth in the name of the right to selfish will. In his view, postmodernism is the result of the division of many contributions of numerous disciplines, among others, evolutionism, nihilism, Levy Strauss's cultural anthropology, Marcuse's and Foucault's pansexuality, Kinsey reports, Marxism, Comte's humanist-religious ideology, Vattim's weak thought, Freud's psychology, Lyotard's reflection, constructivism, Derrida's and Deleuze's deconstructionism, Marxist feminism: from that of equality to radical Anglo-American and French poststructuralism [Abbagnano 1998; Kohler 1977, 8-18; Patella 1996, 63-66]. Postmodernism turns out to be a collection of cultural attitudes characterized by the term post, combining various disciplines, but being for a long time devoid of systematic and self-conscious features. This is the character it acquires starting from the reflections of Ihab Hassan [Hassan 1982; Idem 1998, 7-8] and the categories with which he organized it, and from which the technical terms are derived: we find them in the "new language" initiated by postmodernism in literature, art, mass media and cinema. These concepts have permeated the vernacular by introducing mainstreaming everywhere: indeterminacy, departure from canons, irony, hybridization, carnivalization, fragmentation, vacation of the Self, irrepresentability, performance, constructionism, immamency. Ihab Hassan distinguishes between the concept of modernism, which according to him, refers to artistic and literary phenomena, and the concept of postmodernism, which refers to political and social phenomena. For postmodernism, scientific and technological knowledge is formed in the culture of computer, expressed in a certain language. It is noted that knowledge is no longer an end, it is created in order to be sold, exchanged, consumed as a means of mastering information and thus man through the computerization of modern society. From Ihab Hassan's methodology it follows that postmodernism

consists of and is simultaneously dependent on the trakshumanization of the earth, on the possibility of a new planetarization. Moreover, postmodernism is to be dependent on the technological extension of consciousness, and reduced to information, and history to happenstance. Postmodernism is to turn out again in the dispersion of humanity, immanence of speech and mind finding resonance in art that demolishes and divides and consequently as an artistic, erotic, philosophical and social phenomenon.

3.

All dehumanized theories and especially positivized science have betrayed man fully, in his individuality and distinctiveness. Democratic societies have focused on creating a one-dimensional man, creating a criterion for social recognition and thus achieving relative stability. Information technology, which has been developing extremely rapidly over the past few years, becomes a discipline with vast fields of research. New technologies have created a dictate for digital techniques, it can even be said that digital totalitarianism has been created. States and man have lost their sovereignty. Man has been stripped of his spiritual sovereignty become a lost and fearful person. The canon of Judeo-Christian civilization (X commandments) of Europe formerly accepted by Christians and atheists alike is being undermined today. A depreciation of values is taking place, because the man as a person with his personal dignity is not respected. The information society becomes indifferent to violations, threats to human rights and freedoms, and accepts the anti-values that are promoted by the mass media, although not by all of course. Man is being tamed by the language of revolutionary globalization ethics striking at the foundations of humanity, values, thus leading to depersonalization. Various measures are being taken so that in Poland man, in the name of pluralism and freedom, is not "condemned" only to Christianity and the values it proclaims. Hence, various ways of thinking, creating and expressing man are offered on social platforms, unlearning thinking and teaching only action. The information system offers everything that this man needs for further actions. Various social theories, ideologies are mixed in order to "help" change the mentality of the spirituality of modern man in this way. We know that the essence of thinking includes freedom, and therefore the ability to direct thoughts, and when subjected to a certain "treatment" man loses his freedom. That is why thinking is closely related to morality defined at the same time with values. Information and communication technology shows how to effectively manage time, in which, consequently, man loses control over it. The phenomena and processes of electronization, informatization, computerization, digitization, algorithmization, Internetization, virtualization bring new and previously unknown: dangers

– obvious and not obvious dangers on an individual, group, local and global scale. Information and communication technologies have, for the first time in the history of mankind, attempted to control the process of shaping a new civilization. Scientific, technical and organizational tools allow it. People, enraptured by novelties, enter softly into various ideologies, consumerism, and therefore the satisfaction of needs and multiplication of temporal goods forgetting about the spiritual because they are fed by a lower culture. As Michal Heller put it, "thought changes the world – from a morally neutral world into one permeated with values […] and so every good and every evil is born of thought […] the good of thought is wisdom and the evil of thought is stupidity […] rationality constitutes the morality of thinking. Pondering rationality must lead to the question of truth. The dramatic nature of human destiny is that the most important decisions to make in the area of difficult rationality" [Heller 2015, 7ff]. There is a symptom of inhibition of the realization process of uniqueness of the person, inhibition of the need for difficult (demanding) freedom, involving a sense of responsibility for the shape of own spirituality and own life, as well as for the shape of reality dependent on us and the meaning of life. The problem of modern democratic societies is the withering of critical thinking, the complex and multiple causes of which lend to a fundamental bundle that has its source in the overwhelming liberation from responsibility. Nowadays, post-truth and hype is a difficult to avoid element of information transfer. Only the use of reason underpinned by correct formation can help overcome these difficulties. Conviction in this case is not enough but must also be justified. Therefore, it is not rationality of the positivist type, but as Michal Heller describes it, "rationality as a morality of thinking, or simply ethics" [ibid., 27ff]. A world overwhelmed by materialist philosophy is incapable of providing answers to key questions about the nature of man, and at the same time offers no hope of ever providing them in an intelligible way. At the same time, we note that its proponents have succeeded in convincing millions of people that they should not develop their spirituality because they do not have it.

We are all experiencing changes in the modern world, because we live in a time when the whole parameters of the operation of information and communication systems as well as networks, which are saturated with computer hardware using digital means of data processing, the amount of information collected and transmitted, the availability of information resources for potential users, the environment of artificial intelligence, are increasing faster and faster. Adopted in the bodies of world business are modern information and communication infrastructures that form the most important factor in the growth of the wealth of nations and the most effective means of realizing civil and political rights. International business has begun to increasingly influence the emerging policies and structures

of states. Shaping e-commerce and electronic democracy, it has become the focus of state bodies and international organizations. At the same time, there have been difficulties in distinguishing between important and unimportant information the impact of new technologies on lifestyles, the meaning of life, organization, the amount of information goods and services offered and used, the extent of information necessary for life in society and the state, the dependence of human existence on the correct operation of technology, the risk of abuse by uncontrolled processes, the likelihood of a total empire of privacy control, the disparity between the initiated and uninitiated in issues of information technology. New and hitherto unknown difficulties arise in legal transactions and administrative operations. Widely available information on the Internet and easily established communication through it, shapes new communities called virtual communities. Thus, new communities, collectivities, organizations, institutions and businesses with unlimited reach are being formed. Such communities today become immeasurable markets for marketing penetration and media manipulation, something the church has limited access to with its message of values and evangelism. Public acceptance of total surveillance and manipulation is attempted by exposing the economic benefits of an easy life, satisfying ludic needs and overlooking cultural risks.

As the Blessed Primate of the Millennium Cardinal Stefan Wyszyński did in the past in relation to the times and the mission of church in them, the pursuit of truth must be a moral choice, as well as realism that builds on the rock, and this is what is most difficult – assessing the strength of the arguments for and against. What has been lacking so far within the Catholic community is a recent diagnostic and prognostic effort in the context of Catholic social teaching to clarify and assess, the current situation of the church's mission in the world of liquid modernity. The Church should return to its original form, known from the New Testament, it is necessary to develop the human potential of church members. Formation is needed that integrates faith and reason, heart and mind, life and thought. A life following Christ requires a whole, integrated personality. Where the intellectual, rational dimension is neglected, a form of pious enchantment is too easily born, living solely from emotions and states of mind that cannot be sustained throughout life. And where the spiritual dimension is neglected, diluted rationalism and anti-values are created. Proper and correct intellectual-spiritual formation of church members – priests and laity – must take place in the church. The church must teach thinking, because it is a choice, it is up to each of us what we will do with this world and our temporal life, not being indifferent to the spreading evil, which we must be able to diagnose guided by Christian values. For thinking and living are closely intertwined.

M. Foucault expresses a view related to transgression, writing that modernity, or rather the attitude of modernity, is an attempt to treat the present in a new way. The present is to be subjected to constant criticism. The criticism, which is conducted permanently, is supposed to make it possible to get an answer to the most important question: who am I? And at the same time, who am I really in certain conditions and in a given situation? In this way, the ontology of the present and the analytics of truth are practiced. This is the emerging problem of truth, the subject of truth and inventing oneself as a newly constituted moral subject [Foucault 1990, 46]. According to Ch. Taylor, the answer to the question of who one is involves indicating choices, commitments, identifications; to be faithful and act in accordance with them; in reflecting on orientations and actions to determine what is important to us and what is not. The question of identity is not determined by an ordinary set of facts, but by strongly valued choices [Taylor 2012, 93]. Reflection allows the constitution of own world, the autonomy of subject. "The constant effort to understand ourselves also concerns our future, whether we are moving in the right direction. The answer: yes or no, although given at different times in our lives and posed from different points of view (the story of our own life – how we became, who we are – also includes an idea of the future) hides the question of absolute good. We cannot do without an orientation towards the good, although our ideas about the good change over time, it permeates our entire way of understanding ourselves." Undoubtedly, certain periods and situations may favor the refinement of moral sensitivity, reading the value system correctly, and others hinder this. As R. Piłat notes, "The object of reflection is not so much the content, form or course of own mental processes, but the fact that they occur at all and that they are mine – in this kind of reflection the property of the one who thinks or experiences is captured, thus revealing himself" [Piłat 2013, 15].

Reflection allows to see the difference between a thing, others and ourselves. It also lies at the heart of our talk about persons. As R. Spaemann puts it, "Morality is possible only of this capacity for self-objectification and thus self-relation" [Spaemann 2001, 20]. On the other hand, the ability to self-create has through reflection: it distinguishes between what is right and wrong, higher and lower, better or worse, organizes motivation hierarchically and acts on the basis of the construction of ethical commitments [Taylor 2001, 285]. There are strong value judgments that are anchored in feelings, emotions and aspirations. In them is contained the moral map of the subject.

The term IT worldview appears in the literature to denote a certain type of pre-philosophical views that have as their basis the strong belief that various IT concepts (such as data, algorithm, or automaton) play a key role

in describing the world and in the human-world and often human-human relationship [Marciszewski and Stacewicz 2011, 112].

Living in the era of post-truth, liquid modernity, information society, we most often see cognitive and moral relativism, pragmatism grounded in utilitarianism and hedonism, anti-historicism that undermines the meaningfulness of tradition, as well as utopian syncretism, which often turns into religious eclecticism or some form of atheism, godlessness or ideology of the information worldview. Added to this is a naturalistic vision of man, which reduces human existence to the field of production, consumption of means of life. On the other hand, on the ground of multicultural community, there is latent or overt irrationalism pointing to the purposelessness of human life, stimulating man to perpetual amusement or to the competition of one with the other, ultimately making the other his servant-slave. In the commercialized world as a result of the spread of consumerism ideology, dignity does not matter – what matters is money. For their acquisition, values do not count. An inevitable consequence of the current state of affairs is a crisis of the existing world of values, its order, meaningful side, clear axiological criteria, constant and reliable direction indicators, basic norms and principles.

L. Nowak notes that "Postmodernism finds […] a place for man, but this place is subordinate, the chief place is occupied by structures" [Nowak 1993, 45], and that which is interpersonal is ontologically primary in relation to that which is human. Attention is drawn to the interest of postmodern philosophers in the interpersonal, that which exists not in man, but what he produces in contact with the world around him, and therefore – among others – also with other people. In postmodernism, the idea of destroying the notion of subject, understood in the traditional way, which is a basic element of the hitherto anthropocentric philosophy, is fully realized. The individual seen is postmodern prism acquires a unique feature, individual characteristics, appropriate only to itself terms and characteristics. Postmodernity gives the chief place to the person, but this person is the "Self" and not the "Other." A person has first and foremost duties to himself and not to others, has allegiance to himself and not to something or someone. He recognizes that conforming to external standards of behavior is false, and that controlling emotions and reactions is hypocrisy. In this world, morality is turned "inward" and not "outward" as before. The honest person should be first to himself and possibly only second to others. Hence the multiplicity of identities in place of the former few group identities (family, religious, class, national) [ibid., 46ff].

H. Arendt points out that "In the new secularized and emancipated society, people were no longer sure of those social and human rights that were outside the political order and guaranteed by the government

and the constitution, but of social, spiritual and religious forces" [Arendt 1993, 325]. He argues that from that moment the bond between man and his rights was broken. Man, along with his rights, was inscribed in the order of the nation-state in such a way that when he is removed from it or has to evacuate his rights cease to accompany him and becomes outside any rule of law [ibid., 326].

There is no doubt that there is an important difference between traditional society and modern society. It has already been specified that modernity is a transition from a society of fate to a society of choice [Piwowarski 2000, 186], but also a society of risk. Increasingly less people discover and understand the model of marriage and family resulting from the gospel, and consequently so few are building their marriage and family based on the principles that result from it. The crisis of family is related to a crisis of faith, with a crisis of the proper hierarchy of values in life, which results from a false philosophy of life, a false anthropology. We adopt, being influenced by the model of life of French and partly American modernity – a vision of socio-political reality opening to new ideologies.

CONCLUSIONS

The afflictions affecting people in the 20th and first decade of the 21st century came from the absence of the ethical dimension in the understanding of man, or its subordination to the ontological dimension. Therefore, it becomes a necessity to change thinking by reversing the relationship between ethics and ontology. The real life of man takes place in the family and not in virtual reality – information and communication technology must become a tool for achieving higher goals for the good of man and not for his destruction and depersonalization. Over the past few years, there has been a marked change in geopolitical policy, which must result in the fact that the peoples of Europe must take a different look at the positions hitherto presented on universal values, making the effort to dialogue in building a common good, which is Europe, rejecting theories, ideologies that do not serve this – tendencies to dehumanize and re-educate the meaning of man – the person. Guided by freedom, reason and responsibility, there must be an ethical perspective in political, social, community and economic life, thus the dimension of difficult art of service and sacrifice for the person and society rejecting posthumanism as well as transhumanism. In the biotechnological revolution, the meaning of person-human and human nature, the self-understanding of human species must be at stake. There is no doubt that technique and new technologies are also becoming an opportunity for human beings, but they require consideration of ethical and moral norms and higher values as well as rethinking the future. There is a need

to mobilize wisdom, hearts and spirit to correctly read the signs of times. What is needed is sustaining friendship and solidarity within the bosom of Europe, mutual acceptance, participation, co-responsibility for a common destiny and not competition, rivalry, desire to dominate another nation.

We live in an age of crises and the 21st century has inherited them. The 20th century has left us a terrible legacy from which no one can escape. In view of this, we must ask ourselves not how to eliminate crises, but how to teach people to live in difficult situations and resolve disputes and interpersonal conflicts. This is a psychological, ethical, legal, social, cultural and religious task at the same time. The urgent need is for moral-social education that takes into account the pedagogy of solidarity consisting of liberation, and therefore the stimulation of pro-social attitudes and behavior, a culture of affection, goodness, respect for the elderly and children, education of altruism and empathy, care, concern, and help.

REFERENCES

Abbagnano, Nicola. 1998. Storia della filosofia. G.E. L'Espresso. Vol. 9.

Arendt, Hannah. 1993. *Korzenie totalitaryzmu*. Vol. 1. Translated by Mariola Szawiel, and Daniel Grinberg. Warszawa: Świat Książki.

Bauman, Zygmunt. 2006. *Płynna nowoczesność*. Translated by Tomasz Kunz. Kraków: WL.

Cieciuch, Jan. 2009. "Value priorities and structure in adolescence and early aadulthood in 19 European countries." In *Axiological aspects of development in youth*, edited by red. Wanda Zagórska, Jan Cieciuch, and Dariusz Buksik. Warszawa: Wydawnictwo UKSW.

Cieciuch, Jan. 2010. "Nadzieja jako moderator związku poczucia koherencji z preferencjami wartości." *Kwartalnik Naukowy Towarzystwa Uniwersyteckiego Fides et Ratio* 2(2):25-38.

Cieciuch, Jan. 2013. *Kształtowanie się systemu wartości. Od dzieciństwa do wczesnej dorosłości*. Warszawa: Liberi Libri.

Eliot, S. 2000. "O centralnej pozycji chrześcijańskiej tradycji, łączącej w sobie dziedzictwo Grecji, Rzymu i Izraela." In Norman Davis, *Europa*. Kraków: Znak.

Elzenberg, Henryk. 2005. "Pojęcie wartości perfekcyjnej." In Henryk Elzenberg, *Wartości i człowiek. Rozprawy z humanistyki i filozofii*. Toruń: Wydawnictwo UMK.

Foucault, Michel. 1990. "Qu' est-ce que la critique? Critique el Aufklarung." *Bulletin de la Societe francaise de Philisophe* no. 2.

Fromm, Enrich. 2000. *Ucieczka od wolności*. Translated by Olga Ziemilska, and Andrzej Ziemilski. Warszawa: Czytelnik.

Fukuyama, Francis. 2004. *Koniec człowieka. Konsekwencje rewolucji biotechnologicznej*. Translated by Bartłomiej Pietrzyk. Kraków: Znak.

Habermas, Jürgen. 2003. *Przyszłość natury ludzkiej. Czy zmieniamy do eugeniki liberalnej?* Translated by Małgorzata Łukaszewicz. Warszawa: Scholar.

Hassan, Ihab. 1982. *The Dismemberment of Orpheus*. Madison, Wis.: University of Wisconsin Press.

Hassan, Ihab. 1998. "Post moderno e letteratura." In Nicola Abbagnano, *Storia della filosofia*. G.E. L'Espresso, vol. 9.

Heller, Michał. 2015. *Moralność myślenia*. Kraków: Znak.

Ito, Y. 1991. "*Birth of Joho Shakai and Johoka Concepts and Their Diffusion Outside Japan*." *Keio Communication Review* 13:3-12.

Jaroszyński, Piotr. 2007. "Pułapka politycznej poprawności." In *Polityka a religia*, edited by Piotr Jaroszyński. Lublin.

Kalaga, Wojciech. 2001. *Mgławice Dyskursu. Podmiot, tekst, interpretacja*. Kraków: Universitas.

Kiepas, Andrzej. 1996. "Dylematy etyki inżynierskiej." In *Technika w świecie wartości*, edited by Stanisław Jedynak, 11-21. Kielce: Wydawnictwo Politechniki Świętokrzyskiej.

Kłoskowska, Antonina. 1983. *Kultura masowa*. Warszawa: Wydawnictwo Naukowe PWN.

Kołakowski, Leszek. 1990. *Horror metaphysicus*. Warszawa: Wydawnictwo „Res Publica".

Kohler, Michael. 1977. "«Postmodernismus». Ein begriffsgeschichtlicher Überblick." *Amerikastudien* 22, no. 1:8-18.

Kołakowski, Leszek. 1996. "Nasz relatywny relatywizm." In *Habermas, Rorty, Kołakowski. Stan filozofii współczesnej*, edited by Józef Niżnik. Warszawa: IFiS PAN.

Laing, Ronald D. 2005. *Polityka doświadczenia. Rajski ptak*. Translated by Agnieszka Grzybek. Warszawa: Znak.

Lorenz, Konrad. 1986. *Regres człowieczeństwa*. Translated by Anna Tauszyńska. Warszawa: Państwowy Instytut Wydawniczy.

Lubacz, Józef. 1999. *W drodze do społeczeństwa informacyjnego*. Warszawa: OWPW.

Marciszewski, Witold, and Paweł Stacewicz. 2011. *Umysł – Komputer – Świat. O zagadce umysłu z informatycznego punktu widzenia*. Warszawa: Akademicka Oficyna Wydawnicza EXIT.

Nowak, Leszek. 1993. "Postmodernizm: pewna próba wykładni metafizycznej i wyjaśnienia historycznego." In *Wobec kryzysu kultury*, edited by Lech Grudziński. Gdańsk: Wydawnictwo Uniwesytetu Gdańskiego.

O'Leary, Denyse, and Mario Beauregard. 2011. *Duchowy mózg. Neuronaukowa argumentacja za istnieniem duszy*. Translated by Zbigniew Kasprzyk. Kraków: Wydawnictwo WAM.

Oleś, Piotr. 1989. *Wartościowanie a osobowość. Psychologiczne badania empiryczne*. Lublin: Redakcja Wydawnictw KUL.

Patella, Giuseppe. 1996. "Le categorie del moderno e del postmoderno." *Nuova Secondaria* 1:63-66.

Paździora, Michał. 2006. "Spór o prawa człowieka." In *Z zagadnień teorii prawa. W poszukiwaniu podstaw prawa*, edited by Adam Sulikowski. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Piłat, Robert. 2013. "O kruchości refleksji." In Robert Piłat, *Powinność i samowiedza*. Warszawa: Wydawnictwo Naukowe UKSW.

Piwowarski, Władysław. 2000. *Socjologia religii*. Lublin: Redakcja Wydawnictw KUL.

Radbruch, Gustaw. 1938. *Zarys filozofii prawa*. Warszawa-Kraków: Księgarnia Powszechna.

Rickert, Heinrich. 1915. *Kulturwissenschaft und Naturwissenschaft*. Tübingen: Mohr.

Rokeach, Milton. 1993. *The nature of human values*. New York: Free Pr.

Rorty, Richard. 1999a. *Obiektywność, relatywizm, prawda*. Translated by Janusz Margański. Warszawa: Aletheia.

Rorty, Richard. 1999b. *Philosophy and Social Hope*. London: Penguin Books.

Rorty, Richard. 1996. *Przygodność, ironia i solidarność*. Translated by Wacław J. Popowski. Warszawa: Wydawnictwo Spacja.

Rorty, Richard. 2005. *Prawa człowieka, rozum i uczucia*. Translated by W. Jach. *Odra* 2:57-58.

Safranski, Rüdiger. 1999. *Zło. Dramat wolności*. Warszawa: Aletheia.

Schopenhauer, Artur. 1995. *Metafizyka życia i śmierci*. Translateb by Józef Marzęcki. Warszawa: Ethos.

Schwab, Klaus. 2016. *La quarta rivoluzione industriale*. Milano: Franco Angeli.

Schwartz, Shalom H. 2006. "Basic human values; Theory, measurement and applications." *Revue francaise de sociologie* 47, no. 4:929-68.

Seton-Watson, Hugh. 1985. "What is Europe? Where is Europe?" *Encounter* July/August, vol. LXV, no. 2.

Spaemann, Robert. 2001. *Osoby. O różnicy między czymś a kimś*. Translated by Jarosław Merecki. Warszawa: Oficyna Naukowa.

Stawrowski, Zbigniew. 2012. *Wokół idei wspólnoty*. Warszawa: Znak.

Stróżewski, Władysław. 1964. "Kultura a wartość." *Znak* XVI, no. 7-8(121-122):825-27.

Stróżewski, Władysław. 1991. *W kręgu wartości*. Kraków: Znak.

Szahaj, Andrzej. 2003. "Co to jest postmodernizm?" In *Postmodernizm. Teksty polskich autorów*, edited by Maria A. Potocka. Kraków: inter esse.

Sztompka, Piotr. 2012. *Socjologia. Analiza społeczeństwa*. Kraków: Znak.

Śpiewak, Paweł. 2000. *Spór o Polskę 1989-1999*. Warszawa: PWN.

Tatarkiewicz, Władysław. 1978. "Pojęcie wartości." In Władysław Tatarkiewicz, *Parerga*, 60-73. Warszawa: PWN.

Taylor, Charles. 2001. "Samo-interpretujące się zwierzęta." In *Filozofia podmiotu. Fragmenty filozofii analitycznej*, edited by Joanna Górnicka-Kalinowska. Warszawa: Aletheia.

Taylor, Charles. 2012. *Źródła podmiotowości. Narodziny tożsamości nowoczesnej*. Warszawa: PWN.

Wolniewicz, Bogusław. 1998. *Filozofia i wartości II*. Warszawa.

Wojciszke, Bogdan. 1986. *Struktura „Ja", wartości osobiste i zachowanie*. Wrocław: Ossolineum.

Wojtyła, Karol. 1964. "Chrześcijanin a kultura." Znak 10(124):1153-157.

Wust, Peter. 1995. *Niepewność i ryzyko*. Warszawa: PWN.

Znamierowski, Czesław. 1924. *Podstawowe pojęcia teorii prawa*. Poznań.

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HEATED TOBACCO AS A NOVELTY TOBACCO PRODUCT SUBJECT TO EXCISE DUTY: A CROSS-COUNTRY COMPARISON

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Abstract. First prototypes of tobacco heaters were developed by the largest global tobacco companies as early as the 1980s. However, the first heat-not-burn tobacco products (not resembling the prototypes) were promoted on the market with success many years later – in 2014 in Japan, then in Switzerland, and in Italy. From the beginning, these products were offered for sale with the information that they were less risky for consumers, compared to traditional tobacco products. The first definition of novel tobacco products, which included heated tobacco products (HTPs), was part of the so-called Tobacco Directive (TPD). However, HTPs are not yet a subject to TPD norms. Therefore, each Member State is free to apply the excise tax rates to HTPs. Currently, there is a discussion in the EU on harmonizing excise tax policy also with regard to heated tobacco. The article discusses the current legal status of HTPs at the level of EU law, as well as in light of legal systems of selected Member States representing a diversified approach in the field of excise policy towards this category of tobacco products.

Keywords: excise tax; heated tobacco products; novel tobacco products; health consequences; the fiscal impact of the excise tax on HTPs

INTRODUCTION

Heated tobacco products (HTPs) are a new type of product created by tobacco companies to substitute traditional tobacco products. These products differ from traditional cigarettes. Instead of regular tobacco, they use tobacco-containing elements, also generally referred to as units or refills (these are usually *sticks* that look like cigarettes, wrapped in special paper) which are heated using dedicated, stylish, and modern-looking, electronic devices [Gruszczynski and Melillo 2020, 1]. The latter are embedded with heating systems to heat the tobacco rapidly (the whole process takes several seconds, from about 15 to 20 seconds). Thus, the tobacco contained in the cartridges is not burned in the device. Heating, in this case, is the process of bringing

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the temperature to approximately 250-350°C depending on the type of device induction or smokeless [Auer, Concha-Lozano, Jacot-Sadowski, et al. 2017, 1050-1052; Davis, Williams, and Talbot 2019, 34-41]. In contrast, to smoke a cigarette, tobacco needs to reach approximately 600-800°C.[1] For HTPs, a pack of refills typically contains 20 units, with a price equal to or slightly higher than that of a high-quality cigarette pack. However, there is a difference between HTPs and e-cigarettes – the former use tobacco, whereas the latter use liquids. A liquid containing nicotine is heated and then inhaled.

The leading manufacturers claim that HTPs are less damaging (they are the so-called *reduced risk* products) to health than traditional tobacco products. Due do that, the vast majority of countries that allow these products to be marketed put a lower (and thus preferential) excise tax rate on HTPs than on cigarettes, thereby promoting these products and making them more competitive. According to research, on average, excise tax on a pack of traditional cigarettes worldwide comprises 56% of its retail price. In comparison, on average, excise tax on HTP refills comprises 18% of its retail price.[2] For EU countries, the current average excise rate on HTPs is about 30% of that on traditional cigarettes and this percentage is bound to increase.[3] The following matter remains open: how will future harmonization efforts renegotiate this rate?

However, there is a lot of controversy surrounding the health consequences of HTPs. The World Health Organization (WHO) is strongly opposed to the preferential tax treatment of these products. WHO refers to HTPs as *specially designed cigarettes* and calls for them to be subject to the same regulations as traditional cigarettes in order to reduce their use. This includes high excise taxes. WHO estimates that heated products contain about 20 substances of potential health concern (in particular, carcinogens).[4]

The aim of the current article is a synthetic analysis of selected legal systems of European countries in the context of excise duty policy related to HTPs. This is important in the context of the European Commission's announced harmonization of legislation in this area.[5] Nonetheless, it is almost

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[1] *Statement on the toxicological evaluation of novel heat-not-burn tobacco products,* opinion from the UK Committee on Toxicity, p. 2, point 6, www.cot.food.gov.uk/sites/default/files/heat_not_burn_tobacco_statement.pdf [accessed: 08.08.2021].

[2] *WHO report on the global tobacco epidemic 2021. Adressing new and emerging products*, report produced by the World Health Organization, 2021, www.who.int/teams/health-promotion/tobacco-control/global-tobacco-report-2021 [accessed: 02.08.2021].

[3] *European Commission expected to revise tobacco directive*, www.vaporproductstax.com/european-commission-expected-to-revise-tobacco-excise-directive/ [accessed: 05.08.2021].

[4] *Heated tobacco products (HTPs). Information sheet*, World Health Organization, ed. 2, 2020, www.who.int/publications/i/item/WHO-HEP-HPR-2020.2 [accessed: 05.08.2021].

[5] *Commission staff working document evaluation of the Council Directive 2011/64/EU*

certain that this process will not be completed by 2024, so the issue of excise duty rates on HTPs will continue to be the subject of legislative efforts in individual Member States for a number of years to come.

1. DEVELOPMENT OF HTP MARKET TO DATE

The development of the first HTPs by major global tobacco companies began as early as the 1980s [Gruszczynski and Melillo 2020, 1]. However, the first successful HTPs (which were nothing like their prototypes) were released in 2014 in Japan by Philip Morris International (in Japan, e-cigarettes are not available, and the domestic market for heated tobacco is the most diverse in the world). In Europe, the first devices of this type were launched in Italy and Switzerland in 2014, by the same tobacco company [McNeil, Brose, Calder, et al. 2018, 201]. From the beginning, these products have been offered for sale (also through fairly aggressive direct sales) with the message that they pose far less risk to consumers than traditional tobacco products. The success on the European and Asian markets can be attributed to HTPs' potentially lower harmfulness. Moreover, the *aspirational brand* aspect and contemporary fashion trends also contributed to the increased popularity, especially among younger consumers aged between 15 and 24.[6] Across this group in Europe in 2020, 7% of consumers declared using HTPs at least occasionally, while 2% declared regular use.[7]

2. THE EVOLUTION OF EXCISE DUTY AND THE CURRENT STATE OF THE LAW IN THE EU

The tobacco industry is a large sector of the economy which significantly contributes to job creation and budget revenues from tobacco excise duties.

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of 21 June 2011 on the structure and race of excise duty applied to manufactured tobacco, euroconsulting.be/wp-content/uploads/2020/02/10-02-2020-tobacco-taxation-report.pdf [accessed: 05.08.2021].

[6] There is a clear downward trend in the use of traditional tobacco products among adolescents – see, for example, Summary results of the global youth tobacco survey in selected countries of the WHO European region, World Health Organization Report 2020, p. 7. Poland, in particular, ranks quite high among European countries where smokeless tobacco products are particularly popular among consumers in the 13-15 age group, WHO Report, p. 9, www.euro.who.int/en/health-topics/disease-prevention/tobacco/publications/2020/summary-results-of-the-global-youth-tobacco-survey-in-selected-countries-of-the-who-european-region-2020 [accessed: 20.08.2021].

[7] Report of 5 May 2021 from the Commission to the European Parliament and the Council on the application of Directive 2014/40/EU concerning the manufacture, presentation and sale of tobacco and related products, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0249&from=EN [accessed: 20.08.2021], p. 11.

In general, there is a wide variation in excise revenues across EU countries as a result of differences in population sizes within Member States, demand for excise goods, and different excise duty rates [Rosiński 2015, 168]. Countries with lower GDP tend to rely more on excise revenues than those with higher GDP. A considerably broader scope of goods is subject to excise duty in the former group of countries.

State tax policy focuses on the three primary objectives: 1) fiscal; 2) economic – development or inhibition of development of certain sectors of the economy; 3) social – involving, for instance, education or health care [Pomaskow 2017, 136].

Excise duties are imposed on goods for which demand is inflexible or relatively inflexible. Moreover, the production, distribution, and sale of these goods are thoroughly and effectively controlled by the state. Lastly, excise duties are imposed on products which are harmful (to health or environment) or considered luxury.[8]

In economics, optimal taxation is explained by the Laffer curve [Nowak-Far 2021, 101]. It is extremely difficult to determine the tipping point on the curve beyond which excise revenues drop. It can only be estimated through systematic, albeit modest, increases in excise rates to assess the flexibility of demand and other factors that influence sales of a particular product (e.g., the number of cigarettes smoked on average per day, and black-market share of tobacco products).

The amount of excise duty revenue and the economic impact of excise duty depend on their structure. As a general rule, there are two main ways of calculating excise duty on excisable goods: *ad valorem* and *ad quantum (also referred to as specific)*. In some countries excise duty may be collected on the basis of a hybrid method, namely, on the quantity of goods and the percentage of the maximum price (this applies in particular to tobacco or alcohol products). The literature considers it optimal to structure tobacco excise duty based on a hybrid method, where either the ad valorem rate or ad quantum rate may dominate Alternatively, a specific product value threshold can be set, below which the ad quantum tax is applicable. Above that threshold, the ad valorem tax is applicable, or a mixed rate of ad quantum and ad valorem tax. In the EU, regarding excise duty on HTP, the ad valorem rates are implemented in most countries.[9]

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[8] *Selected Excise Duties in OECD Countries. Consumption Tax Trends 2020: VAT/GST and Excise Rates, Trends and Policy Issues*, OECD, iLibrary (oecd-ilibrary.org) [accessed: 02.08.2021].

[9] *European Commission expected to revise* [...].

3. EXCISE DUTY REGULATIONS ON HTPS IN INDIVIDUAL EU MEMBER STATES

The concept of novelty products was first legally defined in EU law, in the so-called Tobacco Products Directive (TPD), that is Directive 2014/40 EU Parliament and Council of 3 April 2014.[10] According to Article 2(14) of the TPD, novelty products are tobacco products which are not any of the following: cigarettes, roll-your-own tobacco, pipe tobacco, water-pipe tobacco, cigars, cigarillos, chewing tobacco, nasal tobacco, or tobacco for oral use, placed on the market after 19 May 2014. This is a negative definition, characterized by the absence rather than the presence.

Novelty products, however, are not covered by the EU's Tobacco Tax Directive, which greatly limits the freedom of Member States to set excise rates on tobacco products. In turn, this currently results in significant tax differences between EU countries.

There are four main legal situations regarding HTPs: 1) ban on import and sale of HTPs, for example in Norway,[11] Australia, or Mexico; 2) permitted import and sale, with standard tobacco regulations applicable; 3) permitted import and sale, application of preferential excise duty rates. There is a whole range of ideas regarding the degree of this preferentiality; there are cases of temporary suspension of excise duty collection in order to encourage consumers to use HTPs instead of traditional products. The governments may also raise excise duties suddenly; 4) lack of regulations, uncertain legal situation of entrepreneurs and consumers.

3.1. Poland

Excise taxation, as already mentioned, is subject to harmonization[12] in EU Member States, and the EU excise duty regulations are subject to periodical verification and amendment, every 5 years or so [Karczewska and Parulski 2021, 48]. However, harmonization does not apply to excise duties on novelty tobacco products. The excise duty rates for a given year

[10] Directive 2014/40 EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC Text with EEA relevance.

[11] However, due to the current process of legislative alignment with the Tobacco Products Directive (TPD, 2014) in Norway, the ban is expected to be lifted by the end of 2021 – *Tobacco control in Norway*, www.helsedirektoratet.no/english/tobacco-control-in-norway[accessed: 15.08.201].

[12] For tobacco products, see Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco.

are presented together with the assumptions of the Budget Act for a given financial year. According to Article 2(1)(36) of the Polish Excise Duty Act, novel products include: a) a mixture which contains tobacco or dried tobacco, b) the mixture referred to in point (a) and containing e-cigarette liquid separately- other than products delivering aerosol without combusting the mixture, referred to in Articles 98(1) and 99a(1); This definition thus covers, among others, HTPs.

As of 2018, excise duty in Poland was also extended to the so-called novelty tobacco products, initially at a zero rate.[13] The Polish Excise Duty Act was amended by adding, among others, Article 99c(3) and (4) according to which: the basis for taxation of novelty products is their quantity expressed in kilograms, whereas the excise rate was calculated as exactly PLN 141.29 for each kilogram and 31.41% of the weighted average retail selling price of tobacco for smoking. Nonetheless, until 31 December 2018, the excise duty rate remained at a zero level. Thereafter, by the Act of 22 November 2018,[14] the zero-excise duty on tobacco products was extended until 30 June 2020. The Minister of Finance of Poland issued an order on 30 June 2020 on abandoning the collection of excise duty on electronic cigarette liquid and novelty products[15] effective from 1 July 2020 to 30 September 2020.

Pursuant to the Act of 21 November 2019 amending the Polish Excise Tax Act, the excise duty rate was increased as of 1 January 2020. Currently it amounts to PLN 155.79 for each kilogram and 32.05% of the weighted average retail selling price of tobacco for smoking, as expressed by Article 99c(4) of the Polish Excise Duty Act. This allows the price to be adjusted to the current tobacco market and there is no need to put a maximum price on the product.

3.2. Italy

The Italian market is the most significant HTP market in Europe. It is estimated to have a value in excess of one billion dollars [Liu, Lugo, Spizzichino, et al. 2018, 274]. HTPs fall under the legal category of tobacco products for smokeless inhalation (in Italian: *i tabacchi da inalazione senza combustione*). According to Article 39bis(2)(e) of the Decree of 26 October 1995 on taxes, smokeless tobacco products which can be used without combustion include heated tobacco for inhalation.[16] Until 2018, Italy was among

[13] Under the Act of 12 December 2017 amending the Excise Duty Act, Journal of Laws of 2018, item 137.

[14] Journal of Laws of 2018, item 2404.

[15] Journal of Laws of 2020, item 1159.

[16] Consolidated text of Decree no. 504 of 26 October 1995 on taxes on production and consumption and the related penal and administrative penalties, in Italian: Decreto

the countries with the highest excise duty rates on HTPs. In 2018, the Italian government decided to reduce this rate to the European average. Currently (i.e., as of 1 January 2021), the excise duty rate is 30% of that imposed on traditional cigarettes,[17] but it will gradually increase by 5% each year. Effective 1 January 2023, the excise duty on HTPs is to be equivalent to 40% of the excise duty rate on conventional cigarettes.[18]

3.3. France

For tax purposes, the tobacco in refills for HTPs is included in the category "other tobacco products, novelty products" (in French: *les autres produits du tabac, nouveaux produits du tabac*). It includes all products that could not be classified in other categories (products which are not cigarettes, cigars and cigarillos, roll-your-own tobacco, chewing tobacco or snuff). This categorization is not satisfactory because heated tobacco is not *smoking* tobacco, yet it is legally classified as a combustible tobacco product just like pipe tobacco or water pipe tobacco.

Currently, there has been an increase in the excise tax rates in the "other smoking tobacco" category. Pursuant to Article 575A of the French Tax Act, the excise duty rate is a hybrid. The ad valorem rate is 51.4% of the retail price of 1 kg of pipe tobacco and the specific tax is €31.30 per kg; the minimum excise duty threshold is €135.20 per 1000 pieces.[19] There are plans to gradually increase the specific excise duty rate until 2026. Currently, its rate is also higher than the European average. In autumn 2020, a proposal to reduce the excise tax rate on HTPs was submitted, but was not approved by the National Assembly.[20] France, which is one of the most restrictive European countries in terms of applying high excise duty rates to HTPs, continues to struggle with the broad problem of nicotine addiction.[21] The French

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legislativo n.504, 26.10.1995, *Testo unico delle disposizioni legislative concernenti le imposte sulla produzione e sui consumi e relative sanzioni penali e amministrative*, version as of 25 January 2021, online: www.adm.gov.it/portale/documents/20182/6661054/D.Lgs.+504+del+1995.pdf/8cb16e54-a972-4fc6-91cd-5cb162d05bc5 [accessed: 08.08.2021].

[17] Traditional cigarettes are subject to specific excise duty currently amounting to €44.63 per 1000 cartridges – Italian State Budget Act for the financial year 2021 and multi-year budget for the three-year period 2021-2023, in Italian: *Bilancio di previsione dello Stato per l'anno finanziario 2021 e bilancio pluriennale per il triennio* 2021 - *2023*, no. 178 of 30 December 2020, Gazetta Ufficiale serie generale n. 322.

[18] *Ibidem*.

[19] French Excise Duty Act, Code général des impôts, www.legifrance.gouv.fr/codes/article_lc//LEGIARTI000043662353/ [accessed: 13.08.2021].

[20] *French Assembly rejects call to reduce tax on heated tobacco from 2021***,** www.tobaccointelligence.com/french-assembly-rejects-bringing-down-heated-tobacco-tax-from-2021/ [accessed: 13.08.2021].

[21] *Repenser la fiscalité des nouveaux produits du tabac et de la nicotine pour lutter contre*

National Academy of Medicine encourages nicotine addicts to consume HTPs or e-cigarettes as alternatives to traditional tobacco products to facilitate smoking cessation.[22]

3.4. Lithuania

An amendment of 28 June 2019 introduced a legal definition of heated tobacco into Lithuanian legislation. Pursuant to Article 3(2) of the Excise Tax Amendment Law no. IX-569,[23] *heated tobacco products (in Lithuanian: Kaitinamojo tabako produktai) are tobacco products intended for use in a dedicated electronic device in which they are heated, without a combustion process, and are not cigars, cigarillos, cigarettes, or smoking tobacco. This product has been subject to specific excise duty, the rate of which in 2021 is €113,20 per 1 kilogram of tobacco.*[24]

3.5. Germany

In 2021, Germany – citing the need to protect public health and specifically to prevent tobacco use among the underage – began work on amending the Tobacco Tax Act.[25] The amending Act, that is, *Tabaksteuermodernisierungsgesetz* (TabStMoG[26]) was passed by the Bundestag in June 2021. Its goal is to close the excise duty gap between traditional cigarettes, e-cigarettes, and HTPs (in German: *Erhitzter Tabak*) in the 2022-2026 period. In 2026, heated tobacco is to be taxed at the same excise rate as traditional cigarettes. As far as heated tobacco is concerned, this category was legally separated from the more general category (it was treated as pipe tobacco)

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le tabagisme, www.fr.irefeurope.org/Publications/Etudes-et-Monographies/article/Repenser-la-fiscalite-des-nouveaux-produits-du-tabac-et-de-la-nicotine-pour-lutter-contre-le [accessed: 13.08.2021].

[22] *L'Académie nationale de médecine rappelle les avantages prouvés et les inconvénients indûment allégués de la cigarette électronique (vaporette)*, www.academie-medecine.fr/academie-nationale-de-medecine-rappelle-les-avantages-prouves-et-les-inconvenients-indument-allegues-de-la-cigarette-electronique-vaporette/ [accessed: 13.08.2021].

[23] Act amending the Excise Duty Act – Lietuvos Respublikos akcizų įstatymo nr. IX-569 1, 2, 3, 30, 31 straipsnių, ii ir iii skyrių pakeitimo Įstatymas (dated 28 June 2018 no. XIII-1327), www.e-seimas.lrs.lt/portal/legalAct/lt/TAD/39131ae27adb11e89188e16a6495e98c [accessed: 17.08.2021].

[24] *Excise duty. Ministry of Finance of the Republic of Lithuania,* online www.finmin.lrv.lt/en/competence-areas/taxation/main-taxes/excise-duties [accessed: 17.08.2021].

[25] Tabaksteuergesetz, 15 July 2009 (BGBl. I S. 1870) as amended.

[26] Gesetz zur Modernisierung des Tabaksteuerrechts (Tabaksteuermodernisierungsgesetz – TabStMoG), www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_III/19_Legislaturperiode/2021-08-17-TabStMoG/3-Verkuendetes-Gesetz.pdf?__blob=publicationFile&v=3 [accessed: 18.08.2021].

and redefined as a tobacco product cut into pieces, individually wrapped, the use of which consists in the inhalation of aerosol or smoke produced by a dedicated device.[27] Effective 1 January 2022, excise duty on HTPs will be equivalent to the amount of excise duty levied on pipe tobacco and the amount of special tax equivalent to 80% of the amount of tax on conventional cigarettes reduced by the amount of excise duty on pipe tobacco - per unit of product [Karczewska and Parulski 2021, 52].

The change was based on research conducted by the German Federal Institute for Risk Assessment (BfR[28]). The Institute concluded that flavored heated tobacco refills contain addictive substances, just like traditional tobacco products. There is an important fiscal aspect to the amendment that needs to be highlighted - available data suggests that the growth of heated tobacco sales in Germany over the past two years has reduced government revenues from excise duties on conventional cigarettes [ibid., 51].

3.6. Latvia

Article 4(4)(10) of the Latvian Excise Duty Act[29] defines heated tobacco (in Latvian: *karsējamā tabaka*) as excisable industrially processed tobacco, which produces an aerosol containing nicotine without combusting the tobacco. According to Article 13(1)(5) of the Act, as from 1 March 2021, there is a specific excise duty of €160 per 1 kilogram of tobacco. This rate is increased incrementally starting 1 January 2020. As of 1 January 2022, it will amount to €207 per 1 kilogram of tobacco, and as of 1 January 2023 - €218 per 1 kilogram of tobacco.

CONCLUSIONS

Excise duty is a single-stage, selective, regressive indirect tax, the burden of which is ultimately borne by consumers who purchase taxable products. Taxes are a certain addition to the cost of production and are at odds with industrial growth, as lower costs would increase both production and consumption.

Excise duties serve a fiscal purpose, but are also intended to create a change in consumption trends or are even used as a means to eliminate certain behaviors. In the Anglosphere, excise duty is commonly referred to as a *sin tax*, in economics, it is also called the Pigouvian tax. In the case

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[27] § 2a of the German Tobacco Tax Act.

[28] In German: *Bundesinstitut für Risikobewertung*.

[29] Amendment to the Latvian Excise Duty Act (from Latvian: *Par akcīzes nodokli*), www.likumi.lv/ta/id/319404-grozijumi-likuma-par-akcizes-nodokli [accessed: 17.08.2021].

of tobacco products, WHO attributes the latter role to excise duty. WHO has repeatedly advocated that excise duty on all tobacco products, including HTPs, should be increased, acknowledging the price-affecting role of this tax. Another issue is that the policies of many governments include excise duty as a means to address the negative impacts (health, environmental, social) caused by the purchase of excisable goods. A moderate excise duty rate may be sufficient to generate stable revenues without creating significant difficulties for economic development.

Concerns about cross-border trade and the growth of a black market between countries with large price disparities may make it difficult to impose a high tax rate in some countries in the absence of effective regional cooperation.

REFERENCES

Auer, Reto, Nicolas Concha-Lozano, Isabelle Jacot-Sadowski, et al. 2017. "Heat-Not-Burn Tobacco Cigarettes: Smoke by Any Other Name." *JAMA Internal Medicine* 177, no. 7:1050-1052.

Gruszczynski, Lukasz, and Margherita Melillo. 2020. "The FCTC dilemma on heated tobacco products." *Globalization and Health* 16, no. 81:1-14.

Karczewska, Anna, and Szymon Parulski. 2021. "Niemiecka legislacja podatkowa na przykładzie akcyzy tytoniowej – wzór dla Polski?" *Przegląd Podatkowy* 7:48-54.

Liu, Xiaoqiu, Alessandra Lugo, Lorenzo Spizzichino, et al. 2018. "Heat – not -burn tobacco products are getting hot in Italy." *Journal of Epidemiology* 28, no. 5:274-75.

McNeil, Ann, Leonie Brose, Robert Calder, et al. 2018. *Evidence review of e – cigarettes and heated tobacco products 2018. A report commissioned by Public Health England.* London: Public Health England.

Nowak-Far, Artur. 2021. "Opodatkowanie akcyzowe wyrobów nowatorskich." *Państwo i społeczeństwo* 1:99-115.

Pomaskow, Joanna. 2017. "Ekonomiczna analiza podatku akcyzowego na wyroby alkoholowe w świetle teorii gier." *Studia Ekonomiczne. Zeszyty Naukowe* 311:135-45.

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TAX INSTRUMENTS FOR SUPPORTING PERSONS WITH DISABILITIES AS SEEN IN THE EXAMPLE OF THE REHABILITATION RELIEF IN THE PERSONAL INCOME TAX

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Abstract. Problems of persons with disabilities should be examined also at a legal angle. Creation of legal instruments of support for such persons is absolutely crucial. With the assumption that tax law is one of the more intrusive branches of law, which on the other hand may serve non-fiscal, including social goals, this study analyses those instruments which may be elements of such support. The author concentrates on regulations of the personal income tax and the rehabilitation relief regulated by them as a tax credit that is fundamental for this research area. Special focus is given to interpretation dilemmas that accompany the application of these regulations, which may greatly limit their efficiency. The analysis of the normative material and views of legal scholars and commentators and the judicature has allowed a number of conclusions, *de lege lata* and *de lege ferenda* alike.

Keywords: disabled persons; personal income tax; tax privileges

INTRODUCTION

Problems of persons with disabilities should be examined in various dimensions, including in the juridical aspect. Legal guarantees of particular protection of and support for persons with certain relevant features, including health deficiencies, are crucial. It needs to be emphasized, that seeing it as necessary, the legislator has formulated relevant rules related to the care of such persons in the basic law.[1] Leaving aside a global analysis of the legal system in terms of how it implements constitutional standards, it seems reasonable to analyse legal measures of one branch of law, that is the tax law. It is because this law is exceptionally intrusive and its regulations often affect peoples' living standard. This means in particular rules of taxing incomes of natural persons, which thus determine their disposable income.

[1] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

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The aim of this study is to examine whether and to what degree regulations of the Personal Income Tax Act[2] may be considered a basic instrument of supporting persons with disabilities. This is why I analyse here those provisions of this act which, both theoretically and practically, may be treated as such instruments. These are provisions relating to the so-called rehabilitation relief. Special focus is given to interpretation dilemmas associated with the application of these provisions, which may greatly limit their efficiency. The composition of this study has been dictated by its subject matter – the first part refers to general requirements and rules of application of the tax preference discussed, I then move on to an analysis of the personal and material scope of the relief and of premises of its application (which determine the general structure of this privilege).

The study employs the method of investigation of the law in force; an in-depth analysis covers the normative material, views of legal scholars and commentators and the abundant judicial decisions. This paper also takes into account individual explanatory takes on tax law provisions, which play a special role in interpretation of this law.

1. REHABILITATION RELIEF – INTRODUCTION – GROUNDS FOR ITS APPLICATION

In this part of the study we must refer to the basic question, that is the validity of application of tax instruments to support specific categories of persons (including persons with disabilities). Before we move on to the main discussion, we must point out that it is one of the nodal problems of the tax law, extensively debated among legal scholars and commentators and reflected in the abundant judicial decisions. Due to space limitations of the study, we must only focus on questions that are of cardinal importance for the subject matter presented.

As has already been signalled, disabled persons should be subject to special protection which also involves support from the state. As true as this claim is, it is reasonable to consider whether the tax system too should include mechanisms that implement this postulate. While taxes are mainly intended to satisfy their fiscal function, we should agree with some views expressed in relevant literature that an optimal tax system should also serve non-fiscal purposes [Owsiak 2016, 16]. It may be used not only, in most general terms, to supply income, but also to run active economic and social policies, whereby it is possible to achieve such objectives [Zieliński 2019, 117].

[2] Act of 26 July 1991 on the Personal Income Tax, Journal of Laws of 2021, item 1128 as amended.

The personal income tax is considered a particularly predestined levy for mitigating income stratification of individual social groups due to its universal and personal character that encumbers taxpayers' personal incomes [Pomorska 2016, 55]. On the other hand, the tax's three components, that is the tax-free amount, progressive tax system and its rates, together with various tax reliefs and exemptions, are especially useful and in fact universally applied in performing the redistribution function. However, as is rightly emphasized, they are not used fully and effectively in the Polish personal income tax, which is why they also call for essential changes [Idem 2015, 152] (which will be discussed further in this study).

The construction of a tax system and its evolution are inseparably related to the tax policy in place, which in all its manifestations is also intended to serve public goals. These, in turn, are the subject of interest of a broadly understood social policy, which may be defined as a discipline of activity of the state and its organizations in shaping people's living and working conditions and social relations, which aim, i.a. to ensure social security, to satisfy higher-order needs or to ensure social governance. As a field of activity, it is put to work by means of detailed policies, e.g. social insurance policy, family policy, or policy for persons with disabilities [Grzywna, Lustig, Mitręga, et al. 2017, 12].

A comparison of objectives of the social and tax policy leads to a conclusion that their reconciliation is complicated, yet indispensable. However, this requires that consistent, long-term assumptions of both policies and a harmonization of instruments that serve the goals must be determined. Therefore, tax measures too should correspond with general social objectives and respect basic constitutional values, also those that refer to persons with disabilities.

The objective, that is integration, is crucial for the social policy applied to this group. Such integration in essence shall mean the creation of an inclusive environment and enabling persons affected by disability to carry out suitable activity to the greatest possible extent, in conditions in which this environment functions, i.e. a society free from limitations. The integration process refers to aspects of life of persons with disabilities such as family life, education, work, spending free time, life in a local community or social activity [Ogryzko-Wiewiórowska 2017, 7]. As a consequence, both the spectra of responsibilities and the corresponding implementation measures are especially wide and may be composed of both actions in fact and in law.

An assumption that the use of tax instruments, especially tax privileges, to implement non-fiscal aims of taxation is valid implicates another field for a scientific reflection that includes in particular their examination through the prism of the principle of equitable taxation. We shall not take up an in-depth analysis of understanding it, as it goes beyond the framework

of this study, but we must acknowledge its role in the law application process. First of all, we must note that it is assumed today that an equitable tax system must be individualised and differentiated and must take into account many factors that affect taxation. In other words, equitability of taxation does not mean that all subjects should pay the tax in the same amount and that they should bear equal burdens [Gomułowicz 1996, 3]. Therefore, we must give full approval to the conclusion that the principle of ability to pay, according to which a tax burden is conditioned on the capability to pay the tax, should be the cardinal rule that affects the creation of a fair tax system [Idem 1998, 86]. Respecting the rule of the ability to pay, in turn, requires respect for diversification of tax for individual payers. This rule must also apply to a certain measure – equitability of taxation. In this place it needs to be emphasized that according to the accepted line of judicial decisions of the Constitutional Tribunal,[3] the constitutional principle of equality before the law (equality in law) in the broadest approach means that all subjects of the law (addressees of legal norms) that equally bear this significant (relevant) feature must be treated equally, that is according to the same measure, without discriminatory and favouring differentiations.[4] This rule assumes the existence of a proportion between essential features of individual categories of people and their due treatment (relevance rule).[5]

In consideration of these arguments it must be inferred that the equity doctrine does not rule out tax privileges. Their application, however, requires suitable justification, understood as identifying a particular payment situation of a specific taxpayer group, while at the same time not causing a sense of discrimination among others. Therefore, we need to ensure exceptional care about the legislative quality of legal measures that standardize tax privileges [Szołno-Koguc 2016, 171]. Persons with disabilities are one of such taxpayer groups referred to above.

In conclusion, it is worth emphasizing that irrespective of these dilemmas, regulations of tax law that are compliant with the equitable taxation rule should take into account the possibility of differentiating tax burdens, which may also be a consequence of respecting the assumptions of social policies, including the one applied to persons with disabilities.

We must also add that persons with disabilities are usually burdened with additional costs of living due to their health. For these reasons, when the personal income tax entered legal transactions, the rehabilitation relief

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[3] Cf. decisions of the Polish Constitutional Tribunal of 8 May 1990, ref. no. K 1/90, OTK 1990/1/2, of 11 December 1990, ref. no. K 9/90, OTK 1990/1/6.

[4] Judgement of the Polish Constitutional Tribunal of 6 March 1990, ref. no. K 5/89, OTK 1990/1/1.

[5] Judgement of the Polish Constitutional Tribunal of 6 April 1993, ref. no. K 7/92, OTK 1993/ 1/7.

was introduced at the same time. It is intended to recompense these costs to some extent. It is regulated by Article 26 of the Act, amended many times, especially in its material scope, which is analysed in further parts of this study. In simplest terms, it means that the tax base is adjusted, i.e. decreased by the expenses made under terms stipulated in the statute. When listing general features of this relief we must point out that the legal basis of applying this institution was laid down in an editorial unit dedicated to other deductibles. From this point of view, this relief was equated with other preferences that involve reduction of the tax base. We cannot overlook the fact that up until the end of 2000 the catalogue of deductible expenses was stipulated by a regulation of the Finance Minister issued in agreement with the Minister for Labour and Social Policy.[6]

2. PERSONAL SCOPE OF THE REHABILITATION RELIEF

As a rule, natural persons are taxpayers of the personal income tax. Therefore, this relief is applied to incomes of these persons. Nevertheless, it may only be used by taxpayers who have disabilities, as understood in the tax statute. The specification of the personal scope of application of the relief takes the form of a condition that entitles one to use it. Importantly, it was formulated in a way typical to tax law: one of formal requirements specified mainly in Article 26(7d) of the Personal Income Tax Law must be met. Pursuant to this provision, the taxpayer (save for the extending exception that will be discussed further in this study), must have at least one of the following documents: a certificate of qualification by competent authorities for one of the three disability categories, specified in separate regulations, or a decision awarding a disability pension on account of complete or partial inability for work, training allowance or social allowance. Persons of up to 16 years of age must hold a certificate of disability issued under separate regulations.[7] The correlation of provisions of the act on professional and social rehabilitation and employment of persons with disabilities with, inter alia, the PIT Act is characteristic. Article 3(2) of the former stipulates that a certificate that determines the degree of disability is also a basis for the award of reliefs and rights under separate provisions (here: tax law). At the same time, it must be assumed that the tax administration authority does not have rights to question a decision that determines the degree

[6] Article 1(25) of the Act of 9 November 2000 on amending the personal income tax and certain other acts, Journal of Laws No. 104, item 1104.

[7] These provisions mainly include regulations of the Act of 27 August 1997 on professional and social rehabilitation and employment of persons with disabilities, Journal of Laws of 2021, item 573 as amended.

of disability. An administrative court does not have such power, either.[8] We must emphasize that it is rightly assumed that fulfilment of the requirement of holding a certificate that entitles one to benefit from this relief is assessed not as at the date of incurring the expense, but as at the date of making the deduction. This position, favourable to taxpayers, results from a linguistic interpretation of the provision.[9]

It is worth noting that the legislator often uses the expression "qualification to a disability group" in Article 26 of the PIT Act. At the same time, to avoid interpretation doubts, Article 26(7f) lays down that these expressions must be adequately assigned to individual degrees of disability. Thus, the tax law also takes into account the specific characteristics of social insurance law regulations. Persons who hold a disability certificate issued by a competent authority under separate regulations in force until 31 August 1997 may also benefit from this relief.

From the point of view of taxing families, the relief's specific personal extension referred to before is crucial. This means that it may be resorted to by taxpayers for whom persons with disabilities are dependants.[10] However, in order to be eligible to apply Article26(7e) of the Act, these persons must be included in the family circle referred to in this provision and they cannot receive incomes specified in this editorial unit (which refers to both the income category and amount).

We must note in this context the amendments of the regulation of the act[11] that result mainly from the ruling of the Constitutional Tribunal. In its judgment of 3 April 2019, the CT held that Article 26(7a) of the Act of 26 July 1991 on personal income tax, in the wording given by the Act of 12 November 2003 on amending the personal income tax act and certain other acts,[12] in the scope in which the income referred to in this provision induces child support[13] received by the disabled child from a parent

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[8] Cf. judgement of the Voivodship Administrative Court in Kielce of 26 April 2018, ref. no. II SA/Ke 205/18, Lex no. 2490183.

[9] Cf. judgement of the Voivodship Administrative Court in Poznań of 12 December 2012, ref. no. II SA/Po 865/12, Lex no. 1233575.

[10] To avoid unnecessary repetitions, the concept of the taxpayer's income is equated to the income of the taxpayer who provides maintenance to a person with disabilities.

[11] Article 26(7e) amended by Article 1(40)(f) of the Act of 29 October 2021 emending this act with effect of 1 January 2022, Journal of Laws of 2021, item 2105 and by Article 8(1) of the Act of 17 December 2021 amending this act with effect on 4 January 2022, Journal of Laws of 2022, item 1.

[12] Journal of Laws No. 202, item 1956.

[13] Apart from this, the amended provision of the Act removes the following from the catalogue of incomes that are calculated into the annual income: the supplementary benefit referred to in Article 21(1)(100a), the electricity allowance referred to in Article 5c of the Act of 10 April 1997, the Energy Law; the protective allowance referred to in Article 2(1) of the Act

is contrary to Article 71(1) sentence two in connection with Article 32(1) of the Constitution of the Republic of Poland.[14] The procedure for calculating the income of persons with disabilities was also amended – originally the threshold was clearly expressed in the statute. Since 2022 the incomes of persons with disabilities must not exceed 12 times the amount of a social assistance allowance specified in the Act of 27 June 2003 on the social assistance allowance,[15] in the amount valid as at December of a tax year. This amendment deserves credit as it allows for an automatic adjustment of the amounts that entitle one to the relief. When it comes to the circle of persons who may be considered the taxpayer's dependants we must note that it is upheld. It includes a spouse, taxpayer's own and adopted children, other children the taxpayer brings up, stepchildren, parents, parents of the spouse, siblings, stepfather, stepmother, sons-in-law and daughters-in-law. Exclusion of ascendants (especially grandparents) from this catalogue deserves criticism. Their presence in this typology may derive from the model of a Polish family as a multi-generational household and, moreover, for practical reasons – factual ties, including financial ties between the generations.

It needs to be emphasized that there is no additional requirement to document the financial support[16] given to a close relative, and this requirement cannot be derived from other regulations of the Act. Being a taxpayer's "dependant" is determined by the annual income of the disabled person specified in the Act, which together with incurring the expenses identified is intended to give the persons concerned the right to make the deduction.

Therefore, we must conclude that the provisions of the act discussed should be further verified in this aspect. We must note at that that ascendants are considered the closest relatives under the Gift and Inheritance Tax Act.[17] Admittedly, we cannot expect for such a solution to be copied in other acts of special tax law; however, given the above we should conclude that grandparents too could be the taxpayer's dependants.

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of 17 December 2021 on the protective allowance (Journal of Laws of 2022, item 1) and also allowances granted under separate provisions: the nursing allowance and additional annual financial allowance for old age pensioners and disability pensioners.

[14] Judgement of the Polish Constitutional Tribunal of 3 April 2019, ref. no. SK 13/16, Journal of Laws 2019, item 674.

[15] Journal of Laws of 2020, item 1300.

[16] We cannot share the view that the taxpayer has the obligation to prove that a disabled person who has an annual income that does not exceed the statutory limit is the taxpayer's dependant – judgment of the Supreme Administrative Court of 12 July 2000, ref. no. SA/Lu 535/99, Lex no. 45402.

[17] Act of 28 July 1983 on gift and inheritance tax, Journal of Laws of 2021, item 1043.

3. MATERIAL SCOPE OF THE RELIEF

The material scope of the rehabilitation relief is the part of its construction that brings most interpretation dilemmas. This is down to a few factors. The catalogue of expenses that qualify for this tax preference is rather broad and covers a dozen or so items. At that, it is a closed catalogue. The expressions used by the legislator are general, which on the one hand is intended to ensure a flexible application of this provision, on the other, though, leads to these problems. Secondly, to interpret provisions of the tax law with a focus on the application of tax preferences, it is important to highlight that thy cannot be in any way interpreted to extend them, because tax reliefs are an exception from universal taxation, which in turn is a canon of income tax.[18]

A general analysis of the material scope of the relief inspires a conclusion that is has been and still is relatively frequently modified so that it may be adjusted to the changing facts. Significant changes were introduced to legal transactions on 29 October 2021, effective on 1 January 2022. In this case the amendment of the act concerned both the catalogue of expenses and specification of previously-applied legal measures.

Besides, a general conclusion springs to mind that concerns the correlation of the material scope with the personal scope of the relief. It is because the legislator has differentiated expenses addressed to each person authorised to benefit from the relief and persons and expenses that were associated with specific kinds or degrees of disability. We can also see a certain regularity whereby in the majority of cases the amounts of expenses that are deductible are not limited. This means that the upper limit of the deduction is the taxpayer's annual taxable income. This deserves full approval – it allows for a relativisation of the amount of expenses made by taxpayers to their individual incomes.

In a review of deductible expenses, we may make a conventional and very general classification, which allows us to identify the following types of expenses: related to the purchase and possible repair of individual medical equipment and products, related to real property of a disabled person, related to transportation (travels and vehicles) and other expenses.

All these outlays have a special objective, that is to improve the functioning (also in the place of residence) and rehabilitation of a disabled person. As has been signalled, in the practice of application of the rehabilitation

[18] Cf. judgment of the Supreme Administrative Court in Warsaw of 24 November 2000, ref. no. III SA 2907/99, Lex no. 47117; judgment of the Supreme Administrative Court of 1 September 2017, ref. no. I GSK 641/17, Lex no 2373526, judgment of the Supreme Administrative Court of 28 August 2018, ref. no. II FSK 2505/16, Lex no. 2553597.

relief, it is the material scope of the relief – qualification of an expense as a deductible or not – that causes most interpretation dilemmas and discrepancies. Given the width of the subject matter, the analysis is limited to selected,[19] key interpretation problems. We must note here that the period of application of this provision has allowed for certain interpretation lines to be formed and thus, elimination, at least partial, of previously-occurring discrepancies of the application of this provision.

The first group of expenses are those made as part of adaptation and equipping of apartments or residential buildings[20] as suitable to the needs resulting from disability. An interpretation of this rule allows a conclusion that the legislator wishes to treat adaptation and equipping separately, which, nevertheless, must be related to the type of disability, as determined by the phrase "as suitable to...". It is because such expenses may be deducted as long as they are adequate to the need of a specific taxpayer. The use of such an expression on the one hand increases flexibility of the provision, on the other may contribute to excessive "discretion" of tax authorities. However, it seems that it was a good direction to move away from excessive casuistry and to not specify a closed catalogue of such expenses. Granting of the flexibility attribute, despite practical doubts, allows for the relief to be applied in a scope broader that it would result from clearly identified categories of outlays.

The terms "adaptation" and "equipment" used by the legislator are extremely crucial for the application of this regulation. The former needs to be understood as adaptation to a different use, a re-make to give something a different character. Therefore, we may talk about adaptation of an apartment or a building in cases of re-doing them for use by a disabled person. These works are to improve the disabled person's functioning in a given building or premises, not to improve their comfort of living.[21]

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[19] The choice was made on the basis of a criterion of the impact of a given expense on the standard of living/rehabilitation of a disabled person at the same time taking into account those expenses for which tax authorities issue decisions or explanations.

[20] It needs to be noted that in the light of an individual interpretation of the Director of the Tax Chamber in Warsaw of 21 May 2009, ref. no. IPPB4/415-183/09-4/JK2, www.mf.gov.pl, expenses for renovation of an outbuilding and its adaptation for the needs of residing there in the spring-summer period in order to undergo intense rehabilitation are not expenses incurred for the adaptation and equipment of a residential building as suitable to the needs resulting from disability.

[21] Cf. individual interpretation of the Director of the Tax Chamber in Bydgoszcz of 10 July 2008, ITPB2/415-536/08/IL, www. mf.gov.pl, according to which expenses incurred for building a swimming pool (to be used in rehabilitation of a person with a locomotor system disability) must be considered as expenses that improve their comfort of living and functioning, thus not deducible as the relief; individual interpretation of the Director of the Tax Chamber in Warsaw of 22 July 2009, ref. no. IPPB4/415-328/09-4/PJ, www.mf.gov.pl.; cf. judgment of the Supreme Administrative Court in Szczecin of 10 April 1997,

On the other hand, equipping an apartment/building involves giving them material elements that improve their usability and that are intended to make the performance of basic every-day activities easier.[22]

Without a doubt the ability of transportation (movement) is very important to persons with disabilities. This is why the rehabilitation relief accommodated a few types of expenses that relate to the transportation realm. They include adaptation of mechanical vehicles to the needs resulting from disability, different forms of transporting the taxpayer or him using his own vehicle. An analysis of this group of provisions of the act leads to the following conclusions: First of all, when it comes to the use of a car, the approved simplification[23] of the provision stands out, leading to a conclusion that the deduction is in fact related to the very use of the car that is owned (co-owned) by the taxpayer. At the same time, it is a limited expense, which deserves credit with today's construction of the regulation. We may only consider whether persons that spend amounts that exceed this limit should not benefit from the possibility of higher deductions which, in turn, could be linked with specific objectives of the use of the vehicle and require that the expenses made be documented.

As has been pointed out, expenses incurred on the adaptation of mechanical vehicles suitably to the needs resulting from disability fall under the category of expenses covered by this tax preference. Analogically to previously-mentioned "housing" expenses, a number of dilemmas relating to the interpretation of the provision results from establishing whether a given expense is proportionate to the needs of the taxpayer. Arguments for such a legislative solution have already been presented, whereby we need only emphasize that tax authorities should in each case examine this question in detail. We must also note that the phrase used in this provision, "adaptation of vehicles", brings difficulties in the application of this provision as it rules out the purchase of vehicles that are already adapted to given types of disability.[24] A position that one cannot deduct the expense for the purchase of an automatic car as a rehabilitation relief fits such a mainstream.[25]

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ref. no. SA/Sz 696/96, ONSA 1997, No. 4, item 193.

[22] Individual interpretation of the Director of the Tax Chamber in Warsaw of 27 May 2009, ref. no. IPPB2/415-163/09-5/AK, www.mf.gov.pl.

[23] It was decided not to link the expense with the use of the vehicle in order to get to necessary rehabilitation activities and to eliminate the obligation to document expenses – Article 1(16) of the Act of 27 October 2017 on amending the act on personal income tax, the act on corporate income tax and the act on flat-rate income tax on certain incomes obtained by natural persons (Journal of Laws 2017, item 2175 as amended).

[24] Cf. judgment of the Provincial Administrative Court in Gliwice of 4 March 2021, ref. no. I SA/Gl 1342/20, Lex no 3164333; judgment of the Provincial Administrative Court in Warsaw of 19 December 2019, ref. no. III SA/Wa 1040/19, Lex no. 3072650.

[25] Letter of 11 February 2022 from the Director of the National Tax Information Office, ref.

While a refusal to deduct a purchase of a car corresponds with the linguistic interpretation of the provision, it seems reasonable to postulate that the regulation be partially amended. It would be then possible for this tax preference to cover this part of expenses which exceeds the price of the "standard" vehicle and corresponds to the adaptation of the vehicle to a specific type of disability. Admittedly, this could mean difficulties in making such valuation, but it could contribute to a more effective use of the relief in this regard. We should also take into account the situation where a previous owner adapts the vehicle; if this deduction were allowed, it would improve in this case trading on the second-hand market, naturally upon clarification of requirements for benefiting from this tax privilege (e.g. loss of the right to the relief or its part when selling the vehicle before a certain period expires). We must add as a side note that under the current legal status such transfers result in losing this tax privilege.

One of the most specific expenses accommodated under the relief is the expense associated with the purchase of medicine under terms and conditions specified by statute. An introduction of a lower limit for expenses which, when crossed, entitles one to the relief is the most characteristic for this deduction. Pursuant to Article 26(7a) PIT Act, expenses made for medicines, in the amount that is the difference between expenses truly made in a given month and the amount of PLN 100, if a specialist doctor decides that the persons with disabilities should take specific medicines (permanently or temporarily), are also considered as expenses made for the purposes covered with the relief. This editorial unit was used to introduce three conditions whose joint satisfaction allows for the tax base to be reduced, that is:[26] the deduction concerns medicine; the medicine must be prescribed by a specialist doctor to exercise the right to the deduction; the expenses made to purchase them must exceed the minimum threshold. Stepping aside from practical problems that concern the interpretation of the term medicine[27] and certificates issued by competent doctors, we must focus on the most important flaw of this regulation. It results from the introduction of a minimum monthly limit of expenses that allows the use of the relief,

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no. 0112-KDIL2-1.4011.1183.2021.2.KF, Lex.

[26] Cf. Judgement of the Voivodship Administrative Court in Warsaw of 12 February 2014, ref. no. III SA/Wr 2401/13, www.nsa.gov.pl.

[27] The term "medicine" used, given the lack of a statutory definition under the tax law, should be interpreted in accordance with the provisions of the act of 6 September 2001, Pharmaceutical Law, consolidated text, Journal of Laws of 2020 item 1977 as amended. Pursuant to Article 2(32) of Pharmaceutical Law, a medicinal product shall mean any substance or combination of substances presented as able to prevent or treat disease in human beings or animals, or administered with a view to making a medical diagnosis or to restoring, correcting, or modifying physiological functions of an organism through pharmacological, immunological or metabolic action.

which violates the tax equity rule. Taxpayers classified under the same personal category may be treated differently depending on how these expenses are made, which, in turn, may de down to their financial standing, which evidently violates the idea of the relief. For example, a taxpayer who buys his long-term medication once a quarter, with a monthly expense of PLN 100, will be entitled in a yearly calculation to a deduction in his income by PLN 800 and a disabled person who makes the purchase once a month for the amount of PLN 100 will not have the right to deduct the expenses in a yearly tax calculation.

Therefore, another amendment is necessary to create an opportunity for persons that incur analogous expenses for the same purpose in a tax year to benefit from the relief.

It is also worth adding that a general rule was formulated in the act, which lays down that the taxpayer's expenses are deducted if they are financed (co-financed) from the corporate fund for the rehabilitation of disabled people, the corporate activity fund, the State Fund for Rehabilitation of Disabled People or from the funds of the National Health Fund, the corporate social performances fund or were not reimbursed to the taxpayer in any form. Where the expenses were partially financed (co-financed) from these funds (sources) the taxpayer does not lose the right to the relief – it is only limited to those expenses that were financed by the taxpayer independently. This solution must be unequivocally given credit as it allows stakeholders to use the tax preference even partially.

To sum up, the analysis of the material scope of the rehabilitation relief and the views of the judicature on its application allows a conclusion that it is directly associated with the fundamental objective of the relief, that is the stimulating function.[28]

4. OTHER REQUIREMENTS FOR BENEFITING FROM THE REHABILITATION RELIEF

The structure of the tax preference in question, apart from its material and personal scope, also includes formal requirements concerning documentation of these expenses. At that, application of such a legislative measure is

[28] Cf. judgment of the Provincial Administrative Court in Łódź of 10 January 2012, ref. no. I SA/Łd 1312/11, Lex no. 1120004; judgment of the Provincial Administrative Court in Szczecin of 4 June 2014, ref. no. I SA/Sz 1198/13, Lex no. 1481126; judgment of the Supreme Administrative Court of 12 June 2014, ref. no. II FSK 1723/12, Lex no. 1469208; judgment of the Provincial Administrative Court in Olsztyn of 19 November 2015, ref. no. I SA/Ol 632/15, Lex no. 1946460; judgment of the Provincial Administrative Court in Kraków of 6 December 2018, ref. no. I SA/Kr 763/18, Lex no. 2638701.

typical to and commonly used in laying laws that provide for preferential treatment of tax law entities.

Pursuant to the literal wording of Article 26(7c), for expenses referred to in subsections 7a(7), (8) and (14), it is not required to have documents that confirm their amount. However, at the request of tax authorities the taxpayer is obliged to present evidence necessary to establish the right to the deduction, in particular: 1) to provide the first and second name of the person paid for being a guide; 2) to produce an assistance dog certificate.

The above shows that the construction of Article 26 employs the method of classification into expenses that must be documented and expenses that are not required so. What is characteristic, this requirement was done away with in the case of limited expenses. This must be recognized as a specific synchronization of regulations that encourages rationalization of relevant solutions.

The rule that the amount of the expense must be documented is also a valid conclusion.

When it comes to the first category of expenses, it must be concluded that in the understanding of the provision cited, a document means a data carrier that allows one to learn of its content.[29]

Interpretation of rules that refer to the remaining expenses seemingly does not cause any dilemmas. An in-depth analysis of relevant provisions of the act, however, leads to completely different observations. This results from using the expression "evidence necessary to determine the right to the deduction, in particular". It needs to be emphasized that this phrase does not mean the obligation of documentation which refers not only to the fact of incurring an expense, but most of all to its amount. When it comes to certain categories of expenses it is indispensable to confirm one's very right to use the relief (apart from satisfying remaining formal requirements specified in Article 26 of the Act). As signalled, this provision only identifies certain evidence that confirms this entitlement. Such wording of the provision is intended to make it easier to apply it on the one hand, but on the other may also lead to unauthorised extension of competences of tax authorities in formulating evidence requests. It is because it is them that were given the authority to judge about the "indispensability" of having to prove that the expense was made. It needs to be assumed here that, both, the concept of proof referred to in the provision analysed and the very carrying out of evidentiary proceedings should comply with rules laid down

[29] Cf. Article 77^3 of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2020, item 1740 as amended.

in the Tax Ordinance Act.[30] All actions of tax authorities should be rational and adequate to the needs of a specific case.

We should note in this context that these rules have become somehow simplified, which has already been mentioned in the previous part of this study and referred to categories of expenses associated with the use of the vehicle of a disabled person. Since the legislator opted not to link an expense with transportation to therapeutic and rehabilitation activities, the amendment of the provision concerning the obligation to document the fact of performing these activities was a natural consequence. Therefore, in the current legal status that obligation to prove the right to make such a deduction must be associated with the fact of owning (co-owning) a car.

To sum up, it needs to be concluded that the obligations discussed are instrumental responsibilities, where failure to meet them ultimately results in the loss of the right to deduct expenses covered under the material scope of the rehabilitation relief.

CONCLUSION

Supporting persons with disabilities has a significant social value. It should be implemented by means of all available legal instruments, including tax measures. The rehabilitation relief is one of the most significant measures here. It is one of the longest functioning tax preferences in the Polish tax system. It was introduced for non-fiscal purposes, it applies to a specific group of taxpayers and is not in conflict with the principle of tax equity; quite the contrary – it allows it to materialize.

Its position in the regulations of the personal income tax is justified in the universality of this tax and at the same time directly affects the amount of taxpayer's disposable income. Thus, it may be a significant compensation of expenses made due to a natural person's disability.

An analysis of provisions of the act that regulate this preference allows the following conclusions. First of all, a significant evolution of relevant regulations may be noted, intended most of all to streamline and simplify the terms for the application of the relief and at the same time to extend its material scope. This proves the legislator's certain sensitivity as it responds to the changing outside environment. Adjustment of regulations to this environment is undoubtedly good for the rationality and efficiency of their use.

[30] Act of 29 August 1997, the Tax Ordinance Act, Journal of Laws of 2020, item 1540 as amended.

A generally positive assessment of the relief does not mean, however, that it should not be further amended in the aspect identified in this study. *De lege ferenda* conclusions formulated in previous parts of the study that concern amendments refer most of all to the extension of the personal scope of the relief as well as changes in how deductions on account of purchase of medicines are made.

To recap, we may conclude that the rehabilitation relief in the personal income tax is an example of a rational use of tax instruments to support persons with disabilities.

REFERENCES

Gomułowicz, Andrzej. 1996. "Problemy teorii opodatkowania w Polsce." *Glosa* 4:3-5.

Gomułowicz, Andrzej. 1998. "Postulat sprawiedliwości podatkowej a prawodawstwo podatkowe." In *Księga pamiątkowa ku czci Profesora Apoloniusza Kosteckiego Studia z dziedziny prawa podatkowego*, edited by Bogumił Brzeziński, Jan Głuchowski, Cezary Kosikowski, et al., 85-91. Toruń: TNOiK.

Grzywna, Paweł, Joanna Lustig, Marian Mitręga, et al. 2017. *Polityka społeczna: rozważania o teorii i praktyce*. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Ogryzko-Wiewiórowska, Mirona. 2017. "Wprowadzenie: człowiek niepełnosprawny w życiu społecznym." In *Nowe formy wsparcia rozwoju osoby niepełnosprawnej*, edited by Marta Komorska, and Ewa Miszczak, 5-18. Lublin: WSPA.

Owsiak, Stanisław. 2016. "System podatkowy Polski w okresie transformacji – próba oceny." *Annales Universitatis Mariae Curie-Skłodowska Lublin Polonia, Sectio H* L, no. 1:15-27.

Pomorska, Alicja. 2015. "Najnowsze zmiany w konstrukcji podatku dochodowego od osób fizycznych w Polsce." *Annales Universitatis Mariae Curie-Skłodowska Lublin Polonia, Sectio H* XLIX, no. 2:151-57.

Pomorska, Alicja. 2016. "Potrzeba wzmocnienia funkcji redystrybucyjnej podatku dochodowego od osób fizycznych." In *Potrzeba i kierunki reformy podatków dochodowych w Polsce*, edited by Alicja Pomorska, 47-74. Lublin: Wydawnictwo KUL.

Szołno-Koguc, Jolanta. 2016. "Dylematy sprawiedliwości podatkowej – równość i powszechność opodatkowania a przywileje podatkowe." *Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach* 294:164-72.

Zieliński, Robert. 2019. "Funkcje podatków w doktrynie prawnofinansowej oraz ich znaczenie dla praktyki stanowienia prawa podatkowego." *Roczniki Nauk Prawnych* XXIX, no. 1:115-30.

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THE BROADCASTING OF LOCAL AUTHORITY DECISION-MAKING BODIES' MEETINGS

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Abstract. This paper is an attempt at showing the broadcasting of local community council meetings contributes to enhancing citizens' participation in the administration of local community affairs. The same goal guided the legislator, too, whose Act Amending Certain Laws to Enhance Citizens' Participation in the Process of Election, Operation, and Supervision of Certain Public Bodies dated 11 January 2018 introduced the duty of broadcasting and recording with recording equipment of the image and sound of the meetings of local authority decision-making bodies. First of all, the realisation of constitutional transparency needs to be emphasised, as reflected in local government legislation, *inter alia*, and incorporated in the access to meetings of the bodies and their committees and to documents, as well as the broadcasting of meetings. The study will apply the methods proper to legal sciences.

Keywords: principle of transparency; access to information; public participation; local community council meetings; broadcasting of meetings

INTRODUCTION

Specialist literature lists claims to participation in governance among political subjective rights [Habermas 2005, 149].[1] The status of legal forms of public participation are enhanced in current legislative practice by their regulation with statutes. Some guarantees of civic involvement in public affairs is not a new or an unknown institution. These regulations have often been governed by the statutes of local government units. Such a boost to their statutory rank offers opportunities for and occasionally even enforces civic participation in public affairs. Given the present level of civil society's development, a public administration based solely on hierarchical

[1] Local government legislation, see: the Local Government Act of 8 March 1990, Journal of Laws of 2021, item 1372 as amended [hereinafter: the LGA]; the County Government Act of 5 June 1998, Journal of Laws of 2020, item 920 as amended [hereinafter: the CGA]; the Regional Government Act of 5 June 1998, Journal of Laws of 2020, item 1668 as amended [hereinafter: the RGA].

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administrative legal relations seems insufficient and hardly effective [Sura 2015, 9-15]. Therefore, solutions need to be sought to encourage citizens' involvement in public affairs and allow for public supervision.

The construct of public participation needs to be discussed to begin with. It is an object of multiple scientific disciplines, including legal sciences (law and administrative theory) [Szlachetko, 2016; Kalisiak-Mędelska 2015, Ostaszewski 2013; Mączyński and Stec 2012]. I. Lipowicz points out the participation means the involvement in the administration's decision-making processes of the potential addressees of its actions [Lipowicz 1991, 122]. It consists, therefore, in all citizens holding rights and freedoms that assure everyone's part in governance. This participation may become a direct or indirect part in governance [Niżnik-Dobosz 2014, 21]. B. Jaworska-Dębska distinguishes two mechanisms in this respect. The first involves bringing the administration closer to society by ensuring a broadly-defined transparency of its operation, which encompasses intended and current actions and their results (including local laws). The other mechanism is about bringing the public closer to the administration through diverse forms of public participation [Jaworska-Dębska 2020, 49-64]. Public participation as a legal construct of co-administration may become a response to all the problems of civic involvement in public management [Świtał 2019, 108].

M. Stefaniuk is right to note the postulate of building a participative model of public administration is the starting point for any discussions of public participation as a form of governance [Stefaniuk 2009, 408]. The model is founded on a shared making of resolutions in public affairs, with a (human) person and society playing a key role. Such postulates are realised as the principle of transparency of public life, with the access to public information and information about persons in public positions, to the meetings of decision-making bodies and their committees, as well as the duty of broadcasting their meetings as the legal forms of public participation that provide for a part in public life and resolutions of local government bodies.

1. ACCESS TO PUBLIC INFORMATION AS A REALISATION OF THE PRINCIPLE OF TRANSPARENCY

Janusz Łętowski was among the first administrative law theorists to use the term 'transparency' in Polish literature, meaning access to information, files, and documents held by authorities [Górzyńska 1999a, 116]. The principle of transparency of public authorities' actions is currently a foundation of the contemporary democratic rule of law [Idem 1999b, 25-26]. This transparency is part of all the legal mechanisms that foster the public supervision of public authorities [Opaliński 2019, 35-43]. A transparent, open, and clear operation of public authorities is no longer treated as a declaration,

but an obligation which is increasingly enforced by citizens [Fleszer 2010, 33]. Transparency as the operating principle of public authorities, including the administration, is seen as a model in a democratic state. It evolves as public life transforms [Piskorz-Ryń 2015, 34]. The freedom of obtaining and transferring information is significant to an aware civil society.

The right to public information is a dimension of transparency, which is constitutional in the Polish legal system. In accordance with Article 61(1) sentence 1 of the Polish Constitution, "the citizen shall have the right to gain information about the activities of public authorities and persons in public positions." The right also comprises the information about business and professional self-government, other individuals and organisations insofar as they carry out the duties of public authorities and administer local or State Treasury property. As P. Wróblewska points, the right of access to public information is phrased generally (though not vaguely) in the Polish constitutional law as a matter of principle. Hence the issue needed to be regulated in a lower-rank act [Wróblewska 2016, 66-74]. Article 61 of the Polish Constitution implies the catalogue of entities bound to inform the public about their operations is long and open-ended. The right to information may be realised in a variety of forms. The Constitution merely gives examples of the access to documents and meetings of collegiate, universally elected public authorities (the meetings of the two chambers of Parliament and of decision-making bodies of local communities) or the right to record sound and image [Kędzior 2018, 40-54].

The right of access to public information is specified in the Access to Public Information Act of 6 September 2001.[2] The law sets out the subjective and objective scope of the right of access to public information, the procedures of its supply (ex officio, as requested, and access to the meetings of universally elected, collegiate state authorities), and the extent of court supervision over the actions of entities bound to provide it [Szustakiewicz 2021, 151-52]. By virtue of Article 1(1) of the APIA, any information about public affairs is public information under the Act and shall be supplied as provided for by the Act. This legal definition is the object of multiple court decisions. Public information should be seen as any message generated by broadly defined public authorities and other entities discharging public duties and the administration of local or State Treasury property. Any information not generated but relating to these entities is public information, too.[3] In line with the Supreme Administrative Court judgment of 29 January 2021, the concept of public information also relates to any facts relevant

[2] Access to Public Information Act of 6 September 2001, Journal of Laws of 2020, item 2176 as amended [hereinafter: the APIA].

[3] Supreme Administrative Court judgment of 18 September 2014, ref. no. I OSK 45/14, Lex no. 1664475.

to public affairs and public activities, and any determinations in this respect should be made with reference to a particular case.[4] The public affairs mentioned by the legal definition under Article 1(1) of the APIA are the activities of public authorities (local authorities, individuals, and organisations) in discharge of public duties and the management of public property, i.e., local or State Treasury property.[5]

The right of access to public information is constructed as a public subjective right. The duty of supplying citizens with public information by the entities designated in the Act corresponds to this right.[6] The right is realised with the local government laws; thus, Article 11b of the LGA stipulates the transparency of local community bodies comprises in particular citizens' right to information, access to the meetings of local councils and their committees, as well as access to the documentation of the discharge of public duties, including the minutes of local council and committee meetings; the regulations are incorporated in Article 8 of the CGA and Article 15 of the RGA. The access to meetings is realised with the duty of broadcasting local council or assembly meetings, introduced by the 2018 Act. These provisions serve the realisation of the right to gain information about the operation of public authorities (Article 61(1) of the Polish Constitution), an equivalent to the constitutional right of access to the meetings of universally elected, collegiate public bodies, where the sound or image can be recorded (Article 61(2) of the Polish Constitution). At the time of the epidemic, meanwhile, Article 15zzx of the Special Solutions in Connection with the Prevention, Counteracting and Countering COVID-19, Other Infectious Diseases, and the Resultant Crisis Situations Act of 2 March 2020 introduced a special regulation applicable to the states of epidemic hazard or epidemic. It allows the bodies of local government and collegiate executive bodies of local authorities (as well as local government associations, metropolitan associations, regional accounting chambers, and local government appeal courts) to hold meetings and sessions and to pass resolutions by means of remote communications or correspondence (remote sessions).[7]

Aside from these regulations, voting on resolutions is open as well. As the Lublin Administrator notes in a decision, the introduction of this rule

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[4] Supreme Administrative Court judgment of 29 January 2021, ref. no. III OSK 2468/21, Lex no. 3242629.

[5] Regional Administrative Court in Gdansk judgment of 29 May 2013, ref. no. II SA/Gd 183/13, Lex no. 1321102.

[6] Regional Administrative Court in Warsaw judgment of 13 March 2014, ref. no. II SAB/Wa 6/14, Lex no. 1468055.

[7] Special Solutions in Connection with the Prevention, Counteracting and Countering COVID-19, Other Infectious Diseases, and the Resultant Crisis Situations Act, Journal of Laws of 2021, item 2095 as amended.

as the bottom line is primarily a realisation of the constitutional principle of the citizens' right to information about the activities of public authorities and persons in public positions. Any departures from open voting on resolutions are only permitted by force of law.[8] The transparency also applies to financial administration. It should be noted legal regulations concerning the transparency of local authorities' operation should also be incorporated in the statutes of local government units, that is, the acts determining their systemic order.

2. THE DUTY OF BROADCASTING MEETINGS OF DECISION-MAKING BODIES

The Act Amending Certain Other Acts to Enhance Citizens' Participation in the Process of Electing, Functioning, and Supervision of Certain Public Authorities of 11 January 2018[9] introduced the duty of broadcasting and recording, with sound and image recording equipment, the meetings of decision-making bodies of local government organisations. Its Article 20(1b) stipulates local council meetings should be broadcast and recorded with sound and image recording equipment. The meeting records are made available in the Public Information Bulletin, at a local community website, and in other customary ways. The relevant provisions are contained in Article 15(1a) of the CGA and Article 21(1a) of the RGA. The legislation imposes the duty of broadcasting (recording) of the meetings of local government organisations, yet without extending it to their internal authorities, namely, committees [Rulka 2018, 18-21].

P. Kłucińska, D. Sześciło and B. Wilk point out "the recording of council (assembly) meetings is not a new idea. Some authorities are already preparing and publishing meeting records in their Public Information Bulletin sites (or their own websites). These materials are also posted by local citizens, journalists and councillors, taking advantage of the right of access to and recording of the meetings of council (assembly) bodies as guaranteed by Article 61 Section 2 of the Polish Constitution RP and the statutes" [Kłucińska, Sześciło, and Wilk 2018, 31-44]. These actions are an expression of involving citizenry in the public affairs of local authorities and improving public awareness.

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[8] Lublin Administrator's supervising decision of 6 July 2016, NK-I.4131.207.2016.AHor, NZS 2016, No. 4, item 66.

[9] Act Amending Certain Other Acts to Enhance Citizens' Participation in the Process of Electing, Functioning, and Supervision of Certain Public Authorities of 11 January 2018, Journal of Laws item 130 as amended.

Such regulations are intended to boost civic participation in the process of supervision and operation of local authorities.[10] Like B. Jaworska-Dębska notes, enhancing the transparency of operation and access to the meetings of local decision-making bodies is an indubitable instrument of improving residents' awareness of the mechanisms and effectiveness of local authorities and supporting public supervision by local populations [Jaworska-Dębska 2019, 599]. The online broadcasting and records available on the internet may expand the range of those following the activities of local (county, regional) authorities [Kłucińska, Sześciło, and Wilk 2018, 31-34]. This is a public participation institution, as it provides local residents with more access to public information and council meetings, the option of following its meetings on an ongoing basis and of exercising public supervision.

J. Korczak is correct in noting "the participation [in council and committee meetings] does not necessarily involve physical presence at the location, since the commonly available, state-of-the-art communications allow for the participation through, for instance, broadcasting. It also includes the possibility of using information processed as records that can be replayed at a later date, not simultaneously with the real time of meetings. The degree of the processing may vary from a full account to one limited (in time or subject matter), where the reliability of recording and results of the processing are guaranteed" [Korczak 2014, 82]. This view is upheld by the Regional Administrative Court in Rzeszów by stating audio-video or ICT materials must form a full and faithful record of a meeting which is prepared in such a way as to fulfill the disposition of Article 19 of the APIA. The fullness of a record means it cannot contain gaps (interruptions) or any other defects (e.g., distortions or reduced volume) that prevent an authorised individual from learning about the contents of a collegiate body's meeting.[11] The Access to Public Information Act allows, if audio-video or ICT materials recording a meeting in full are compiled and made available, for neglecting the duty of compiling the minutes or stenographic records of a council or committee meeting (Article 19 of the APIA). In the event, the duty continues to apply to committee meetings after the introduction of obligatory recording and broadcasting of council meetings [Pawłowski and Macuga 2018, 238].

Records posted in the Public Information Bulletin, at a website or published in another customary way must reflect the progress of a council or assembly meeting and be of an adequate technical quality to provide

[10] Form No. 2001 MPs' draft Act Amending Certain Other Acts to Enhance Citizens' Participation in the Process of Electing, Functioning, and Supervision of Certain Public Authorities, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?No.=2001 [accessed: 01.02.2022].

[11] Regional Administrative Court in Rzeszów judgment of 22 November 2019, ref. no. II SAB/Rz 102/19, Lex no. 2752879.

for an undisturbed access to a meeting. A record of a council meeting is undoubtedly a material representing the progress of a meeting and council's actions and thus evidence of a collegiate body's activities.[12] The regulation fails to specify technical requirements of the conditions of recording and broadcasting of a meeting. The standardisation of this requirement would produce a comparable quality of broadcasting yet would involve additional costs for local authorities. The information recorded during a meeting is publicly available as well, cannot be removed or censored. According to a Supreme Administrative Court judgment, a record of a council meeting reflects its progress and the council's actions and thus is evidence of a collegiate body's activities. In the circumstances, the materials and documents generated during a collegiate public body's meeting, including records made with audio-video equipment, constitute information of public affairs.[13] As W. Baranowska-Zając notes, doubts connected to these regulations also involve the question whether they mean direct meeting broadcasts in the so-called real time or only the recording of sound and image of a meeting and supplying the same to an electronic internet database and the Bulletin [Baranowska-Zając 2020, 249-50]. It should be pointed out in this connection the legislator intended the online broadcasting in real time, so that every citizen could be able to take part in a council or assembly meeting.

With reference to meetings at the time of the COVID-19 pandemic, it should be stressed the broadcasting and recording of council meetings, necessary before the epidemic while local communities had held direct meetings (Article 20(1b) of the LGA), are insufficient to maintain the principle of transparency. Had remote meetings been possible only by force of statutory regulations prior to the institution of Article 15zzx(1) of the 2020 Special Solutions in Connection with the Prevention, Counteracting and Countering COVID-19, Other Infectious Diseases, and the Resultant Crisis Situations Act, a legislative interference would have been redundant, at least in this respect. Since the statutory limitation of the transparency principle applies only to the time of epidemic hazard or epidemic, the statutory limitation of transparency cannot be extended to extraordinary states in all or part of the state or to risks to life or health of councillors or risks to considerable property, since that would go against Article 15zzx(1) of the said COVID-19 Act and Article 11b(2) of the LGA.[14] This regulation is only introduced for the time council meetings cannot be held as provided

[12] Regional Administrative Court in Opole judgment of 3 December 2009, ref. no. II SA/Op 333/09, Lex no. 554925.

[13] Supreme Administrative Court judgment of 17 June 2015, ref. no. I OSK 1564/14, Lex no. 2089729.

[14] Supreme Administrative Court judgment of 14 October 2021, ref. no. III OSK 3979/21, Lex no. 3289386.

for in constitutional laws, while the provisions of the COVID Act are a temporary solution which can ensure the continuity of decision-making bodies. This solution authorises a local community unable to finance the equipment to utilise the equipment for the registration of electoral activities.

CONCLUSION

The broadcasting of local government body meetings is a form of realising the principle of transparency, expressed with the right of access to public information. This is owing to the legally guaranteed access to public information that citizens gain information about all public affairs, which are of paramount importance for them. The participation in the management process is founded on citizens' access to public information and their involvement in supervising actions taken by the administration. As assumed, the broadcasting contributes to expanding citizens' participation in the process of supervising and operation of local community bodies. Like the paper points out, the technical aspects concerning equipment and conditions of meetings need to be more specific in order to standardise the fitting of recording equipment on the meeting premises so that all those present are within reach. The availability of adequate sound systems and high-quality and resolution cameras presenting the image is important as well. The dissemination of information via the Public Information Bulletin, website or in other customary ways is commendable.

REFERENCES

Baranowska-Zając, Wioleta. 2020. "Budżet obywatelski, obowiązek sporządzania i utrwalania pisemnego wykazu głosowań radnych oraz obowiązek the broadcastinga i utrwalania obrad organów stanowiących i kontrolnych jako przejawy zwiększenia udziału członków wspólnot samorządowych w procesie funkcjonowania i kontrolowania organów samorządu terytorialnego." *Przegląd Prawa i Administracji* CXXII, 239-53.

Fleszer, Dorota. 2010. "Zakres jawności działania organów stanowiących jednostek samorządu terytorialnego." *Samorząd Terytorialny* 4:33-48.

Górzyńska, Teresa. 1999a. "Kilka słów o prawie do informacji i zasadzie jawności." In *Państwo prawa, administracja sądownictwa*, edited by Adam Łopatka, Andrzej Wróbel, and Stefan Kiewlicz. Warszawa: Instytut Nauk Prawnych PAN.

Górzyńska, Teresa. 1999b. *Prawo do informacji I zasada jawności administracyjnej*. Kraków: Zakamycze.

Habermas, Jurgen. 2005. *Faktyczność i obowiązywanie. Teoria dyskursu wobec zagadnień prawa i demokratycznego państwa prawnego*. Warszawa: Wydawnictwo Naukowe SCHOLAR.

Jaworska-Dębska, Barbara. 2020. "Partycypacja społeczna w samorządzie terytorialnym. Przemiany koncepcji prawnej i praktyki w latach 1990-2020. Zagadnienia wybrane." *Samorząd Terytorialny* 3:49-64.

Jaworska-Dębska, Barbara, 2019. "Kontrola społeczna." In *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie*, edited by Małgorzata Stahl. Warszawa: Wolters Kluwer.

Kalisiak-Mędelska, Magdalena. 2015. *Partycypacja społeczna na poziomie lokalnym jako wymiar decentralizacji administracji publicznej w Polsce*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Kędzior, Aleksandra. 2018, "Jawność i transparentność postępowania administracyjnego." *Przegląd Prawa Publicznego* 1:40-54.

Kłucińska, Paula, Dawid Sześciło, and Bartosz Wilk. 2018. "Nowy model demokracji samorządowej – uwagi na tle zmian w ustawach samorządowych wprowadzonych ustawą z 11 stycznia 2018 r." *Samorząd Terytorialny* 10:31-44.

Korczak, Jerzy. 2014. "Zasada jawności działania organów jednostek samorządu terytorialnego." *Nowe Zeszyty Samorządowe* 5:25-34.

Lipowicz, Irena. 1991. *Pojęcie sfery wewnętrznej administracji państwowej*. Katowice: Uniwersytet Śląski.

Mączyński, Marek, and Mirosław Stec (ed.). 2012. *Partycypacja obywateli i podmiotów obywatelskich w podejmowaniu rozstrzygnięć publicznych na poziomie lokalnym*. Warszawa: Wolters Kluwer.

Niżnik-Dobosz, Iwona. 2014. "Partycypacja jako pojęcie i instytucja demokratycznego państwa prawnego i prawa administracyjnego." In *Partycypacja społeczna w samorządzie terytorialnym*, edited by Bogdan Dolnicki. Warszawa: Wolters Kluwer.

Opaliński, Bartłomiej. 2019. "Dostęp do informacji publicznej jako emanacja zasady jawności życia publicznego." *Przegląd Prawa Publicznego* 7-8:35-43.

Ostaszewski, Kazimierz. 2013. *Partycypacja społeczna w procesie podejmowania rozstrzygnięć w administracji publicznej*. Lublin: Wydawnictwo KUL.

Pawłowski, Kacper, and Paweł Macuga. 2018. "Wybrane zagadnienia dotyczące problematyki dostępu do informacji publicznej w działalności organów stanowiących jednostek samorządu terytorialnego." *Dyskurs Prawniczy i Administracyjny* 1:225-41.

Piskorz-Ryń, Agnieszka. 2015. "Pojęcie ponownego wykorzystywania informacji sektora publicznego w świetle dyrektywy 2003/98/WE." *Samorząd Terytorialny* 4:34-42.

Rulka, Marcin. 2018. "Obowiązkowa transmisja i nagrywanie obrad rad." *Wspólnota* 9:18-21.

Stefaniuk, Marek. 2009. *Działanie administracji publicznej w ujęciu nauk administracyjnych*. Lublin: Wydawnictwo UMCS.

Sura, Rafał. 2015. "Partycypacja społeczna fundamentem dobrej administracji (wybrane aspekty prawno-aksjologiczne)." *Samorząd Terytorialny* 10:9-15.

Szlachetko, Jakub. 2016. *Partycypacja społeczna w lokalnej polityce przestrzennej*. Warszawa: Wolters Kluwer.

Świtał, Paweł. 2019. *Gwarancje prawne udziału mieszkańców we współzarządzaniu gminą*. Radom: Instytut Naukowo Wydawniczy SPATIUM.

Szustakiewicz, Przemysław. 2021. "Rażąca bezczynność i przewlekłość postępowania w sprawach z zakresu dostępu do informacji publiczne." *Samorząd Terytorialny* 1-2:151-58.

Wróblewska, Paulina. 2016. "Zasada jawności działań administracji a prawo dostępu do dokumentów wewnętrznych na podstawie ustawy o dostępie do informacji publicznej." *Przegląd Prawa Publicznego* 5:66-74.

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DETAILED CHARACTERISTICS OF THE LIMITATION OF THE RIGHT OF ACCESS TO PUBLIC INFORMATION DUE TO REGULATIONS ON THE RECAPITALIZATION OF CERTAIN INSTITUTIONS AND GOVERNMENTAL FINANCIAL STABILIZATION INSTRUMENTS

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Abstract. As a public subjective right, the general right to public information is subject to limitations at both the constitutional and statutory levels. Significant in this respect are the provisions of Article 61(3) and Article 31(3) of the Constitution of the Republic of Poland of 2 April 1997 and Article 5 of the Act of 6 September 2001 on access to public information. Paragraph 2b of Article 5 of the Law on Access to Public Information indicates a specific type of restriction related to the regulations of the Law of February 12, 2010 on the Recapitalization of certain institutions and governmental financial stabilization instruments. The focus of the deliberations conducted has been centered on detailing the essence and nature of this limitation.

Keywords: access to information; public information; restriction; secrets; recapitalization

INTRODUCTION

The right to information set out in Article 61 of the Constitution of the Republic of Poland of 2 April 1997[1] sets the limits to which the level of common and individual interest in public affairs can reach. This is especially important in a democratic state where, as J.E. Stiglitz points out, it is a fundamental right of the individual to be aware of what is being done by public authorities and for what reasons [Stiglitz 2003, 115-56]. The legislator also points out the ways in which an individual can satisfy his or her curiosity with information that has the characteristics of public knowledge. Their detailed development is done through statutory regulations. The Act of 6 September 2001 on access to public information is dominant in this respect.[2] It is called a general (systemic) law, which by defining the right

[1] Journal of Laws No. 78, item 483 as amended

[2] Journal of Laws of 2022, item 902 [hereinafter: u.d.i.p. or Access Act].

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to information as a claim directed to the authorities and entities carrying out public tasks [Czarnow 2007, 23-36], determines the main principles of the process of access, the legally guaranteed ways of its realization and the planes of limiting the availability of public knowledge. However, the content of Article 1(2) u.d.i.p. makes it clear that it is not the only regulation and, more importantly, not always the first legislation in force on the subject of making public knowledge available.[3] The regulations of the u.d.i.p. do not violate the laws of other Acts defining different principles and procedures of access to information that is public. Doctrinal interpretation of the above-mentioned regulation leads to conclusions in the light of which one should not disregard also such regulations to which the u.d.i.p., despite its primary role in ensuring transparency of public life, guarantees inviolability. The detailed development of this inviolability allows us to assume that in this case it is about giving these exceptional regulations priority in shaping their image of the procedure of making information on public matters available to the public, first of all in establishing specific ways, deadlines, and forms of the process of disclosure. Thus, one can boldly say that the u.d.i.p is a meta-statute [Karsznicki 2015, 112-22] – a statute referring to other regulations that determine the issues related to accessing public data differently than it does itself. Importantly, despite the lack of a clear indication of this matter on the grounds of the u.d.i.p., the group of regulations mentioned above should also include those that the legislator qualifies as limitations to access to public information. They are described in the contents of Article 5 of the u.d.i.p. This applies, inter alia, to the Act of 12 February 2010 on Recapitalisation of Certain Institutions and Government Financial Stabilisation Instruments.[4] The focus of the considerations is put on defining the essence of this kind of restriction. An attempt is also made to qualify it as one of the levels of limiting access to public knowledge. Of crucial importance in this respect is to unambiguously determine whether Article 5(2b) of the u.d.i.p. involves a proper restriction of access to public information or merely "inhibition" of the provisions of u.d.i.p. Act in their general application. It seems helpful in this regard to provide an approximation of the limitation concept and its typology based on constitutional and statutory regulations.

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[3] See judgement of the Constitutional Tribunal of 15 October 2009, ref. no. K 26/08, OTK ZU 9A/2009, item 135; judgement of Voivodship Administrative Court in Poznań of 2 February 2022, ref. no. II SAB/Po 237/1, https://orzeczenia.nsa.gov.pl/doc/2AB759F540 [accessed: 03.05.2022]; judgement of Supreme Administrative Court of 15 December 2021, ref. no. III OSK 4343/21, https://orzeczenia.nsa.gov.pl/doc/E50F2E54DC [accessed: 03.05.2022]; judgement of Supreme Administrative Court of 2 February 2021, ref. no. III OSK 2946/21, https://orzeczenia.nsa.gov.pl/doc/9B7E414303 [accessed: 03.05.2022]; judgement of Supreme Administrative Court of 20 March 2012, ref. no. I OSK 2451/11, https://orzeczenia.nsa.gov.pl/cbo/search [accessed: 03.05.2022].

[4] Journal of Laws of 2022, item 396 [hereinafter: u.r.i.s.f. or the Recapitalisation Act].

1. RESTRICTION OF THE DISCLOSURE PROCESS AND ITS TYPES

In the Polish legal system, it is impossible to find a legal definition of the restriction of disclosure or secrecy of information [Szpor and Gryszczyńska 2016, XXV]. The colloquial understanding of limitation evokes associations of a negative and undesirable phenomenon in human life. It is perceived through the prism of restraining or completely depriving an individual of the ability to act freely, to act according to one's own opinion and personal intentions. It is identified as an obstacle, a hindrance to achieving desired goals, and a block to fully realizing personal aspirations. The above understanding also applies in the context of limiting access to public knowledge, although it is designed to protect certain values and goods, including those attributed to individuals and the state as a whole. At this point, it is worth emphasizing the position of E. Jarzęcka-Siwik, who points out that within the institution of social information constantly the main role is played by secrets, which, because of being exceptions, are interpreted narrowly, but nevertheless, through the multitude and diversity of occurrences, often lead to far-reaching restrictions and entail the instability of the legal system and discrepancies in interpretation [Jarzęcka-Siwik 2005, 74-95].

The right to information is restricted,[5] because for the proper functioning of the state, it is necessary to optimize such solutions that will allow various social goods to coexist at the same time and in the same environment so that everyone can benefit from them while guaranteeing their security [Ulasiewicz 2010, 6-22; Banasik 2012, 16-29]. One such solution is considered to be legally regulated secrets (restrictions), which, as M. Tugendhat points out, are established to keep hidden what is true, but in the name of protecting a certain value [Tugendhat 2001-2002, 3-7]. As emphasized by the legislator in Article 61(3) of the Constitution of the Republic of Poland, limitation of the general right to information may only occur given the protection of freedoms and rights of other persons and business entities, as well as because of the protection of public order, security or an important economic interest of the state, as specified in the laws.[6] Concretization of the permissibility of limiting access to public information takes place in the law,

[5] The Constitutional Tribunal emphasizes that the realization of the universal right to information cannot involve "striving to guarantee citizens access to information at any cost", see judgement of the Constitutional Tribunal of 19 June 2002, ref. no. K 11/02, OTK ZU 4A/2002, item 43.

[6] In the doctrine and judicature, there is an emphasis on the need to take into account the content of Article 31(3) of the Constitution of the Republic of Poland in the context of limiting the universal right to information. See judgement of the Constitutional Tribunal of 20 March 2006, ref. no. K17/05, OTK ZU 3A/2006, item 30, and judgement of the Constitutional Tribunal of 15 October 2009, ref. no. K 26/08, OTK ZU 9A/2009, item 135 [Tarnacka 2009, 257; Górzyńska 1999, 93].

which, given the background of the regulation, gives rise to constitutional and statutory limitations. The differentiation in this respect is based on the manner of their expression. For, as already emphasized, the legislature focuses its attention on what is to be protected in the face of limiting the freedom to obtain public knowledge. The legislature, in turn, combines these constitutional goods and values into certain units and gives them specific names, such as protection of classified information, privacy, or business secrecy. This makes it possible to distinguish public and private-law secrets, [7]and thus also secrets serving the protection of public and individual interests [Mucha 2002, 230]. And even though it does not clearly result from the content of the regulations of the u.d.i.p., Article 5 is not the exclusive limiting regulation, although it rises to the rank of the most important one. However, comparing the content and meaning of Article 5 u.d.i.p with Article 1(2) u.d.i.p. Act mentioned above, it is possible to distinguish direct and indirect restrictions in light of the general access regulations. The second group remains in close connection with the provision that refers to specific regulations (Article 1(2) of the u.d.i.p.) in all those cases of access that deviate from the general rules set out in the content of the u.d.i.p. In fact, it does not lead to a limitation of the disclosure process itself, but to a limitation of the application of the regulations of the u.d.i.p. as general regulations in the area of access to public information. Thus, one may take the position that the content of Article 1(2) of the u.d.i.p. creates a particular kind of restriction – a quasi-limitation of the process of making public information available, and its indirect character is based on inhibition of the regulations of the u.d.i.p. in their full application, and not on the complete elimination of access to public information. The above division is closely related to the contemporary understanding of the restriction of access to public information as a situation in which certain information, although public, is not subject to public disclosure (communication) because it cannot be disclosed, or is subject to disclosure, but with the use of a special mode, tool, manner, or based on special rules, other than those presented by the legislator in the content of the u.d.i.p. [Ulasiewicz 2010, 6-22; Jaśkowska 2002, 75].

[7] Information protected due to a confidentiality agreement is a private-law secret [Taczkowska-Olszewska 2014, 211]. This is closely related to the division into secrets derived from the act and the contract, in a sense as a consequence of Article 721(1) of the Act of 23 April 1964, the Civil code (Journal of Laws of 2020, item 1740 as amended).

2. IS THE U.R.I.S.F. A PROPER RESTRICTION ON THE DISCLOSURE PROCESS OR A QUASI-RESTRICTION ON ACCESS TO PUBLIC KNOWLEDGE?

As B. Opaliński notes, having the status of one of the most important values under the protection of the legislator and being one of the basic determinants of the existence of a democratic system, the essential feature of the restriction of openness must be its justification [Opaliński 2019, 35-43].[8] Limiting the transparency of public life, which is deprived of its legitimacy, leads to the objectification of citizens, who are not treated as individuals holding the power in the state, but pretend to be subjected ruthlessly subordinated to the directives of those in power [ibid.]. It is important to note that this justification cannot be based solely on the fact that the restriction has a legitimate purpose, but must first and foremost, while complying with the principle of proportionality, be connected with the desire to secure other more important goods and values that are valuable from the point of view of society as a whole, the state, or the individual. In the doctrine, it is emphasized that restrictions of this nature are located in Article 5 of the u.d.i.p. The right to public information is subject to restriction to the extent and under the conditions specified in the provisions on the protection of classified information and the protection of other statutorily protected secrets. The right to public information is subject to limitations due to the privacy of an individual or the secrecy of an entrepreneur (Article 5(1)(2) u.d.i.p.).

Paragraphs 2a and 2b of Article 5 of the u.d.i.p. are atypical. This atypicality is based on a different way of formulating the restriction of access to public information compared to barriers established due to the protection of classified information, due to the privacy of an individual or a legal person. In creating and presenting these particular restrictions (in Article 5(2a)(2b) of the u.d.i.p.), the legislator refrains from adopting specific nomenclature, but only refers to separate regulations, making them a platform for determining the existence of a particular type of restrictions in the process of making public information available. According to the aforementioned regulations, the right to public information is subject to restrictions to the extent and on the terms outlined in the regulations on forced restructuring and is subject to restrictions to the extent and on the terms outlined in the Act on Recapitalization of Certain Institutions and Government Financial Stabilization Instruments. A closer look at their content allows us to conclude that, while in paragraph 2a of Article 5 of the u.d.i.p. it is possible to speak of a general reference to separate regulations (for the legislator

[8] A. Piskorz-Ryń and M. Sakowska-Baryła in turn, point to the lack of freedom of establishment as one of the features of the limitation of the right of access to public information [Piskorz-Ryń and Sakowska-Baryła 2021, 23-33].

generally provides for provisions on restructuring, although, in this case, it is the content of the Act of 10 June 2016 on the Bank Guarantee Fund, deposit guarantee system and compulsory restructuring[9]), while in paragraph 2b of Article 5 of the u.d.i.p., there is a specific emphasis on those regulations (the Act), the content of which is a plane limiting the process of making available according to general principles. Notwithstanding the aforementioned differentiation, however, the nature of the restrictions presented is similar. The very fact that they are placed in Article 5 of the u.d.i.p. creates a possibility to claim that they constitute a group of direct (proper) restrictions. For it is the content of Article 5 of the u.d.i.p. (in its entirety) that is the statutory expression of the formulation of objections to the freedom to obtain public information, which is emphasized by both the doctrine and the judicature. However, a detailed look at these regulations (on restructuring and recapitalization) reveals that these restrictions are closer to the quasi-limitation of availability referred to earlier than to the direct restrictions specified in Article 5 (1)(2) of the u.d.i.p. Importantly, the very statutory formulation providing for a limitation in scope and on principles (followed by a more or less concrete approximation of the name of these regulations, which play a special role in this case) leads to an emphasis on the priority of their application (the priority of regulations from paragraphs 2a and 2b of Article 5 of the u.d.i.p. over the u.d.i.p. regulations). It must be clearly emphasized here that the affiliation of the Restructuring Act and the Recapitalisation Act to the group of legislation referred to in Article 1(2) of the u.d.i.p. was not only not explicitly emphasized by the legislator in the text of the u.d.i.p., but was omitted. Attempts to unequivocally determine whether this kind of procedure was intentional or not – do not give unequivocal results, anyway it is of little importance from the point of view of the regulations of the u.d.i.p. The intended goal of the legislator has been achieved. Regardless of the placement of the provisions of the u.d.i.p., giving them the character of a specific restriction on access to public information amounts in fact to "retaining" the primacy of the application of the provisions of the u.d.i.p. in connection with specific principles and methods of making public information available. The limitation functionality defined in this way is appropriate for the regulations referred to in Article 1(2) of the u.d.i.p. The difference in this case, however, comes down to the explicit qualification of the Recapitalization Act to the group of restrictions on access to public information, rather than the use of a general formulation as another act, the violation of which cannot be mentioned according to what was emphasized by the legislator in Article 1(2) of the u.d.i.p.

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9 Journals of Laws of 2022, item 793.

In conclusion, it should be noted that a superficial assessment of the content of paragraph 2b of Article 5 of the u.d.i.p. as a limitation of access to public information and a deeper analysis based on the interpretation of the content of the u.d.i.p. clash with the regulations of the u.d.i.p. may lead to different results. The literal wording of the content of Article 5(2b) of the Access Act, in complete disregard of the other provisions of the Access Act, allows the restriction due to recapitalization provisions to be qualified as a restriction of an appropriate nature. On the other hand, disregarding the fact that the restriction in question was placed in Article 5 of the u.d.i.p. while taking into account the content of the u.r.i.s.f. and Article 1(2) of the u.d.i.p., gives grounds to claim that it has a quasi-restriction character. Moreover, it is worth stressing that nothing stands in the way of taking a stand, referring to the entirety of the arguments presented above and accepting the previously indicated assumptions, that the restriction resulting from Art. 5(2b) u.d.i.p. simultaneously has the character of a direct limitation due to its location in the content of the u.d.i.p. and an indirect one due to its specific characteristics. However, this implies the adoption of an indivisible division of the limitations on access to public information (a division that is not dichotomous in nature).

3. WHAT IS THE LIMITATION UNDER ARTICLE 5(2B) OF THE U.D.I.P.?

Returning briefly to Article 1(2) of the u.d.i.p., it is worth pointing out that the priority granted by the legislator to the application of regulations providing for different principles and modes of publishing data on public matters does not deprive the u.d.i.p. of its general and fundamental meaning. As the legislator emphasizes, the provisions of the Act (u.d.i.p.) do not violate the provisions of other Acts (separate Acts), which are governed by their laws when it comes to access to public information. It does not, therefore, imply a complete and absolute dissociation from the general regulations – from the regulations of the u.d.i.p. Confirmation for the present is the very content of those regulations to which the u.d.i.p. gives priority to application. In this case, various regulations are involved, e.g. substantive administrative law and commercial law, which in their essence relate to issues other than the general right to information, but which in their content contain their ways and forms of making public information available, within the meaning of Article 1(1) and Article 6 of the u.d.i.p. The use of a term indicating only retention and not an exclusion of the application of the u.d.i.p. within the scope of regulations referred to in Article 1(2) of the u.d.i.p. is not accidental. Although u.d.i.p. from a formal (procedural) point of view, it is not some super law that would prevail over others, but as it has

already been mentioned, it contains general provisions regulating all those cases in which there are no extraordinary situations of disclosing public knowledge. This is important because in the separate regulations to which the legislator refers in Article 1(2) of the d.i.p., there is often an explicit reference to the general regulations (to the u.d.i.p.). A closer analysis allows us to divide them internally and distinguish between general and specific (detailed) references.[10] The generality of the first of the above is based on the use by the legislator in the content of the specific regulation (Article 1(2) of the u.d.i.p.) of a general formulation that directs the addressee to refer to the Act of 6 September 2001 on access to public information (or otherwise to the regulations on access to public information[11]). On the other hand, the specific (detailed) reference comes down to the use, in the content of separate regulations, of such legal institutions that are appropriate for the process of making available following general rules, and which have been determined by these rules, i.e. the content of the u.d.i.p.[12] Such an unambiguous example of a specific reference is the obligation of specific entities to publish specific data in the Public Information Bulletin, an ICT official publication, referred to, inter alia, in Article 8 of the u.d.i.p.[13] The fact of presence of the discussed references in a special way emphasizes the application of the regulations of the u.d.i.p. This, however, does not alter the fact that in the absence of their occurrence, the regulations of the constitution act cannot be disregarded under the general character possessed by the u.d.i.p. It is rightly emphasized by A. Gryszczyńska that the separateness of the regulations referred to in Article 1(2) of the u.d.i.p. concerns only what follows from them and does not in every case lead to the exclusion of the process of making available in the mode specified by the content of the u.d.i.p. [Gryszczyńska 2016].

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[10] They accompany all these so-called own ways, rules, modes of the process of making available, which are mentioned in specific provisions (in the acts referred to in Article 1(2) of the u.d.i.p.).

[11] The lack of explicit emphasis on the fact that the regulations in question are u.d.i.p. regulations does not matter much in this case.

[12] In this case, it also refers to executive acts, issued on the basis of and to specify the provisions of the u.d.i.p.

[13] See more: Regulation of the Minister of Interior and Administration of 18 January 2007 on the Public Information Bulletin (Journal of Laws No. 10, item 68). Although there is no analogy, in this case, it is also worth paying attention to the numerous use of the content of substantive administrative law, and the so-called other customary methods of public announcement, the closer interpretation of which reduces the essence and functionality of the content specified in Article 11 of the u.d.i.p. to the institution of displaying or posting information in generally accessible places. This is a manifestation of a different, and above all not as clear as in the case of BIP, reference to the regulations of the u.d.i.p., which was placed in the text of the provisions that enjoy, pursuant to Article 1(2) of the u.d.i.p., the privilege of priority of application.

Such references to the u.d.i.p. are also noticeable in the content of the Recapitalization Act regulations. This is even though the u.r.i.s.f. has not been statutorily qualified (as indicated above) to the legislation referred to in Article 1(2) of the u.d.i.p. One might even be tempted to claim that their occurrence - the presence of such references constitutes an additional argument in favor of admissibility of qualifying the u.r.i.s.f. not only as regulations determining a specific limitation of the process of making available but also as privileged regulations from Article 1(2) of the u.d.i.p. Their validity (as well as the significance of all those regulations which the legislator does not call specifically, but defines generally as regulations) is also determined by the fact that the guarantee of inviolability was placed in the initial part of the legislation, i.e. in Article 1 of the u.d.i.p.

At the level of the provisions of the Recapitalization Act, there are references to the Act on Recapitalization of two types (both general and specific). The general reference can be seen in connection with the content of Article 19h(1) of the u.r.i.s.f. On its level, the legislator gives all information related to the application of governmental financial stabilization instruments, i.e. data on public capital support instruments, as well as on the temporary takeover of institutions and financial institutions by the State Treasury in the name of public information. This is in close relation to the content of Article 1(1) of the u.d.i.p., according to which any information on public matters constitutes public information. More specifically, it concerns information concerning the activity of an entity which, although it is not a public administration body, a state legal person, or a unit of the public finance sector, functionally exhausts the characteristics of an entity obliged to provide information in the light of the regulations of the u.d.i.p. (Article 4) [Szczęśniak 2018; Sura 2012, 87-97; Zawadzka, Zimmerman, and Sura 2017; Tomaszewska 2021, 477-90]. Under Article 19a(1) of the u.r.i.s.f., the Bank Guarantee Fund[14] decides to apply the government financial stabilization instrument if the application of the instruments of compulsory restructuring is not sufficient. These actions require the opinion of the President of the NBP and the Chairman of the Financial Supervision Commission.

The connection referred to above becomes even more apparent if we consider further parts of the provisions of Article 1(1) of the u.d.i.p. and Article 19h(1) of the u.r.i.s.f. In both cases, it is about sharing information based on the regulations of the u.d.i.p. As indicated by the legislator, information related to the application of government financial stabilization instruments may be made available based on the provisions on access to public information (Article 19h(1) u.r.i.s.f.). This is an example of a general reference to general provisions accompanied by a legally established variation of the

[14] Hereinafter: BFG.

release process relating to the timeliness of its implementation. This comes as no surprise, since the assigned status of the u.r.i.s.f. implies the admissibility of creating and having one's own – separate – rules for making information qualified as publicly available. As it has been indicated above, it is this very characteristic that determines, on the one hand, the treatment of the u.r.i.s.f. as the act limiting the process of granting access in the light of Article 5 u.d.i.p. and, on the other hand, as the act with a priority of the application, referred to in Article 1(2) u.d.i.p. According to the text of art. 19h(1) of the u.r.i.s.f., information on the application of government financial stabilization instruments may be made available based on regulations of the u.d.i.p. not earlier, however, than after the end of the threat of a systemic crisis[15] and after the end of the prospect of liquidation of that entity, which was subject to compulsory restructuring proceedings (Article 19a u.r.i.s.f.). The use of a general reference to the u.d.i.p. in Article 19h(1) of the u.r.i.s.f. results in the admissibility of applying in the discussed subject those forms and methods of publicity that are appropriate for the process of making it available taking into account the general principles. However, the rule of timeliness in the wording referred to in Article 10(2) and Article 13 of the u.d.i.p. is modified. The provisions of the u.r.i.s.f. in their content determine a kind of initial date, a date without specifying it precisely, but by referring to the circumstances referred to in Article 19a(1) u.r.i.s.f. It significantly affects the process of providing access under the general rules by eliminating the permissibility of providing it in this particular case without undue delay and promptly and by reforming how the statutorily mandated 14 days are calculated.

Similar consequences should be mentioned about making available the BFG's decision on the application of government financial instruments, which is referred to in Article 19h(2) of the u.r.i.s.f. They appear on the occasion of the detailed reference used by the legislator in connection with the limitation of the disclosure process under Article 5(2b) u.d.i.p. Its detailed nature boils down to the use of an electronic bulletin in the process of publishing the decisions of the BFG. It uses the functionality of the instrument, which is the basic method of sharing public information, referred to in Article 7(1) point 1 u.d.i.p.[16] The specific definition of the information to be made available with its help determines the obligatory nature of the publication process, which, with some exceptions, also applies to the data

[15] This is a disruption to the stability of the financial system that has the potential to have serious negative consequences for the internal market and the economy, as identified by the Financial Stability Committee (Article 2(6) u.r.i.s.f.).

[16] In accordance with the principle of priority of the no-application mode referred to in Article 10(1) of the u.d.i.p.

covered by the open catalog in Article 6 u.d.i.p.[17] It is worth noting here that the establishment of a specific deadline does not constitute the only exclusive restriction visible at the level of Art. 19h(2) of the u.r.i.s.f. In the face of the general principle of the unconditionality of making public information available (Article 2(2) of the u.d.i.p.), the legislator specifically conditions the process of making available the decision on the application of government financial stabilization instruments. The BFG, after consultation with the minister in charge of state assets, the President of the National Bank of Poland, the Chairman of the Financial Supervision Commission, and the minister in charge of financial institutions, shall make the decision available on the BIPBFG's subject page, provided that making it available does not cause adverse effects on financial stability or limit or prevent the effective application of government financial stabilization instruments. The content of the regulation presented confirms the dissimilarity of the disclosure process but in terms of this one specific public information, namely the decision of the BFG.

The full content of Article 19h of the u.r.i.s.f. refers to the essence and determines the nature of the limitation used by the legislator in shaping the procedure of making public knowledge available under general rules – the limitation referred to in Article 5(2b) of the u.d.i.p. However, this is not its full face, and one may even be tempted to state that the institution of appeal discussed above (the occurrence of references to the content of the u.d.i.p.) constitutes only one of its properties. The fact that the u.r.i.s.f. exhausts the attributes of provisions in respect of which the legislature takes the position that their infringement by the u.d.i.p. is inadmissible is connected with the existence, on the grounds of the Recapitalisation Act, of different methods of making public information available. This separateness comes down in this case to the use of instruments of data publicity, which were not distinguished in the text of the u.d.i.p. It is not, therefore, about the following specified in Article 7 of the u.d.i.p. publishing public information, including official documents in the Public Information Bulletin; providing access to information by displaying or posting information in generally accessible places, as well as by installing devices in publicly accessible places that make it possible to get acquainted with public information; providing information by means of access to meetings of collective bodies originating from general elections and providing access to materials, including audiovisual and ICT materials, documenting those meetings; providing access to information in

[17] It is worth emphasizing here that while in the context of indicating information that exhausts the prerequisites of public knowledge, the content of Article 6 constitutes an exemplary list, from the point of view of publication in the Public Information Bulletin, this regulation is of a closed nature. Includes those data that are required to be made available in the electronic bulletin.

the data portal referred to in the Act of 11 August 2021 on open data and reuse of public sector information.[18]

In search of such differences, one should refer to Article 19e(2) of the u.r.i.s.f., according to which the entity acquiring share rights[19] by the BFG's decision announces twice in a national daily and in the Court and Commercial Gazette decision on acquiring share rights of an entity that has been covered by an instrument of temporary public ownership. And while the further part of the regulation suggests that the potential addressees of the above information are creditors – who can submit claims within one month from the date of the last publication, the instruments used for the purpose of disclosure guarantee that this type of information reaches a wide audience, which is only confirmed by the fact that information about public status according to the doctrinally shaped principle of subjective universality.[20]

CONCLUSION

The legislator, making the regulations of the u.r.i.s.f. one of the barriers to access to public information, decided to place them in the basic catalog of limitations on the process of making information available. In search of the purpose of this procedure, it should be stated that similarly to the provisions on forced restructuring, the legislator wanted to clearly emphasise the restrictive role of the regulations of the u.r.i.s.f. However, given the content of Article 1(2) of the u.d.i.p., it was not necessary or appropriate to carry out this procedure. Even without this, regulations of the u.r.i.s.f. would not be deprived of the status of regulations limiting. Confirmation for this is their very content, or more precisely, the essence of the restriction, which presents itself against the background of the regulations of the u.r.i.s.f. This restriction comes down to the "shaping" of its methods of making available (different from those mentioned in Article 7 of the u.d.i.p.) and is based on

[18] Journal of Laws 2021, item 1641.

[19] In this case, it concerns shares, pre-emptive rights within the meaning of the Act of 15 September 2000, the Code of Commercial Companies (Journal of Laws of 2020, item 1526 as amended), rights to shares, subscription warrants, and other transferable securities incorporating property rights corresponding to the rights arising from shares, issued on the basis of the relevant provisions of Polish or foreign law, and other transferable property rights that arise as a result of the issue, incorporating the right to acquire or subscribe to such securities.

[20] According to the above-mentioned principle, the circle of entities entitled to apply for public information or independently reach for this type of data has been broadly defined in accordance with what the legislator indicates in Article 2(1) of the u.d.i.p. Everyone is entitled to access to public information, and the person exercising the right to public information may not be required to demonstrate a legal or factual interest (Article 2 of the u.d.i.p.).

the occurrence of references to the u.d.i.p. (although with certain modifications) or specific institutions referred to in the content of the u.d.i.p. This remains in close relation to the statement of M. Rozbicka-Ostrowska and I. Kamińska according to which the content of Article 1(2)of the u.d.i.p. refers to two different regulations, namely to the acts limiting access to information due to particularly important reasons. Kamińska according to which the content of Article 1(2) of the u.d.i.p. refers to two regulations, namely to laws restricting access to information due to a particularly protected good and to laws that often extensively and in detail and, above all, differently determine the process of making public information available [Kamińska and Rozbicka-Ostrowska 2016, 45; Aleksandrowicz 2008, 98]. Thus, despite the placement of the u.r.i.s.f. in Article 5 of the u.d.i.p., the content of the Recapitalization Act clearly confirms the admissibility of its inclusion in the second category mentioned above, as legislation that is in fact a quasi-restriction of access to information, leading only to the exclusion of the application of the u.d.i.p. in all those situations in which it is necessary, without eliminating it as a regulation of a general nature.

REFERENCES

Aleksandrowicz, Tomasz R. 2008. *Komentarz do ustawy o dostępie do informacji publicznej*. Warszawa: LexisNexis.

Banasik, Marcin. 2012. "Ograniczenia prawa do informacji – zagadnienia wybrane na gruncie ustawy o dostępie do informacji publicznej." *Przegląd Prawa Publicznego*5:16-29.

Czarnow, Sławomir. 2007. "Prawo do informacji publicznej w Polsce a wymogi prawa europejskiego." *Samorząd terytorialny* 4:23-36.

Górzyńska, Teresa. 1999. *Prawo do informacji i zasada jawności administracyjnej*. Zakamycze: Kantor Wydawniczy Zakamycze.

Gryszczyńska, Agnieszka. 2016. "Podstawy prawne ograniczeń jawności w Polsce." In *Jawność i jej ograniczenia. Struktura tajemnic*, vol. 4, edited by Grażyna Szpor, and Agnieszka Gryszczyńska. Warszawa: C.H. Beck. Legalis el.

Jaśkowska, Małgorzata. 2002. *Dostęp do informacji publicznej w świetle orzecznictwa Naczelnego Sądu Administracyjnego*. Toruń: TNOiK.

Jarzęcka-Siwik, Elżbieta. 2005. "Ograniczenie dostępu do informacji publicznej o przebiegu postępowania karnego." *Prokuratura i Prawo* 2:74- 95.

Kamińska, Irena, and Mirosława Rozbicka-Ostrowska. 2016. *Ustawa o dostępie do informacji publicznej. Komentarz*. Warszawa: Wolters Kluwer.

Karsznicki, Krzysztof. 2015. "Kryteria dostępu do informacji publicznej." *Prokuratura i Prawo* 11:112-22.

Mucha, Monika. 2002. *Obowiązki administracji publicznej w sferze dostępu do informacji*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Opaliński, Bartłomiej. 2019. "Dostęp do informacji publicznej jako emanacja zasady jawności życia publicznego." *Przegląd Prawa Publicznego* 7-8:35-43.

Piskorz-Ryń, Agnieszka, and Marlena Sakowska-Baryła. 2021. "Umowy cywilnoprawne z klauzulami poufności w procesie udostępniania informacji publicznej." *Samorząd-terytorialny* 10:23-33.

Stiglitz, Joseph E. 2003. "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life." In *Globalizing Right. The Oxford Amnesty Lectures*, edited by Matthew. J Gibney, 115-56. Oxford: Oxford University Press.

Sura, Rafał. 2012. "Bankowy Fundusz Gwarancyjny a interes publiczny." *Studia Prawnicze KUL* 3:87-97.

Szczęśniak, Paweł. 2018. *Środki przymusowej restrukturyzacji*. Warszawa: C.H. Beck. Legalis. el.

Szpor, Grażyna, and Agnieszka Gryszczyńska. 2016. *Leksykon tajemnic*. Warszawa: C.H. Beck.

Taczkowska-Olszewska, Joanna. 2014. *Dostęp do informacji publicznej w polskim systemie prawnym*. Warszawa: C.H. Beck.

Tarnacka, Kamila. 2009. *Prawo do informacji w polskim prawie konstytucyjnym*. Warszawa: Wydawnictwo Sejmowe.

Tomaszewska, Katarzyna. 2021. "The Nature and Essence of the Limitation of the General Right to Information due to the Forced Restructuring Provisions." *Teka Komisji Prawniczej PAN Oddział w Lublin*ie 2:477-90.

Tugendhat, Michael. 2001-2002. "Privacy and celebrity." In *Yearbook of Copyright and Media Law*, edited by Eric Barendt, and Alison Firth, 3-7. Oxford: Oxford University Press.

Ulasiewicz, Michał. 2010. "Ograniczenia dostępu do informacji publicznej. Zagadnienia wybrane." *Przegląd Prawa Publicznego* 9:6-22.

Zawadzka, Patrycja, Piotr Zimmerman, and Rafał Sura. 2017. *Ustawa o Bankowym Funduszu Gwarancyjnym, systemie gwarantowania depozytów oraz przymusowej restrukturyzacji. Komentarz*. Warszawa: C.H. Beck. Legalis. el.

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MAN IS HIMSELF THROUGH TRUTH. IN SEARCH OF THE FOUNDATIONS OF KAROL WOJTYŁA'S AND TADEUSZ STYCZEŃ'S PERSONALISM

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Abstract: The paper discusses one of the key aspects of Karol Wojtyła's and Tadeusz Styczeń's ethics, namely, the dependence of freedom on truth. By building their ethics within the framework of the classic metaphysics, both the thinkers were convinced a range of the intellectual and moral errors of the present times, which are dangerous to man, spring from the breach of that constitutive bond between these fundamental values. The article is a reconstruction of the understanding of the relationship between freedom and truth as underlying the mutually supplementary personalist ethics of Wojtyła and Styczeń, with the dignity of the human person as its conceptual centre. The same triad of values, dignity – freedom – truth, in particular, the truth about the human person, would, for John Paul II, become the criterion of evaluation of the human culture and actions taken in the social dimension.

Keywords: person; dignity; conscience; law

INTRODUCTION

This text has been inspired by the thirtieth anniversary of the publication of John Paul II's encyclical *Veritatis splendor*, to fall in August 2023.[1] The concept of truth is placed in the very title and at the core of the document, devoted to "the fundamental issues of the Church's moral teaching." Each encyclical is the head of Church's intervention in response to a malady afflicting man and humankind at any given time. In *Veritatis splendor*, John Paul II points out some trends in contemporary thinking, i.e., subjectivism, utilitarianism, pragmatism, scepticism, and above all, ethical relativism, which threaten to blur the boundary between good and evil. The significance of human freedom is emphasised to such a degree that it becomes absolute and the source of all values. The pope sees the absolutisation of freedom,

[1] Ioannes Paulus PP. II, Litterae encyclicae cunctis catholicae Ecclesiae episcopis de quibusdam quaestionibus fundamentalibus doctrinae moralis Ecclesiae *Veritatis splendor* (06.08.1993), AAS 85 (1993), p. 1133-228 [hereinafter: VS].

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combined with the vanishing of the idea of the universal truth about good as being among the most profound sources of the crisis of contemporary culture. Awarding the individual conscience the prerogative of the supreme instance of moral judgment which decides what is good and what is evil in any given situation by itself is a symptom of the crisis (VS 32). Thus, every human has a truth of theirs, different from the truths of others. At its extreme, the individualism leads to a rejection of the idea of the human nature and, paradoxically, doubting or even an outright questioning of the freedom itself (VS 32, 33).

John Paul II did not limit himself to the diagnosis of the contemporary crisis and its sources but went on to identify a way of overcoming it. It was still in his time as cardinal that he wrote: "Man is himself through truth. The attitude to truth constitutes the person's humanity, dignity …. Thinking about truth and life in truth decides this dignity" [Wojtyła 1980, 115]. This quotation expresses the essence of 'the case of man' that emerges from the anthropological discussions of Karol Wojtyła as well as of Tadeusz Styczeń, who expanded on and propagated the ethical personalism of the author of *Person and Act.* Both the thinkers advanced in their philosophical work an interesting theory of mutual relations between truth and freedom in man's anthropological structure. It is of special importance to the contemporary culture in the context of the notion and phenomenon of post-truth that is becoming highly acclaimed, dangerously fashionable, and influential. In the name of the human person's well-being and rights as well as for the sake of a proper shape of social reality and the good of personal interrelations, we need to continue demonstrating the closest possible links between these two basic values. This is the objective of this paper. To be a little more accurate, it is intended to reach the interface between truth and freedom as underpinning K. Wojtyła's and T. Styczeń's personalism. Since this is human dignity which is key to understanding the ethical thinking of both the philosophers, the discussion will begin with this issue.

1. REVEAL THE PERSON AND ITS DIGNITY

"Ethics finds itself only after it's become a proclamation for personal dignity. Being in the service of that proclamation is therefore the main, if not the only objective of ethics, its proper role, and public mission" [Styczeń 1993b, 13], T. Styczeń claimed in response to the question, "What do I, as an ethicist, see as my role and mission for my contemporaries?" [ibid.]. The experience of moral obligation, of a categorical nature, is the starting point for the ethical deliberations undertaken by Wojtyła and Styczeń.

The novelty of such a personalism consists in the fact of the moral obligation being grounded in the truth of personal dignity [Wierzbicki 2021, 249-50].

1.1. The person is 'somebody' objectively (K. Wojtyła's approach)

To Wojtyła, the person's special ontic status is the source of and reason for the norm essential to morality. The personalist norm stated in *Love and Responsibility* is the core of his ethics. Modifying the second formula of I. Kant's categorical imperative, Wojtyła wrote: "Whenever the person is the object of action in your conduct, remember you cannot treat it merely as a means to an end, as an instrument, but must take into account it has or at least should have an end of itself" [Wojtyła 2001, 30]. Such a personalist norm has two varieties. As a principle with negative contents, it says "the person is a good that doesn't agree with use, which cannot be treated as an object of use and, as such, as a means to an end. This is paralleled by the positive content of the personalist norm: the person is such a good that love is the proper and fully valuable attitude to it" [ibid., 14]. The personalist norm arises from the discovery of the ontological and axiological status of the person among the remaining beings of the visible world. They do give rise to the moral obligation of affirming the person for its own sake. The very fact of being a person 'calls for' living up to who one is. Understanding what the person is engenders the obligation of respect for both its own and other persons' dignity [Wojtyła 2020, 180]. In this sense, the dignity of man as the person means above all a property or a basic quality – in this meaning, the value of the person as such: the value accruing to a man for the reason of him being a person, which man should care for this very reason [Wojtyła 1991, 50].

Man is ontically a personal being. This means that, in a cognitive confrontation with the world, he always manifests himself as *somebody*, different from the remaining beings of the visible world, always merely *something*, in the fullness of his unique and most perfect being [Wojtyła 2001, 24]. The deepest semantic core of the Polish word 'person' points to this 'intrinsic' dimension of every single man. Thinkers have long pondered man's ontic status. The notion of the person as the peak form of being is the good shared by the responses to that first and foremost question, Who is man?, emerging from a variety of philosophical currents.[2]

Explaining what it means to say the person is objectively *somebody*, Wojtyła said: "The word *person* was forged to emphasise man will not reduce

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[2] *Persona significat id quo est perfectissimum in tota natura, scilicet subsistens in rationali natura* (Thomas Aquinas, Summa theologiae, I, q. 29, a. 3).

himself without any residue to the contents of *the individual of a species*, but has something more, a particular fullness and perfection of being which must necessarily be highlighted with the word *person*" [Wojtyła 2001, 24]. Man as a person is neither one of the many pieces of the same species nor even an individual. Even less is he a copy of an object. The person stands out from other beings with its existence characterised by individuality and uniqueness. The dimension of inner life is what decides the exceptional relationship of the person to the outside world and is also the reason for the exceptional status of a human subject (dignity). This spiritual dimension of the person is actuated in the acts of reason and will by means of which the person realises its transcendence in relation to the external world and to itself [Wierzbicki 2021, 29]. Referring back to the classic definition of the person by Boethius and to the fundamental categories developed by Thomas Aquinas, Wojtyła stresses this dimension of the human person's transcendence.

The personalism of Wojtyła the philosopher is rooted in the tradition of Christian thought. The author of *Love and Responsibility* compliments the philosophical understanding of the human person's dignity with the theological perspective. This approach occupies a central position in John Paul II's doctrinal teaching. The personalist norm Wojtyła as pope keeps returning to has its theological grounding in the ending words of the 24th number of *Gaudium et spes* Constitution of the 2nd Vatican Council: "If human beings are the only creatures on earth that God has wanted for their own sake, they can fully discover their true selves only in sincere self-giving."[3] These words imply the statement the fullness of personal being is constituted by mutual self-giving. In this way, the person is constituted in its relation to another.

For John Paul II, the person of Christ the Saviour, who fully reveals man unto himself, is the foundation and ultimate warranty of the human dignity. It is only in Christ, he claims, that man finds "the proper greatness, dignity, and value of his humanity. Man is reaffirmed, as if uttered once again, in the Mystery of Salvation."[4] Since Christ saved every single man, everyone regained their Divine filiation, forfeited through sin. Therefore, to fully comprehend himself and his own dignity, man "must become closer to Christ, must somehow enter Him with himself, must acquire, assimilate the entire reality of the Incarnation and Salvation" [ibid].

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[3] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio Pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025-115, no. 24.

[4] Ioannes Paulus PP. II, Litterae encyclicae ad Venerabiles Fratres in Episcopatu, ad Sacerdotes et Religiosas Familias, ad Ecclesiae filios et filias, nec non ad universes bonae voluntatis hominess Pontificali eius Ministerio ineunte *Redemptor hominis* (04.03.1979), AAS 71 (1979), p. 257-324, no. 10.

In the theological perspective, the calling of man to participation in God's life is a special confirmation of the human person's dignity. K. Wojtyła stresses the human personality expresses itself in particular ways in its relation to the personal God [Wojtyła 2011, 358]. The participation in the life of the Holy Trinity Persons is the ultimate horizon of both human life and a variety of human activities. The relation to God, who, like man, is a personal being who comes to meet man in Christ, is the core of Wojtyła's theological personalism as well as the foundation on which he builds his philosophy of the person [Scola 2010, 136].

1.2. *Persona est affirmanda propter se ipsam* (T. Styczeń's approach)

K. Wojtyła pointed to the personalist norm, which orders the affirmation of each person without exception as the basic standard of morality. T. Styczeń expresses the same conviction, emphasising the moral nature of this obligation. The Lublin-based ethicist was convinced that what is due to the person from another person is given on a simultaneous understanding what good the person is [Wierzbicki 2021, 179]. He placed the person's value at the foundations of the moral obligation. Styczeń makes the moral experience, which consists in a subject directly grasping the absolute obligation of affirming the person and its dignity, the foundation of his personalism. The moral obligation is defined here as a normative interpersonal relation in which "the person-object faces … the person-subject as someone who, by the very fact of being the person, demands recognition from all persons regardless of any other objectives" [Styczeń 1993c, 34]. It's expressed as the following norm: 'the human person must be affirmed for its own sake' (*Persona est affirmanda propter se ipsam*) [Styczeń 2013a, 252]. The formulation of this overarching ethical norm is also grounded in the recognition of the person's status among what can be experienced cognitively in the visible world. The human I's experience of 'above' and 'differently' is directly connected, the Lublin ethicist used to say, to man's inside, his subjective structure [Styczeń 2013b, 133].

Styczeń's understanding of the moral obligation is aptly explained by Alfred Wierzbicki: "The person's dignity is the rationale for the moral obligation. This is not about a theoretical concept of the person that can only be developed by way of philosophical consideration, but about the specific perception of one person by another in real life. It always manifests itself as somebody, the other, the neighbour, not merely one of the objects I have a cognitive and practical contact with, but a magnitude that demands recognition for itself. The recognition of the person's intrinsic value, its … *above* and *differently* in relation to beings which aren't persons, is the essence of the moral experience. The experience of the obligation is thus objectively

grounded in the person's being and value" [Wierzbicki 2021, 176]. The moral obligation, the affirmation of the person for the sake of itself, is empirically ascertainable. It is a judgment about the real state of affairs concerning an interpersonal relation arising from the fact of personal dignity [ibid., 182-83].

According to Styczeń, the moment of discovering himself in himself is the turning point in the formation of man's moral attitude [ibid.]. By sufficiently recognising ourselves and our human dignity, we discover our difference – we find out we're unique and incomparable to anything else in this world, that we are somebody separate and thus 'personal' against the background of the whole universe. In the world and in the universe, there's nothing not only more worthy than but even equal to the person. Styczeń claims, therefore, the value of every human community is only perceived when the value of each separate human being is noticed and appreciated, especially those most defenceless, that is, above all, those who are already alive but haven't been born yet. The measure of authentic freedom (and of democracy, which values freedom so highly) for each and everyone is the respect not for a race, collective or a state, but for each individual person, whose affirmation becomes a norm of morality [Styczeń 1993a, 187].

For T. Styczeń, morality is man's distinctive feature. He names Socrates its discoverer, the first to identify an equality between the sensitivity to the human person's dignity and moral sensitivity. In the opinion of the Lublin thinker, Socrates deserves the name of the father of ethics and a precursor to its personalist model, since he found the meaning of his service in arousing respect for man's dignity among his contemporaries, most of whom regarded their own happiness as the norm of morality and the objective of ethical thinking. The Greek philosopher helped others discover the dignity both in themselves and in others. Socrates compared his role to that of an obstetrician helping others to be born morally, or born to their humanity [Styczeń1993b, 18]. Thinking along the same lines, Styczeń claimed a proper discovery of the person is beyond one's reach. Faced with the impossibility of capturing the person with thought and fully expressing them in language, only one thing remains – silence. "How revelatory… this calling is, though!" Styczeń wrote. "Attention! Person! No more for words any more" [ibid.]. The silence towards the person is an expression of a certain helplessness in the face of a mystery we face, on the one hand. It also expresses, however, a cognitively inspiring meeting and marvel at the person's uniqueness.

Styczeń, like Wojtyła, compliments his search for a most effective proclamation about the person and its dignity with a theological perspective. He says ethics cannot but refer to the event of God's Son's Incarnation. It can't but address the event and teachings of Jesus Christ, "the ethicist of all

times." The incarnation is a kind of demonstration of what each man is worth in himself, since he has such a value to God [ibid., 20]. In response to Anselm of Canterbury's *Cur Deus homo?*, which an ethicist should bother his contemporaries with at all times, Styczeń argues God became man to reveal man unto himself, to fully reveal the person to itself. The deed God dared to undertake in Jesus Christ uncovered the ultimate measure of every single man's value [ibid.]. Its sensitivity to the person's dignity is the greatest success of the civilisation erected on Christian foundations. Even if, Styczeń asserts, Christianity is found a sheer myth, it cannot be denied the power of its disturbing man's dignity [Styczeń 1993b, 17].

Both the authors discussed so far claim an adequate perception of man involves a discovery of the truth of his dignity. Any choices and actions of man should be appropriate to this truth at all times. The affirmation of the person for itself is the sole correct response to the perception of the status of its good.

2. THE NORMATIVE POWER OF TRUTH

Both the authors contemplated here believe the person's exceptional status (dignity) is founded on the dimension of its specific transcendence. Both Wojtyła and Styczeń stress the dimension of human transcendence which is associated with the relationship between the human person's freedom and truth. The link between these two values in man's anthropological structure is so close that it often proves to be impossible to pursue one without the other in practice. John Paul II saw the most profound and dangerous source of the contemporary culture's crisis in a breach of that important bond between freedom and truth. In the pope's view, therefore, the debate on a proper relation between these two fundamental values is of the essence (VS 84).

"All the human issues, broadly discussed and variously resolved in the contemporary moral thought, can be reduced, though in diverse ways, to the principal question, the question of man's freedom" [ibid., 31], John Paul II wrote in the encyclical *Veritatis splendor*. That question undoubtedly remains at the centre of moral reflections thirty years on. Wojtyła's anthropology, outlined as early as *Person and Act*, is above all an attempt at showing the truth of human freedom anew. It's a response to those varieties of 'personalism' that stress man's freedom and regard it as the key foundation of his personal dignity, trying to free it from the duty of respecting the truth man is capable of knowing and should be guided by in life. Jean-Paul Sartre openly raises the postulate of releasing man from any norms. Immanuel Kant and his successors voice this postulate indirectly, by doubting man's cognitive capabilities or by stressing there is no clear

truth of a specific content, in particular, a truth about man that would be binding on him as a moral norm [Szostek 2014, 199].

Wojtyła places the experience of self-determination at the centre of his analysis of freedom, viewing it in the context of exploring experience: 'man acts' or 'fulfils an act'. Wishing to identify everything in his analysis of the act that shows the person as the agent, Wojtyła points out to the moment of personal transcendence that takes place in the act, which he regards as an expression of man's capacity for self-determination, or self-control, fulfilled in the transcendence towards the perceived truth about good. The Cracow-based thinker analyses the act with reference to freedom, manifested with full force in man's actions. He underlines that man, acting consciously and freely, is not only the agent in an act and its transitive and non-transitive effects but also determines himself in this action. The person's agency is also its self-determination [Wojtyła 1976, 15]. Therefore, if one desires to understand the way a subject experiences its agency, one must reach the personal structures that condition that self-determination. In Wojtyła's opinion, self-determination presumes a certain complexity in the person – "namely, the person is one who possesses itself and the one possessed exclusively by itself" [Wojtyła 1994, 152]. The self-possession is followed by another relationship in the person's structure – that of self-mastery. The person is one who masters itself and is mastered by itself. In this manner, self-determination is conditioned by the personal structures of self-possession and self-mastery. Both the person's agency and transcendence are manifested there.

Wojtyła expands and supplements the traditional meaning of transcendence. The objectivist-leaning philosophy regards the human transcendence as overcoming a subject's boundary towards an object, which takes place in the so-called intentional acts (horizontal transcendence). Speaking of transcendence, Wojtyła means primarily the transcendence associated with a person's objectivisation in self-determination. This is transcendence by the very fact of freedom. He explains: 'Such a concept of transcendence as a property of the person's dynamism is explicated precisely with a comparison to the dynamics of nature. Self-determination contributes first of all the superiority of an own *I*' [ibid., 165]. This transcendence primarily reveals the relation of a person unto itself – a transcendence by the very fact of being free in action. Wojtyła defines it as vertical transcendence, a person's feature distinguishing it from other living creatures where only the activity in the horizontal dimension can be established, underpinned with the dynamism of nature. Man is free (autonomous) because he's not fully subject to what merely 'happens' in him, i.e., instincts or feelings. He's not merely an intellectually more efficient animal. As a person, he is characterised by both an appropriate degree of willpower and by the acts of cognition,

which enables him to subject his conduct to the test of objective truth [Merecki 2001, 212-13].

To Wojtyła, freedom in its basic meaning is free will. Man is free as he relies solely on himself in the dynamisation of his subject. He's not only the originator of his action, i.e., an act marked with his own personality and ingenuity, but also the creator of himself, since, by virtue of his acts, he creates the work of the unique, exceptional, human 'I' [Szostek 2014, 46-47]. In this way, freedom is the root of man becoming *somebody* and *somehow*, or morally good or evil through his acts. By emphasising the object of human will in its fundamental meaning is the subject of the same will, Wojtyła continues to emphasise the moment constituting the acts of will is their subordination to the truth of good. That dependence on truth, inherent in the human freedom, is manifest in conscience, whose role consists first of all in showing the subject the truth of itself. Respect for this truth is the path to the realisation of human freedom and thus to man's self-fulfilment as a person [Szostek 1990, 276]. Conscience brings to self-determination the normative power of truth, whose comprehension and choice condition the fulfilment of a person in the act. Wojtyła writes: "The person's transcendence in the act is not only the self-dependence on its own *I*. It also consists in a dependence on truth, which ultimately determines freedom, since the latter is not realised by subordinating truth but by a subordination to truth. The dependence on truth perceived in freedom defines the boundaries of autonomy proper to a human person" [Wojtyła 1994, 198].

The normative power of truth manifests itself experientially in conscience. It is there where that peculiar coupling of truth and obligation is achieved [ibid. 204-205], described by the author of *Person and Act*. The conviction man is himself through truth is the core of K. Wojtyła's anthropology [Wojtyła 1980, 115]. To be oneself is to transcend oneself towards truth, to become dependent on truth. The truth discovered in conscience, particularly the truth of oneself, is never neutral but always stands before a person as an obligation to choose it and testify to it. The claim of the normative power of truth would become the supreme category of T. Styczeń's ethics.

3. TOWARDS FREEDOM IN TRUTH: THE PROBLEM OF CONSCIENCE

T. Styczeń points out the path to the understanding of the connection between faithfulness to a known truth and to oneself, through which the human person's unity is expressed and its dignity protected, leads via the experience of one's own conscience. The Lublin ethicist is aware the dispute about conscience – what it is and what role it plays in man's moral life – concerns the human person itself and its identity. For him, the experience

of conscience as a witness to truth is elementary. As the guard of human dignity, it lets its presence be felt especially when man moves away from what he is and should be by his very essence, i.e., a rationally free being capable of self-determination. In an act of defection from truth, it's not freedom which is enslaved but man who, by an act of free decision, becomes a slave to something in himself or something external to himself [Szostek 1991, 29]. Conscience is an act specific to man only as the sole rational and free being who seeks truth and has the freedom of its choice. Conscience, Styczeń says, is 'an act of a subject's self-dependence on itself in the act of becoming self-dependent on truth' [Styczeń 2013c, 194-95]. The act of becoming self-dependent on truth as an expression of obedience to truth guarantees the subject's personal identity and realises its transcendence, a distancing from a variety of forces pressing on the human will, both those inherent in man's biological nature and exercised by social factors [Wierzbicki 2021, 213].

In his search for connections between freedom and truth, T. Styczeń is once again helped by Socrates and his decision. "Why did Socrates decide to stay in prison just when, thanks to the measures taken by his influential disciples, the gate to freedom opened for him? Why didn't he choose the freedom outside prison? … Why did he prefer death to the freedom offered him?", the ethicist of Lublin asks [Styczeń1993d, 85]. A paradox is inherent in Socrates' decision, which reveals a key piece of information about man: he didn't choose the freedom offered to him because he chose … freedom – the freedom in truth [ibid., 86]. The position of an anonymous Polish John Smith in the 1980s is similar. Styczeń analyses it and regards it as experientially affirming the normative power of truth. One of the many Poles in the time of the Solidarity movement, imprisoned for his 'anti-state' activities during the martial law, he faces the proposition: 'Sign, and you'll be free'. Challenged with one of whose extreme situations, Smith experiences a personal awakening. He discovers himself, breaking the atom of his own I [ibid., 87]. For Smith, like for Socrates before, the threshold of the prison cell became morally impassable, the place of discovery of freedom in truth, and thus of his own subjectivity. Here comes an interesting passage, worth quoting in full: "Smith sees, in a dazzling epitome, the truth, once known and accepted as truth, cannot be ignored without ignoring, even more, without nullifying himself. To save oneself is to save a freedom incomparably deeper and more important than the one the prison supervisors offer to Smith in return for his signature, an act of deserting truth. To save one's freedom, loyalty to the perceived truth, and to save oneself is one and the same thing!" [ibid., 87].

A conscious defection on a known truth is tantamount to self-betrayal, self-denial – a moral suicide. A truth betrayed will remain itself anyway

but its traitor will be marked as a deserter from himself. Striking at truth with an act of treason, the subject deals a fatal blow to his humanity [ibid., 83-96]. Describing Smith's drama, Styczeń demonstrates the very essence and rank of conscience. It is where the subject comes to know the truth he bonds with, with which he becomes as if 'besotted' and which helps him get to know himself as a person. The experience of conscience as a witness to the truth of its subject is as elementary and primal as the experience of freedom [Szostek 1991, 28]. For Styczeń, Smith is a symbolic figure. There are multiple instances of 'the prisoners of conscience' subject to a similar moral test. One need but mention St. Thomas More, Mahatma Gandhi or Stefan Wyszyński. They all held the stand of moral objectivism. Based on the obvious experience, they understood truth is the rationale for the moral obligation that, once known, the subject will accept as truth – and therefore cannot deny at the price of moral desertion. Denying a known truth creates an ontic dissonance in man and his rational nature. By rejecting what I've established with my own act as a subject of cognition, I 'shape' myself as an ataxic man. In this sense, truth is to man a fundamental value. This self-formation has a direction of its own. By his choices and acts, man is to become what he should become as a person. The truth of man is always the decisive criterion of evaluation of the acts building our personality [Lekka-Kowalik 2017, 79-80].

Truth and freedom are the most basic values of the human existence and action. They add meaning to anything man does. In the personalist spectrum, truth comes before freedom, however, providing a kind of beacon for man to exercise freedom properly [Chudy 2007, 65]. John Paul II stressed "in a world without truth, freedom loses its content and man falls prey to open or latent passions and conditions,"[5] therefore, freedom is bolstered fully by accepting truth [ibid.]. Although the vision of freedom free from truth seems attractive, its nature is ruinous. It causes man to surrender to forces, including those present within himself, which he should control as a reasonable being. Both Wojtyła and Styczeń warn that, like the supporters of individualism strive to 'free' freedom from truth, turning to conscience the autonomous lawmaker as far as the truth of norms is concerned, the adherents to totalitarianism reduce the obligation to a mere pressure of external factors [Wojtyła 1994, 209]. Both the personalists argue the truth discovered in freedom is what releases the genuine freedom, whereas any means of compulsion or pressure only mask the transcendence proper to the human person [ibid.]. The abandonment of the concept of objective truth always

[5] Ioannes Paulus PP. II, Littera eencyclicae Venerabilibus in episcopate Fratribus Clericis que et Religiosis Familiis, Ecclesiae Catholicae Fidelibus universis nec non bonae voluntatis hominibus saeculo ipso Encyclicis ab editis litteris «Rerum novarum» transact *Centesimus annus* (01.05.1991), AAS 83 (1991), p. 793-867, no. 46 [hereinafter: CA].

leads to a denial of the transcendent dignity of the human person and its capacity for self-determination and thus to a whole variety of totalitarianisms. If a transcendent truth by obeying which man attains his complete identity is absent, there is no principle capable of warranting just relationships among people (CA 44). In effect, it's not the force of law but the law of force that prevails (following the principle *plus vis quam ratio*). In the circumstances, everyone strives to take advantage of the available means to gain solely his own benefits at any price. It's no exaggeration to say that the experiences that ultimately led to two world wars and the emergence of the 20th century totalitarianisms, their dramatic terrors and genocide on a historically unprecedented scale, were born out of a neglect for the force of the mutual connection between truth and freedom.

CONCLUSION

According to K. Wojtyła and T. Styczeń, the crises of both the contemporary man and his culture are of a metaphysical nature. They arise from a departure from the classic conception of truth, initiated in the modern era, followed by man's free choice that denies the truth of his dignity. In practice, each separation of freedom from truth leads to individualism and subjectivism, and finally self-enslavement that deprive man of the transcendent dimension proper to him. Without truth, freedom is 'suspended in a void', becomes blind, and produces not only a disintegration of individual life but also violence and other degenerations known from history.

Both the philosophers cited in this paper agreed in claiming truth is a fundamental value for personalist axiology. It determines both man's personal and social lives in their varied dimensions. It warrants the moral order man does not create but reads out of the objective reality with his reason. A defection on a known truth is always a treason to oneself and one's rational nature. The dependence on truth inherent in man's freedom manifests itself in conscience. The belief in the dependence of freedom on truth is of particular importance today in discussions with the representatives of individualist and liberal thought, who treat individual freedom as an absolute and make the applicability of moral laws and social principles dependent on that freedom. Both Wojtyła and Styczeń were anxious to explicate it's only in the splendour of truth that all other values adding meaning to human life, above all, the greatness of humanity itself, become evident. Therefore, man can regain and reaffirm his personal freedom and dignity only by returning to the obedience to truth. The grave cultural crises of recent decades demonstrate it's not a purely academic postulate.

REFERENCES

Chudy, Wojciech. 2007. *Społeczeństwo zakłamane*. Part 2. *Kłamstwo jako metoda*. *Esej o społeczeństwie i kłamstwie*. Warszawa: Oficyna Naukowa.

Lekka-Kowalik, Agnieszka. 2017. "Edukacja dla prawdy – odpowiedź na osobową naturę człowieka." *Rocznik Naukowy Duszpasterstwa Nauczycieli* 1:75-86.

Merecki, Jarosław. 1995. "Sumienie a prawda i prawo moralne." In *„Veritatis splendor". Tekst i komentarze*, edited by Andrzej Szostek, 207-19. Lublin: Redakcja Wydawnictw KUL.

Scola, Angelo. 2010. *Doświadczenie człowieka*. Lublin: Instytut Jana Pawła II KUL.

Styczeń, Tadeusz. 1993a. "Nienarodzony miarą demokracji." In *Wprowadzenie do etyki*, edited by Maria Filipiak, and Andrzej Szostek, 175-88. Lublin: Towarzystwo Naukowe KUL.

Styczeń, Tadeusz. 1993b. "Objawiać osobę." In *Wprowadzenie do etyki*, edited by Maria Filipiak, and Andrzej Szostek, 13-21. Lublin: Towarzystwo Naukowe KUL.

Styczeń, Tadeusz. 1993c. "Uwagi o istocie moralności." In *Wprowadzenie do etyki*, edited by Maria Filipiak, and Andrzej Szostek, 28-42. Lublin: Towarzystwo Naukowe KUL.

Styczeń, Tadeusz. 1993d. "Wolność w prawdzie." In *Wprowadzenie do etyki*, edited by Maria Filipiak, and Andrzej Szostek, 83-95. Lublin: Towarzystwo Naukowe KUL.

Styczeń, Tadeusz. 2013a. "Prawda o człowieku miarą jego afirmacji. O gwarancjach zabezpieczających humanizm przed wyrodzeniem się w antyhumanizm." In *Dzieła zebrane*. Part 3: *Objawiać osobę*, edited by Alfred M. Wierzbicki, 251-61. Lublin: Towarzystwo Naukowe KUL, Instytut Jana Pawła II.

Styczeń, Tadeusz. 2013b. "Problem człowieka problemem miłości." In *Dzieła zebrane*. Part. 3: *Objawiać osobę*, edited by Alfred M. Wierzbicki, 121-45. Lublin: Towarzystwo Naukowe KUL.

Styczeń, Tadeusz. 2013c. "Sumienie – źródło wolności czy zniewolenia?" In *Dzieła zebrane*. Part 3. *Objawiać osobę*, edited by Alfred M. Wierzbicki, 179-95. Lublin: Towarzystwo Naukowe KUL, Instytut Jana Pawła II.

Szostek, Andrzej. 1990. *Natura, rozum, wolność. Filozoficzna analiza koncepcji twórczego rozumu we współczesnej teologii moralnej*. Rzym: Fundacja Jana Pawła II.

Szostek, Andrzej. 1991. "Wolność-prawda-sumienie." *Ethos* 3-4(15-16):25-37.

Szostek, Andrzej. 2014. Śladami *myśli* świętego. *Osoba ludzka pasją Jana Pawła II*. Lublin: Instytut Jana Pawła II KUL.

Wierzbicki, Alfred M. 2021. *Osoba i moralność. Personalizm w etyce Karola Wojtyły i Tadeusza Stycznia*. Lublin: Wydawnictwo KUL.

Wojtyła, Karol. 1976. "Osoba: podmiot i wspólnota." *Roczniki Filozoficzne* 24:5-39.

Wojtyła, Karol. 1980. *Znak sprzeciwu. Rekolekcje w Watykanie od 5 do 12 marca 1976. Paris: Éditions du Dialogue.*

Wojtyła, Karol. 1991. *Człowiek w polu odpowiedzialności*. Rzym-Lublin: Instytut Jana Pawła II KUL.

Wojtyła, Karol. 1994. "Osoba i czyn." In *"Osoba i czyn" oraz inne studia antropologiczne*, edited by Tadeusz Styczeń, et al. 43-344. Lublin: Wydawnictwo Towarzystwa Naukowego KUL.

Wojtyła, Karol. 2001. *Miłość i odpowiedzialność*. Lublin: Towarzystwo Naukowe KUL.

Wojtyła, Karol. 2011. "Odpowiedź na pytanie o tematy soborowe nadesłane do Komisji Przedprzygotowawczej." In Robert Skrzypczak, *Karol Wojtyła na Soborze Watykańskim II. Zbiór wystąpień*. Warszawa: Centrum Myśli Jana Pawła II.

Wojtyła, Wojciech. 2020. *Osoba, społeczność, demokracja. W poszukiwaniu personalistycznych podstaw władzy społecznej*. Lublin: Towarzystwo Naukowe KUL.

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HEALTH RESORT BLOCK SUBSIDY AS A SOURCE OF ECONOMIC REVENUE FOR SPA LGU'S

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Abstract. In Article 49 of the Spa Act it is explicitly stated that the spa subsidy is payable to the municipality which performs the tasks defined in Article 46 of that Act. It should be agreed here that the spa subsidy not only fulfils the function of financing own tasks, but also contains an incentive function, which from the point of view of the division of public resources between the government administration and the self-government administration is a secondary function. Therefore, if so, it should not limit the function of task financing. Moreover, it should be pointed out that a subsidy from the state budget is not an appropriate form of financing own tasks, which is commonly pointed out in the literature. Despite those reservations, the Health Resort Act in Article 49 clearly defines this type of income of the health resort community earmarked for financing of tasks mentioned in Article 46 of the Health Resort Act as a subsidy.

Keywords: spa resort government unit; resort subsidy; own tasks of LGU's

INTRODUCTION

The health resort commune performing its tasks mentioned in Article 46 of the Act on health resort medical treatment, health resorts and health resort protection areas and on health resort communes[1] receives a subsidy from the state budget in the amount equal to the revenues from the spa fee collected in the spa in the year preceding the base year , in accordance

[1] Journal of Laws of 2021, item 1301 [hereinafter: u.l.u.].

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with the Act on revenues of local government units.[2] The minister competent for public finance, after consultation with the representation of local self-government units, shall determine, by way of an ordinance, the procedure and deadlines for the determination and transfer of subsidies, guided by the need to secure funds for the implementation of the tasks of spa municipalities.

1. DIFFERENCES BETWEEN A BLOCK GRANT AND A SUBSIDY

A grant is gratuitous and non-refundable financial assistance provided by the state to certain entities for the accomplishment of their tasks. A grant is therefore a financial support of discretionary nature. An entity that applies for a grant must meet certain conditions. The body which grants the subsidy deals with the distribution of the funds granted to the entity. Subsidies can be divided into subject, object and purpose subsidies.

A subsidy is a free and non-refundable financial aid granted by the state to selected entities (e.g. local government units) to support their activities. Subsidy is a legal claim and is not of discretionary character. The funds received from subsidies may be spent voluntarily. Subsidies can be divided into general and specific (for specific activities). A subsidy can be given to individuals, private companies or local governments. Subsidies can be granted to all entities, as long as it is specified in the budget. The subsidy may be in a general form, where the state simply provides financial support to some entity, e.g. for the implementation of a project or goal. If the local government receives a subsidy, the state provides funds for the purpose, for example, related to the construction of a municipal swimming pool or some other project, which was envisaged by the local authorities in the implementation of projects [Borodo 2013].

A grant, similarly to a subsidy, is also a non-returnable form of financial support, it is free of charge and is given by the state to other entities in order, of course, to support their activity and structural development. However, a subsidy, as opposed to a grant, is discretionary in nature, which means that the entity that applies for a subsidy must meet certain requirements, and the funds may be distributed at the discretion of the authority that awards the subsidy. A subsidy and a grant differ in that the former is a legal claim. If the budget provides for a subsidy for a given entity, it must implement it, while the funds are already at the disposal of the body that received the subsidy, unlike in the case of a grant. The funds from the grant are distributed by the granting authority [Sołtyk 2021].

[2] Journal of Laws of 2016, item 198, 1609 and 1985 and of 2017, item 730.

Grants come from public funds, and the way they are used is under special control. Therefore, the grantor is obliged to control the spending of the grant and the grantee is obliged to use the received grant only for the tasks specified in the grant agreement [Owsiak 2022].

2. SPECIFICS OF FINANCING HEALTH RESORT UNITS WITH THE USE OF A HEALTH RESORT BLOCK SUBSIDY

Among the forms of compensating for development barriers and securing funds for the implementation of specific tasks, as well as those encouraging the maintenance and establishment of health resorts, the following should be mentioned: target subsidies for the implementation of health resort and municipal infrastructure meeting the requirements stricter than those stipulated by law, and the right to charge a health resort fee. Each health resort community receives a subsidy from the state budget in the amount equal to the revenues from the health resort fee collected in the health resort in the year preceding the base year. In order to receive the subsidy, the health resort of the health resort must submit an application to the competent provincial governor by 31 March of the budget year, showing annual receipts from the fee, as of 31 December of the year preceding the base year [Czarnecki 2017a; Idem 2017b; Idem 2017c, 118-20]. In accordance with the general directive arising from the principle of allocation of public resources according to tasks, the legislator, while imposing the indicated tasks on the resort municipalities, also assigned them an additional source of own income in the form of a resort fee [Niezgoda 2012]. Undoubtedly, revenues from the spa fee would not be sufficient to implement all the tasks listed in Article 46 of the Spa Act, but also the revenues from this fee do not have to be earmarked exclusively for the implementation of the tasks set out in this provision, because the spa fee is undoubtedly the municipality's own income, which may be spent on any (arbitrary) purpose (tasks).

In Poland, the legal nature of the health resort subsidy was not defined in any legal act, hence its legal status, due to its impreciseness, has been the subject of much controversy for several years now [Wołowiec 2002, 63-67]. Additionally – apart from subsidies and the spa fee (tax), the legislation of the European Union countries tries to compensate both the development barriers of the spa communes (resulting from the necessity to meet restrictive environmental standards) and to support their development through such fiscal and tax policy instruments as: local tourist tax, tax on second homes, increased shares in tax revenues, preferential credits for the construction of recreational, sports and spa infrastructure, adoption of the principle that fees and penalties for economic use of the environment are the income of spa municipalities, subsidies for gas prices, or reliefs

in income taxes of an investment and stimulus nature, and subsidies for ecological investment solutions in the area of energy management [Golba 2001, 56-64; Nowak-Far, 2010, 37-58].

While the issue of the health resort fee does not give rise to any doubts as to its nature and the directions (objectives) of its spending, the health resort subsidy, and in particular its legal status in the system of the commune's revenues is not entirely clear. The Health Resort Act clearly speaks of a health resort subsidy, and not of any other form of budgetary revenue of the health resort district, and such a definition of the district's revenue has certain legal consequences. Article 49(2) u.l.u. stipulates that the Minister competent for public finance shall specify, by way of an ordinance, the manner and deadlines for determining and transferring the subsidy, guided by the need to secure funds for the performance of the health resort gminas' tasks. Such regulation of the Minister of Finance was issued on 9 June 2006[3] and in it the deadlines and principles for transferring the health resort subsidy from the state budget to the health resort district were determined. However, in spite of the issue of implementing regulations to the Act on the health resort in the scope relating to the health resort subsidy, it is not entirely clear whether in a legal sense we are actually dealing with a subsidy or perhaps a subsidy. A controversial issue is the scope of the statutory authorization for the Minister of Finance to issue a regulation, which is limited only to issues related to the mode and timing of the spa subsidy transfer. Some authors think that in the case of the health resort subsidy we are dealing with a subject subsidy, while others believe that it is in fact a purpose subsidy. The resolution of this issue is of fundamental importance for spa municipalities especially in terms of the purpose, accounting for the spa subsidy and controlling how the subsidy funds are spent [Golba 2020].

The subsidy especially subjective or purposeful is always connected with the public task. A public task is any action of the administration that it performs on the basis of the laws. A public task is, among others, providing or ensuring the provision of services to residents and other entities. It should be noted that the tasks indicated in Article 46 of the Act on Health resorts fall within the scope of own tasks, although undoubtedly they have a broader dimension due to the specificity of the health resort gminas. It would be difficult to find in the Act on local self-government such tasks as those mentioned in Art. 46 of the health resort act. The health resort subsidy not only performs the function of financing its own tasks, but also contains an incentive function which, from the point of view of the division

[3] Regulation of the Minister of Finance on the mode and deadlines for determining and transferring subsidies from the state budget to the health resort district, Journal of Laws of 2006, No. 103, item 705.

of public resources between the government administration and the self-government administration, is a secondary function. Therefore, if so, it should not limit the function of task financing. Moreover, it should be pointed out that the subsidy from the state budget is not an appropriate form of financing own tasks, which is commonly pointed out in the literature [Wołowiec 2021, 120-28]. Despite these reservations, the Health Resorts Act in Article 49 clearly defines this type of income of the health resort community earmarked for financing the tasks listed in Article 46 of the Act as a subsidy. There is no doubt that maintaining therapeutic functions requires that the health resort gminas incur expenses on tasks that take into account the specific needs of the health resort treatment.

3. SPECIFIC TASKS FOR HEALTH RESORT LOCAL UNITS UNDER THE HEALTH RESORTS ACT

In Article 49 of the Health Resorts Act it is stipulated that a health resort commune performing the tasks referred to in Article 46 of the Act receives a subsidy from the State Budget in the amount equal to the revenues from the health resort fee collected in the health resort in the year preceding the base year. The Act in Article 46 of the u.l.u. specifies that these tasks include in particular: 1) land management, taking into account the needs of spa treatment, protection of deposits of natural medicinal raw materials and construction or other activities prohibited in individual zones of spa protection; 2) protection of natural conditions of the health resort or the area of health resort protection and meeting the requirements on admissible standards of air pollution, noise intensity, discharge of sewage into waters or into the ground, waste management, emission of electromagnetic fields, as referred to in separate regulations; 3) creating conditions for the operation of spa treatment facilities and equipment and the development of municipal infrastructure to meet the needs of those residing in the municipality for spa treatment; 4) creation and improvement of municipal and technical infrastructure intended for spas or areas of spa protection.

The concept of health resort subsidy appeared in Polish legislation for the first time in 2005 in Article 49 of the Act on health resorts. In subsequent legal regulations referring to health resorts the issue of subsidies for health resorts was not mentioned again. In Europe, on the other hand, the institution of the health resort subsidy has been known and applied for many years. Germans, Austrians, French or Hungarians support their health resorts and even tourist resorts with public funds. The legal nature of the subsidy differs in those countries. It is most often of a targeted subsidy (Germany), but also occurs in the form of a subject subsidy (France) or an object subsidy (Hungary). Its character depends on the purpose

of socio-economic policy of a given country. The notion of subsidy, as one of the categories of municipalities' income, is defined in the Act on revenues of local government units (abbreviated: u.d.j.s.t.). This Act in Article 3 stipulates that the revenues of local government units include: own revenues, general subvention and targeted subsidies from the state budget. As follows from the wording of Article 8 of the u.d.j.s.t. own tasks of local government units and tasks in the scope of government administration and other tasks entrusted by statute may be financed by earmarked subsidy, which in this case constitutes revenue of the LGU [Wołowiec 2004].

The Spa Act specifies in Article 46 the tasks of the spa municipalities as additional own tasks. This provision states that the health resort commune and the commune with the status of the health resort protection area, apart from the tasks provided for in the Act of 8 March 1990 on communal self-government, perform its own tasks related to the preservation of the health resort's therapeutic functions. The health resort commune performs these tasks on general principles from its own revenues, but it is also entitled to charge a health resort fee for their performance on a basis and to receive a health resort subsidy on a basis equal to the revenues from the health resort fee collected in the spa in the year preceding the base year, within the meaning of the Act on revenues of territorial self-government units [Paczuski, 1991, 85-95].

4. LEGAL CONTROVERSY OVER SUBSIDIES AND GRANTS

Some authors are of the opinion that in the case of the health resort subsidy we are dealing with a subject subsidy, while others are of the opinion that it is in fact a purpose subsidy. The resolution of this issue is of fundamental importance for local self-government units (resort municipalities) especially in terms of the purpose, accounting for the resort grant and controlling the way the grant funds are spent [Sikora 2014, 107-24; Korczak 2018, 99-118]. In financial law, the definition of subsidies is provided in Article 126 of the Public Finance Act. According to this definition, subsidies are funds from the state budget, the budget of local government units and from state purpose funds allocated on the basis of this Act, separate acts or international agreements, for financing or co-financing of the implementation of public tasks, subject to specific settlement rules.

The act on public finance in Article 127-130 divides subsidies into subject, object, purpose subsidies. Pursuant to Article 131 of the Act on Public Finance, a subjective grant is a means for an entity indicated in a separate law or international agreement, exclusively to subsidize the current activities in the scope specified in a separate law or international agreement. Entity subsidies are benefits realized from the state budget funds, on the basis

of separate legal norms (laws other than the Budget Act or international agreements). These benefits are subject to special rules of accounting and are intended to subsidize the current activity of the statutorily designated entity, within the scope specified in a separate law or international agreement. The special character of a subject subsidy results from the fact that: 1) the grant must be based on a clearly formulated provision of law (in the rank of an act) or international agreements; 2) the subsidy is provided for the performance of public tasks, i.e. it may be provided to finance or co-finance public tasks; 3) subsidies are subject to specific settlement rules which are defined by the law on the basis of which they are awarded.

However, all these factors must occur together. The formal basis for awarding a subsidy is the annual Budget Act which includes a list of entities receiving subsidies. The basic function of a subsidy is to balance income and expenses of the subsidized unit without specifying the purpose for which the subsidy funds should be used. The basic purpose of such a subsidy is to maintain the grantee's efficiency and liquidity. For this reason, subject subsidies are sometimes called general subsidies. The requirement of a statutory legal basis for awarding a subsidy is justified first of all by the specific legal nature of this institution. Beneficiaries of such subsidies may be both the public finance sector units and entities not belonging to this sector. The institution of subsidy does not apply to budget entities, as their legal structure is based on the principle of full financing of budgetary expenditure.

In the financial law it is commonly acknowledged that subsidizing of current activities of a specific entity, as a departure from equal access to public funds, violates the essence of competitiveness, not always justifiably favoring some entities at the expense of others, and sometimes even taking the form of financing a permanently deficit entity. Can the subsidy for the health resort be classified as a subsidy for entities? Does it meet the criteria for such a subsidy? It seems that the health resort subsidy meets many conditions and legal criteria of an entity subsidy, but is it really an entity subsidy? Before we will try to answer this question, it is worth to look at the characteristics of a subject subsidy in order to exclude or recognize whether the spa subsidy has the legal attributes of such a subsidy.

Pursuant to Article 130(3) of the Public Finance Act, the amounts and subject matter of these subsidies shall be determined by the Budget Act. On the other hand, the Minister of Finance determines the rates of subject subsidies by way of an ordinance issued in the execution of the Act and determines a detailed manner and mode of awarding and accounting for these subsidies, including the form of submitting applications, informing about their acceptance or rejection, the conditions for transferring and accounting for the subsidy, the deadline for returning the subsidy, taking into account

the total amount of subsidy for individual purposes specified in the Budget Act and having regard to ensuring openness and transparency of management of state budget funds. Does the health resort subsidy to some extent meet the criteria of a subsidy in question? There is rather no doubt that the health resort subsidy cannot be classified as a subject subsidy, because it does not in any case meet the requirements specified in Article 131 of the Public Finance Act. So is it a subject subsidy or perhaps an earmarked subsidy?

Targeted subsidies are funds intended for: financing or co-financing of: 1) tasks in the field of government administration and other tasks assigned to local government units by laws; 2) statutory tasks, including tasks in the area of state patronage over culture, performed by units other than local government units; 3) current own tasks of local government units; 4) tasks commissioned to non-governmental organizations; 5) costs of investment implementation; 6) subsidies to interest on bank loans within the scope specified in separate acts.

Thus, the essence of an earmarked subsidy is to provide a beneficiary with financial resources earmarked to finance (co-finance) a specific task (objective or undertaking), as a result of which the beneficiary will incur expenditure the amount and type structure of which are determined by the body providing the subsidy. A grant, especially a subjective or earmarked grant, is always linked to a public task. The concept of a public task has been evolving over time, but it has certain characteristic components that make it possible to distinguish it from other non-public tasks. It seems that the basic criterion for recognizing the task as a public task should be bearing responsibility for its implementation by the public administration (local government or government) even when the contractor is located outside the structures of the administration. A public task is any activity of the administration which it performs on the basis of statutes. A public task is, among others, rendering or ensuring the rendering of services to inhabitants and other entities. Examples of such activities of the administration in carrying out public tasks can be e.g. supply of utilities (electricity, water etc.), waste collection and disposal, organisation of public transport, construction and maintenance of roads, city lighting, care services, education, construction of social housing etc.

5. NATURE OF THE SPA RESORT GRANT – LEGAL CONDITIONS

Generally, the legal norms constituting the basis for granting purpose-specific subsidies for own tasks to local government units are contained in many statutory provisions. In the case of the health resort municipality this norm is expressed in Article 49 of the u.l.u. As it has already been

mentioned, a purpose-specific subsidy is always connected with the performance of a public task performed under the Act. The Act on Public Finance in Article 128(1) provides that the granting of purpose-specific subsidies to local government units is determined by separate acts. Undoubtedly, the tasks set out in Article 46 of the Act on Public Finance belong to the category of public tasks that may be performed only by the resort community. Article 128 of the Public Finance Act limits the amount of the subsidy, stipulating that the subsidy may not exceed 80% of the cost of performing the task, unless otherwise stipulated by separate laws. As far as the tasks specified in Article 46 of the Act are concerned, these are both current and investment tasks. These tasks cannot be valued directly. The Health Resort Act does not stipulate that the amount of the health resort subsidy may exceed 80% of the costs of task execution, as it is done, for example, in Article 115(2) of the Social Welfare Act, which would mean that the subsidy should not cover more than 80% of the costs of execution of the health resort task. However, taking into account other statutory provisions with a similar construction of the subsidy, it should be assumed in this case that the legislature did not limit the amount of the health resort subsidy to 80% of the costs of the task, but applied a different criterion, consisting in the subsidy being equal to the revenues from the health resort fee collected in the health resort in the year preceding the base year within the meaning of the Act on revenues of local government units. Also in view of the fiscal aspect of the principle of adequacy, it should be pointed out that the criterion adopted by the legislature when calculating the amount of the health resort subsidy does not directly refer to expenditures resulting from the performance of the health resort community's specific tasks, but only to the amount of the health resort fee collected.

It should also be pointed out that Article 46 of u.l.u. characterises the tasks of the health resort community which include, apart from its own tasks as provided for in the Act on Municipal Self-Government, also additional tasks related to maintaining the health resort's therapeutic functions. The tasks of maintaining the health resort's functions listed there are not a closed catalog and in many cases they overlap with the basic tasks of the commune and their definite territorial or objective separation (e.g. into those carried out in zones "A", "B", "C" or some other part of the town of the health resort) is very difficult. Moreover, it is not possible to determine unequivocally which tasks are those that are performed under Article 46 of the Health Resort Act and which under Article 7 of the Act on Municipal Self-Government (e.g. maintenance of greenery, sewage disposal, waste management, creation and improvement of municipal infrastructure), as the health resort and municipal functions performed for the benefit of the local community overlap. It is also not possible to precisely describe

the infrastructure and to determine the amount of expenditures on its maintenance, with a division into those for residents and those for visitors. In this case, however, it is important to answer the question as to who this infrastructure is created for in the first place: whether for the residents themselves or for visitors and tourists. The health resort subsidy is undoubtedly also a supplement to financial outlays on the maintenance of health resort infrastructure and a compensation for restrictions resulting from the establishment of health resort protection zones "A"-"C", as well as a compensation for granting preferences to economic entities operating in these zones (e.g. tax breaks) and an incentive to obtain the status of a health resort, which would indicate that it also has an incentive function.

Therefore, assuming that in the case of the health resort subsidy we are dealing with an earmarked subsidy, it should be specified under what rules the subsidy should be granted and accounted for. In Article 150 of the Act on Public Finance it is specified that the authorizer of the budgetary part or the administrator of funds referred to in Article 127(2), when awarding a targeted subsidy, including to a unit of the public finance sector, in the event when separate regulations or an international agreement do not specify the procedure and rules for awarding or settling the subsidy, shall conclude an agreement which specifies in particular: 1) a detailed description of the task, including the purpose for which the grant was awarded and the deadline for its performance; 2) the amount of the grant awarded; 3) the deadline for using the grant, not longer than by 31 December of the given budgetary year; 4) deadline for and manner of accounting for the grant awarded; 5) deadline for return of the unused portion of the grant, not longer than 15 days from the day of the completion of the task as specified in the agreement, and in the case of a task carried out abroad – 30 days from the day of its completion as specified in the agreement; 6) the mode of control of the task performance; the agreement may stipulate that control will be carried out in accordance with the principles and procedures set out in the regulations on control in the government administration.

When authorising the Minister of Finance to issue implementing regulations in Article 49(2) of the Health Resort Act, the legislator stipulated that the Minister would specify the procedure and deadlines for determining and transferring the subsidy, guided by the need to secure funds for the execution of the health resort districts' tasks. In the regulation, the Minister of Finance specified that the municipality submits an application for a subsidy for the execution of its own tasks related to the preservation of the curative functions of the health resort to the locally competent voivode, indicating in it annual receipts from the health resort fee as of 31 December of the year preceding the base year. Moreover, in the application the municipality shows: 1) the fee rate, set by the municipal council, in force in the year

preceding the base year; 2) number of man-days for which the fee was collected; 3) the amount of revenue from the fee collected in the year preceding the base year.

Analyzing the content of this provision, it is clear that it does not contain any elements of a subsidy agreement, which were defined in Article 150 of the Public Finance Act, but it also cannot contain such elements, because the Minister of Finance would have to go beyond the scope of the authorization given to him by the Spa Act. In view of this situation, the deadline for using the spa subsidy and the manner of its settlement should be included in the agreement.

In financial law the construction of an agreement is an exceptional institution, since the legal basis for collecting budget revenues and making expenditures is an administrative decision of a competent authority. Although the law allows the agreement as a form of making public expenditures, e.g. for granting a purpose-specific subsidy or granting a loan from the state budget by the Minister of Finance, as it is emphasized in the legal and financial literature, the adoption of this legal form in public finance is not justified primarily because the subsidy beneficiary does not have any influence on shaping the contents of the subsidy agreement. The contents of the subsidy agreement are determined by the subsidy-granting authority, which results directly from the literal interpretation of Article 150 of the Public Finance Act, which provides that the authorising authority concludes an agreement in which it unilaterally determines the conditions for the subsidy. This solution is undoubtedly inconsistent with the regulations governing liability for improper management of funds from a specific subsidy, which provide for liability on the basis of public law, rather than civil contractual liability (ex contractu). As follows from Article 150 of the Public Finance Act, an obligatory element of the subsidy agreement is to specify the date and manner of accounting for the subsidy provided and the deadline for returning the unused part of the special-purpose subsidy.

The subsidy agreement should be described with particular precision. Describing the subsidy in the subsidy agreement means specifying precisely the amount of the subsidy, the purpose or the description of the material scope of the task for the performance of which the subsidy funds are transferred. This is important not only from the point of view of observing the statutory principles of spending public funds in an economical and effective manner. If a description of an earmarked subsidy is formulated in general terms, the provider of the subsidy may be held accountable for a breach of public finance discipline.

What is punishable on the part of the subsidy beneficiary is, among other things, misuse of the subsidy. Even a mere temporary use of the subsidy in contravention of the subsidy agreement and the purpose specified

therein is not permissible. For the subsidy to be considered misused, it is not necessary to wait for the subsidy recipient to submit a complete factual and financial account or for a decision to be issued specifying the amount to be returned and the date from which interest is to be accrued. Transfer of a subsidy in violation of the rules or the procedure of its award is not connected with depletion of public funds, which in practice would be difficult to demonstrate, but concerns primarily a violation of procedures. The essence of a breach of financial discipline is not depletion of public finances as such, but a violation of the elementary order of public finances.

In the case of the health resort subsidy, doubts may be raised by the common practice of awarding the health resort subsidy during the budget year and including in it tasks that have already been carried out with the beneficiary's own funds. The temporal construction of the health resort subsidy is such that the municipality submits the application for the subsidy by 31 March of a given year and the amount of the subsidy is calculated on the basis of the revenues from the health resort fee collected in the year preceding the base year. As a rule, the municipality receives the subsidy in the second half of the year by August 31 of a given year, and thus can perform tasks for which the implementation time actually falls in four months of a given year. By defining the structure of calculating and awarding the spa subsidy in such a way, the Minister of Finance not only created exceptionally difficult conditions for carrying out the tasks settled by the spa subsidy, but also led to a situation where the municipality, in executing the subsidy agreement, could breach the provisions of the Public Finance Act.

6. *DE LEGE FERENDA* CONCLUSIONS

When formulating conclusions *de lege ferenda*, one should consider either changing the structure of granting and accounting for the health resort subsidy, or a different position of the health resort subsidy in the system of communal revenues. Practice shows that in spite of the fact that the health resort subsidy undoubtedly has the features of a targeted subsidy, it is awarded and accounted for like a subsidy. For correct calculation, allocation and settlement of the health resort subsidy it is necessary to either amend the regulation of the Minister of Finance regarding the procedure and deadlines for the health resort subsidy transfer in respect of the deadline for submission of the application for the subsidy and the deadline for subsidy transfer, or to recognise that the health resort subsidy is in fact a health resort subsidy, as in principle the health resort subsidy fulfils this role.

This view may also be supported by the fact that legal and financial literature more and more often stresses that targeted subsidies from the state budget to co-finance or finance current own tasks should play a limited role

among the sources of revenues of the local government unit. On the other hand, local governments should finance current own tasks from their own revenues as far as possible. There is hardly any doubt that the tasks of the spa resort community fall into the category of own tasks. They are tasks of a special nature, the performance of which is exclusively attributed to the health resort gminas. Health resort gminas belong to one of the two categories of gminas that perform tasks of a special nature. Additional duties were imposed on these communes, and their financing must be of an independent and creative nature, i.e. the self-governing bodies must be guaranteed the right to decide to some extent on the scope and manner of execution of the statutorily defined task, or at least on the manner of its execution and financing.

The doctrine is also unanimous in its view that the institution of a special-purpose subsidy transferred from the state budget to the budgets of local government units constitutes a significant restriction of their financial independence. The principle of limited use of targeted subsidies as a source of financing self-government tasks has also been expressed in Article 9 Clause 7 of the European Charter of Local Self-Government drawn up in Strasbourg on 15 October 1985, from which it follows that, from the point of view of the autonomy of local communities, a general (block grant) or even a sector-specific grant is a more preferable form of providing funds to such communities than specific grants. If, therefore, the spa subsidy by its very essence actually plays the role of a subsidy and in practice is difficult to account for as a specific grant, one should think about its free accounting by the municipality or other legal definition.

CONCLUSIONS

The definition of a subsidy has been formulated by the legislator in Article 126 of the Act on public finances, according to which subsidies are funds from the state budget, budgets of local government units and state purpose funds, which are subject to specific settlement rules, are granted on the basis of the Act on public finances, separate acts or international agreements, are intended to finance or co-finance the implementation of public tasks. It should be noted that in accordance with the above definition of a grant, each subsidy transfer from the state budget, LGU's or state purpose funds is accompanied by the implementation of a public task. Moreover, the subsidy must always be of monetary nature. The principles and procedures for the award of a grant should be understood as all the legislators' requirements concerning the determination of the amount of the grant, the determination of the group of entities to which the grant will be awarded, the manner of its use, as well as the manner of its settlement and control

of the commissioned task. It should be noted that the indicated requirements must be justified by the applicable laws.

The word "subsidy" derives from medieval Latin, where dotatio meant "providing" someone with material goods. In modern languages the term: "subsidy" is used interchangeably with the term: "subsidy". Both the first and the second word in the vernacular are used to describe specific cases of providing someone or providing someone with money, which are public funds coming from the budget or a special purpose fund. According to dictionary definitions, a subsidy is "a gift, donation, bequest made by a donor, founder to a donor". In turn, the word subsidy is used to describe "financial assistance provided by the state to businesses, institutions, individuals". In the vernacular, the term "grant" has the character of a basic concept, while "subsidy" turns out to be a special kind of such a grant in its general meaning. Thus, in the vernacular, grant absorbs the term subsidy.

The origin of grants and subsidies from the budget or special purpose fund determines that their granting has its source in the provisions of the financial law. The science of finance recognizes them as the so-called transfer expenditures. The science of public finance distinguishes between: § real expenditures (real, purchasing or otherwise: direct expenditures); § transfer (transfer) expenditures. Real expenditures (direct expenditures, purchasing expenditures) are purchases of goods and services resulting from private law regulations, payment of wages and salaries, and investment expenditures (purchases or financing of the investment ordered) for the needs of public finance sector units. They are mostly characterized by equivalence of payments made in exchange for benefits received by a public unit. Such expenditures are not financial transfers, which are the expression of unilateral (non-reciprocal) and, as a rule, non-equivalent benefit (no equivalent). External transfers are an expression of the provision of public funds to private entities and may be related to the pursuit of important social or economic objectives by public authorities . Grants and subsidies are not the only type of transfer expenditure. They also include awards, benefits, scholarships and other expenditures paid from the budget based on public law norms.

The general provisions include a definition of subsidy as such and definitions of three types of subsidies (targeted subsidy, subject subsidy, and subject subsidy). The second element of the subsidy law provisions are the special provisions of the Acts or, as assumed by the Act, the provisions of international agreements, which contain the relevant "subsidy titles". The term "subsidy title" should be understood not only as a legal basis for using a specific subsidy, but also as the regulations specifying the amount of the subsidy, the manner and mode of its award, its purpose, and the manner and mode of accounting for it.

The analysis of the subsidy law proves the existence of deficiencies and inaccuracies, both in the case of certain titles of subsidies and in the case of deficiencies in common regulations. An obvious example of this is the fact that the Public Finance Act does not provide a clear legal basis for issuing an administrative decision on returning a subsidy to the self-government budget. Against the background of reforms of the local government law and reforms of the financial law, the postulates raised at the occasion of earlier amendments of three consecutive Acts on public finance should be repeated, so that the structure of the law on subsidies would be clearly described in the Act. Proper grouping and supplementing in one law of general and common norms concerning subsidies will discipline the authors of new special laws to express *de lege ferenda* complete titles of subsidies. It should also result in correcting and completing incomplete subsidy titles in the current legislation and executive acts [Sekuła and Fandrejewski 2011, 64-71].

REFERENCES

Borodo, Andrzej. 2013 (ed.). *Dotacje i subwencje w systemie finansowym samorządu terytorialnego*. Toruń: TNOiK.

Czarnecki, Sławomir. 2017a. "Opłata uzdrowiskowa w prawie polskim – rys historyczny." *Przegląd Podatków Lokalnych I Finansów Samorządowych* 8:11-13.

Czarnecki, Sławomir. 2017b. "Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia z 25 lutego 2016 r. (II FSK 3866/13)." *Biuletyn Uzdrowiskowy SGU RP* 3:5-8.

Czarnecki, Sławomir. 2017c. "Opłaty uzdrowiskowa i miejscowa – podobieństwa i różnice." *Zeszyty Naukowe WSEI seria: Ekonomia* 1-2:118-20.

Golba, Jan. 2001. "Uwarunkowania prawne i finansowe uzdrowisk polskich." *Biuletyn Stowarzyszenia Gmin uzdrowiskowych RP* 1-2:56-64.

Golba, Jan. 2020. *Historyczne i prawne aspekty funkcjonowania uzdrowisk w Polsce.* Warszawa: C.H. Beck.

Korczak, Jerzy. 2018. "Gmina uzdrowiskowa w prawodawstwie polskim." *Opolskie Studia Administracyjno-Prawne* 16:99-118.

Niezgoda, Andrzej. 2012. "Modyfikacja zakresu działania gmin uzdrowiskowych oraz posiadających status obszaru ochrony uzdrowiskowej a podział zasobów." In *Podział zasobów publicznych między administrację rządową i samorządową*. Lex el.

Nowak-Far, Andrzej. 2010. "Miejscowości uzdrowiskowe w Austrii, Czechach, Niemczech i na Słowacji: status prawny i regulacyjne determinanty funkcjonowania." *Studia z Polityki Publicznej* 2(18):37-58.

Owsiak, Stanisław. 2022. *Finanse publiczne. Współczesne ujęcie*. Warszawa: PWN.

Paczuski, Ryszard. 1991. "Zagadnienie odrębności prawnoustrojowej samorządów zarządzających sprawami uzdrowisk." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 53(2):85-95.

Sekuła, Alicja, and Roman Fandrejewski. 2016. "Zasady, tryb przyznawania i przekazywania dotacji celowych przez jednostki samorządu terytorialnego a naruszenie dyscypliny finansów publicznych." *Finanse Komunalne* 10:64-71.

Sikora, Kamil. 2014. "Szczególny status gmin uzdrowiskowych w Polsce." *Studia Iuridica Lublinensia* 23:107-24.

Sołtyk, Piotr. 2021. *Finanse samorządowe.* Warszawa: Difin.

Wołowiec, Tomasz. 2002. "Taksa kuracyjna – źródeł dochodów gmin uzdrowiskowych (rozwiązania niemieckie i austriackie)." *Biuletyn Informacyjny Stowarzyszenia Gmin Uzdrowiskowych RP* 1:63-67.

Wołowiec, Tomasz. 2004. "Metody stymulowania konkurencyjności gospodarczej polskich gmin uzdrowiskowych." *Samorząd Terytorialny* 10:55-62.

Wołowiec, Tomasz. 2021. "Gmina uzdrowiskowa w postępowaniu administracyjnym o zatwierdzenie planu ruchu zakładu górniczego – glosa do wyroku Naczelnego Sądu Administracyjnego z 26.10.2016 r., II GSK 700/15." *GLOSA* 1:120-28.

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THE ISSUE OF ADOPTION OF UNJUST ENRICHMENT CASE FOR NEGOTIABLE INSTRUMENTS' PRACTICE IN THE 10-YEAR APPLICATION OF THE TURKISH CODE OF COMMERCE SINCE 2012

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Abstract. One of the original and exceptional institutions of the negotiable instruments law is the unjust enrichment case. Although unjust enrichment is regulated in the Turkish Code of Obligations in general terms and is accepted as a source of debt relations, it also constitutes the subject of a case-specific to the Turkish Code of Commerce and only negotiable instruments as a result of the choice of the legislator. Due to its exceptional nature, the legislator has also strictly determined the conditions that must be fulfilled to file an unjust enrichment case in negotiable instruments. This approach of the legislator is correct. The unjust enrichment case in negotiable instruments creates an extraordinary and additional demand opportunity for the right holder. Despite this option and opportunity, these bills are used only as ordinary bills instead of filing a lawsuit for unjust enrichment in negotiable instruments. Undoubtedly, this is a contradiction. To put it briefly, the reason for this contradiction is the lack of awareness in the practice of law.

Keywords: negotiable instruments; Turkish law; promissory notes; unjust enrichment; cheques

INTRODUCTION

Negotiable instruments law is a commercial law branch with its own principles and institutions. As a few of these principles, strict form requirements and short statutes of limitations prevailing in negotiable instruments may result in the loss of rights arising from such kinds of bills. This situation is absolutely inconsistent with fairness. For this reason, the legislator has regulated the case of unjust enrichment in negotiable instruments as an exceptional and extraordinary institution. The subject of this study is the examination of this exceptional case in terms of its conditions and consequences. In this way, it aims to examine an original legal institution in terms of Turkish law to contribute to comparative law studies.

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1. *RATIO LEGIS* OF THE PROVISION OF UNJUST ENRICHMENT

1.1. Keeping Negotiable Instruments Law Up-to-Date

Negotiable instruments law is a branch of law that preserves its existence and validity, perhaps by transforming, despite all technological developments and the digitalization of commercial life. Although it is argued in the doctrine that the negotiable instruments law can no longer meet today's needs, has lost its independence and should be accepted as a sub-branch of the law of contracts, in my opinion, the negotiable instruments law has its own principles and is the closest to digitalization and technological developments [Kurt 2021, 24]. On the other hand, it cannot be claimed that the negotiable instruments have not been transformed [Kaya and Tatlı 2022, 23]. As a matter of fact, the electronic cheque and electronic promissory notes codification preparation studies, which started with a delay in Turkish Law, can be considered an example of this transformation. In addition, the data-matrix system in cheques, which has been valid since 2016, reveals that the transformation in the negotiable instruments law, at least in terms of cheques, started earlier [Baytemür 2021, 14].

One of the reasons why the negotiable instruments law maintains its current validity is that its specific principles and institutions still maintain their effectiveness. The basic principles of negotiable instruments law include the validity of the short statute of limitations and submission deadlines and adherence to excessive form conditions [Doğan 2022, 31]. These principles are of vital importance for the negotiable instruments law to meet the needs of fast and stable commercial relations [Kendigelen and Kırca 2022, 45]. As a matter of fact, as long as these needs exist, negotiable instruments law will continue to exist.

1.2. The Need for Alternative Proceedings and Claims in Negotiable Instruments Law

Short statute of limitations specific to negotiable instruments, aggravated procedural conditions that must be followed in order to assert the rights arising from negotiable instruments bring handicaps, especially for creditors [Gültekin 2020, 30]. Rights arising from negotiable documents can be lost because only formal requirements such as submission and protest are not fulfilled. In addition, rights arising from negotiable instruments may lose their ability to be claimed with the expiration of the statutes of limitations, which are shorter than the general statute of limitations. The possibility that right holders may lose their receivables in negotiable instruments simply

because of not complying with short statutes of limitations and not fulfilling excessive formal requirements has led the legislator to provide validity to some alternative and extraordinary claims.

The first of these demand ways is the transfer of the provision. The transfer of the provision is regulated in Article 731 of the TCC. However, the transfer of the provision cannot be valid for promissory notes whose legal nature is not remittance and for cheques with which the addressee banks do not enter into the relationship of the negotiable instruments [Kaya and Tatlı 2022, 99]. Considering that promissory notes are the most preferred type of negotiable instruments, it is seen that the ability of the transfer of provision institution to be an alternative demand method is insufficient to eliminate the handicaps [Aydın 2021, 145]. In other words, the handicaps we mentioned above do not disappear with the transfer of the provision, which is an institution specific to the bill of exchange, which is the least preferred type of negotiable instruments in commercial practice.

As another alternative and exceptional way of demand, unjust enrichment is regulated in bills of exchange. The 3rd Book of the Turkish Code of Commerce,[1] which is dedicated to the Law of Negotiable Instruments, in Article 732 regulates the institution of unjust enrichment in bills of exchange. Contrary to the transfer of the provision, this regulation became valid for all types of negotiable instruments, in other words, for the bill of exchange, promissory note and cheque. For this reason, unlike the transfer of provision, its ability to be applied is wider.

2. CASE OF UNJUST ENRICHMENT IN NEGOTIABLE INSTRUMENTS

2.1. Exceptional Character

The case of unjust enrichment in negotiable instruments has an exceptional character. For this reason, the legislator preferred to meticulously regulate the conditions necessary for the right holder to file a lawsuit arising from the negotiable instruments. These conditions should be interpreted narrowly and strictly when applying. In other words, care should be taken not to expand the application of the unjust enrichment case in negotiable instruments [Eriş 2016, 550].

This indebtedness rising from the unjust enrichment claim is exceptional and unusual. Because although the mentioned debtors get rid of their debts arising from the negotiable instruments, the legislator still exceptionally gives the creditor the opportunity to pursue, perhaps as a last chance,

[1] Official Gazette. Date: 14.02.2011. Number: 27846.

against the debtors of the negotiable instruments. Contrary to the unjust enrichment in the law of obligations, unfair enrichment cannot be mentioned here. It does not need to be mentioned either. In the case of unjust enrichment in negotiable instruments, it is required and also sufficient for the enrichment of the defendants on the loss of the holder's right due to the short statute of limitations or failure to fulfil the formal conditions [Eriş 2016, 551].

2.2. Conditions for Claiming Right Related to Unjust Enrichment

According to Article 732 of the TCC, the essential prerequisite for filing a lawsuit for unjust enrichment in negotiable instruments is that the bearer of the bill must lose the rights arising from the negotiable instruments. However, this loss must occur for two reasons so that an unjust enrichment lawsuit can be filed [Kaçak 2010, 353]. The first of these is the statute of limitations. The second is negligence in the submission process necessary for protecting the rights arising from the negotiable instruments and in the protest process in case of non-payment of the negotiable instruments [Uzunallı and Yıldırım 2021, 80]. With the realization of any of these reasons, although the issuer and the acceptor, who are the main debtors of the negotiable instruments, are freed from their obligations arising from the negotiable instruments, they remain indebted to the right holder, who is the creditor.

2.2.1. Loss of Right in the Negotiable Instruments Due to Statue of Limitations

Compared to other debt relationships, shorter statute of limitations have been determined for negotiable instruments. As stated before, the reason for this is the establishment of fast and stable relations with transaction security in commercial life with negotiable instruments. As a matter of fact, in the Turkish Code of Obligations,[2] which is one of the main legal sources of private law, 2-year and 10-year statutes of limitations have been determined for claims arising from torts. In contrast, a 10-year statute of limitations has been generally accepted for claims arising from contracts. We should also state that the statute of limitations of 5 years instead of 10 years is specifically regulated in the legislation. For example, the statutes of limitations for the receivables arising from agency and brokerage agreements are determined as 5 years.

Here, the statute of limitations applicable to the negotiable instruments is regulated shorter than the general statute of limitations foreseen for debt

[2] Official Gazette, Date: 04.01.2011. Number: 27836.

relations. This choice of the legislator is very accurate. First, the rights arising from negotiable instruments are devoid of reason. To put it more accurately, negotiable instruments are sources of exclusive debt relationships. The existence of a basic debt relationship is not a necessary prerequisite for issuing negotiable instruments [Kendigelen and Kırca 2022, 246].

As a matter of fact, we can examine the statute of limitations stipulated for the bill of exchange under three sub-headings. Accordingly, claims against the accepting addressee are subject to a 3-year statute of limitations. This period runs from the maturity date of the bill of exchange. The statute of limitations is 1 year for the claims of the holder against the debtors of the application in the bill of exchange [Kaçak 2010, 353]. The 1-year period runs from the date the holder protests the bill of exchange and the maturity of the bill of exchange if exemption from the protest is in question [Uslu 2006, 37]. The last statute of limitations on the bill of exchange is 6 months. The shortest limitation period of 6 months is for the claims of the debtors of the bill of exchange against other application debtors who were in the negotiable instruments relationship before them as payers. As a matter of fact, the 6-month statute of limitations begins to run from the date the debtor of the application pays the bill of exchange or the notice is sent to him for payment [Uzunallı and Yıldırım 2021, 82].

Similarly, the statute of limitations has been determined for the promissory note, which is the most preferred type of negotiable instrument. Accordingly, claims that can be made against the issuer of the promissory note are subject to a 3-year statute of limitations [Günay 2022, 379]. This is because the legal responsibility and position of the issuer of the promissory note are the same as the addressee who accepted the bill of exchange. The final debtor in the bill of exchange is the addressee who accepts, while in the promissory note, the final debtor is regarded as the issuer of the promissory note. The 3-year limitation period, which is subject to the claims that the holder may raise against the issuer of the promissory note, will also run from the maturity of the bill [Uslu 2006, 38]. The claims that the promissory note holder can bring against the debtors of the application are also subject to the 1-year limitation period, just like the bill of exchange, and the 1-year limitation period runs from the date of the protest. In case of exemption from the protest, the date on which the 1-year limitation period will start to run will still be the due to the maturity date. The 6-month statute of limitations also applies to the promissory notes. Just like in the bill of exchange, the 6-month limitation period, which is subject to the claims of the payer of the bill against the debtors who came before him in the bond relationship, will start to run from the date of notification of the proceedings initiated for the payment if the application debtor has not paid the bill, or the date of the lawsuit if filed [Uzunallı and Yıldırım 2021, 82].

While the bill of exchange qualification is being discussed in comparative law, the statute of limitations for cheques that do not have a question mark in terms of Turkish law is also regulated under two headings. Accordingly, in cheques, the claims of the holder to the debtors of the application and the debtors of the application to each other as payers are subject to a 3-year statute of limitations [Karadayı 2021, 156]. The 3-year limitation period for the holder starts to run from the end of the legal submission periods. The statute of limitations for the claims of the debtors against each other will start to run from the date of payment or notification of the lawsuit or enforcement proceeding [Aydın 2021, 43]. It should be noted that there is no debtor in the form of an acceptor in cheques. Because the addressee of cheques can only be the bank and the addressee bank cannot be included in the cheque relationship as debtor in accordance with the principles of cheque law.

Here, the expiration of the statute of limitations, which varies according to the types of negotiable instruments, causes the loss of rights arising from negotiable instruments. For this reason, the beneficiaries who pass the statute of limitations will no longer be able to assert their claims arising from the negotiable instruments [Eriş 2016, 551]. However, at this point, we encounter questions that may need to be discussed in another scientific study. While the statute of limitations was not regulated in the TCO as a reason for ending a debt, why would the statute of limitations in negotiable instruments cause the loss of rights? Is there a contradiction here?

2.2.2. Loss of Right in Negotiable Instruments Due to Failure to Fulfil Procedural Requirements

There are formal requirements that must be fulfilled in order not to forfeit and use the application right, which is a right specific to negotiable instruments. The first is to submit the negotiable instruments to the debtor within the legal deadlines. If not paid, it is determined by the form conditions specific to the negotiable instruments. If these requirements are not fulfilled, it is still accepted that the right arising from the negotiable instruments has expired, regardless of whether the statute of limitations has expired.

Submission of negotiable instruments to the debtor of the bill is subject to certain conditions in terms of time, place and form. Failure of the submission causes the right arising from the negotiable instruments to no longer be asserted to the final debtor [Eriş 2016, 552]. According to Article 708 of the TCC, the bill of exchange must be presented to the addressee at the place of payment indicated on the bill, to be paid on the day of payment or within two working days following the payment day. If the debtor

has a workplace, it must be submitted for payment at the workplace if there is no workplace at his residence. If the bill of exchange is paid when it is submitted, in this case, the submission for payment must be made within 1 year from the issuance of the bill of exchange. This rule, which is valid for the bill of exchange, is also valid for promissory notes in accordance with Article 778 of the TCC. The submission of cheques for payment is regulated with a different approach. The submission periods for payment on the cheque are regulated differently according to the payment and issuance places of the cheque [Karadayı 2021, 103]. Accordingly, if the cheque is to be paid at the place of issuance, it must be presented within 10 days. If the cheque is to be paid in a place other than where it was issued, it must be presented within 1 month. If the cheque is to be paid in a different continent from where it was issued, a legal submission period of 3 months applies. If the cheque is not submitted to the addressee bank within these periods, the creditors will no longer be able to claim their rights arising from it [Büyükşişli 2020, 38]

The bearer, who submits his right arising from the negotiable instruments within the legal periods, should have the non-payment status determined with appropriate documents if the payment is not made. Otherwise, a loss of rights will occur again. However, in this case, the lost right is the right of application that can be asserted against the application debtors. Determining the non-payment status with appropriate documents is possible with the protest process carried out by the notary public for bills of exchange and promissory notes. In cheques, the legislator has made it possible to determine the non-payment condition with two more alternative procedures in addition to the protest process [Büyükşişli 2020, 45]. The first of these transactions is the statement of the official clearing house and the second is the statement of the addressee bank to which the cheque is submitted, which determines that the cheque has not been paid [Karadayı 2021, 127]. Here are the other reasons that cause the loss of the right arising from the negotiable instruments, not making the submission for payment to the final debtor or the addressee bank for the cheques and failure to determine the non-payment status with appropriate documents even if the submission has been made.

2.3. Parties to the Litigation

The case of unjust enrichment in negotiable instruments can be filed by the right owner who lost his right in the negotiable instruments for the reasons and conditions explained above. This person is specified as a bearer in the Code.

In the case, on the defendant's side, there is the debtor who has been freed from his debt in the negotiable instruments only because the bearer lost his right due to the statute of limitations or the failure to take the necessary procedural actions [Kaçak 2010, 353]. However, this debtor is specified as "accepting addressee" and "issuer" in the Code. Accordingly, for the bills of exchange, in this case, it is the accepting addressee, if there is one, or the issuer of the bill of exchange if there is none. In the promissory notes, on the other hand, only the issuer of the bill can take place on the defendant's side. In the cheque, there can be only one related party on the defendant's side too: the issuer of the cheque [Aydın 2021, 56]. As a matter of fact, the addressee banks cannot accept the check; even if they do, this declaration of acceptance does not create any legal consequence [Kaya and Tatlı 2022, 136].

The cases of unjust enrichment in negotiable instruments cannot be brought against endorsers, whom we can refer to as application debtors [Eriş 2016, 552]. The legislator has determined that an unjust enrichment lawsuit cannot be filed in negotiable instruments against endorsers whose debts arising from the relationship of the negotiable instruments expire for the same reasons. Although only endorsers are stated in the article, it is necessary to evaluate the debtors of application other than endorsers in the same way and accept that the case can only be brought against the main debtors in negotiable instruments [Toros 2019, 153]. Considering that the institution is based on an exceptional and extraordinary right to demand and that exceptional provisions should be interpreted narrowly, it is appropriate to reach this conclusion.

2.4. Period of Limitation of the Case of Unjust Enrichment

The provision of the case of unjust enrichment in negotiable instruments does not recognize a right to a lawsuit that can be benefited forever. The statute of limitations for the unjust enrichment case in negotiable instruments, which was the subject of discussions since it was not regulated at the time of the repealed law, has been clearly and unequivocally determined as 1 year in Article 732 of the TCC. When the 1-year statute of limitations begins to run, the rights that can be directed against the main debtor in the negotiable instruments become time-barred [Eriş 2016, 553].

This 1-year statute of limitations can be criticized for appropriateness. In our legal system, there are general assumptions about the statute of limitations, such as 2 years, 5 years and 10 years. The commission that prepared the TCC aimed that the statute of limitations to which the unjust enrichment case is subject to be both an exceptional regulation and in line with the general limitation period approaches, and underlined that the duration

should be compatible with the 2-year period. However, contrary to this approach, it was not appropriate to choose a 1-year statute of limitations in the enactment process.

2.5. Criticism of Regulation

The rules of proof in the case of unjust enrichment in negotiable instruments conflict with the general principles of evidence law. The general principle of law is that the plaintiff (claimant) proves his claim. It is the defendant's rebuttal of the plaintiff's claim. However, this generally accepted equation has not been accepted as valid in the case of unjust enrichment in negotiable instruments. Because according to Article 732 of the TCC, the plaintiff is not obliged to prove that the defendant has become rich. It is necessary and sufficient for the legislator to prove that the plaintiff lost his right from the negotiable instruments and that this loss was caused by the expiration of the statute of limitations or the failure to comply with the formal conditions necessary for asserting the right.

On the other hand, the defendant can only save himself from making payment by proving that the plaintiff did not become rich despite losing his rights. As can be seen, the legislator's choice contradicts the general principles of the law of evidence. This situation, which may seem strange at first glance, should be considered reasonable considering the exceptional character of the unjust enrichment case in negotiable instruments.

In my opinion, it is a correct choice to accept the case of unjust enrichment in bills of exchange as valid for all types of negotiable instruments without discrimination. While the validity of the case of unjust enrichment in negotiable instruments was controversial in the previous Code, these discussions were ended in the TCC, and it was accepted that the case of unjust enrichment in negotiable instruments would be valid for all types [Günay 2022, 354].

The statute of limitations on the unjust enrichment case in negotiable instruments was not regulated in the previous Code. This situation was a deficiency which was the subject of discussions about the statute of limitations. Thanks to the TCC, the legislator wanted to eliminate this deficiency and regulated that there is a 1-year limitation period from the date of expiration of the right in the negotiable instruments. This provision is accurate because it fills a gap. However, the inaccurate thing is to prefer a 1-year period, considering the general approach of the legislator for statutes of limitations as explained in the previous title.

Although the unjust enrichment case in negotiable instruments grants the bearer an exceptional right of claim and the burden of proof and the conditions for litigation are eased in favour of the bearer, we see

that it is not preferred much in legal practice. The apparent reason for this is that the holders prefer to use the said bills as ordinary bills in cases where the right in the negotiable instruments expires due to statute of limitations or non-compliance with formal procedures. The accuracy of this choice is debatable. However, the main reason is the lack of awareness regarding law practitioners. The clearest evidence of this is the scarcity of the Supreme Court's decisions based on Article 732 of the TCC.

CONCLUSION

As an exceptional and extraordinary institution, the case of unjust enrichment in negotiable instruments is the last exit before the bridge, so to speak, because it gives a last claim to the right holder who unfairly lost his right due to the short statute of limitations and excessive form conditions. Due to this exceptional character, the necessary conditions for the lawsuit to be filed have been strictly determined and no expansionary interpretation has been allowed. Again, exceptional rules regarding both the parties to the case and the burden of proof have also been validated. On the other hand, the legislator also made wrong choices to eliminate all the deficiencies while reregulating this case with the TCC that came into force in 2012. Perhaps the most important of these choices is that the 1-year statute of limitation does not comply with the statute of limitations prevailing in Turkish private law. On the other hand, the reason why the case, which created such an exceptional demand opportunity, was not accepted in the commercial practice can be explained by the lack of awareness in the commercial practice, even among the lawyers.

REFERENCES

Aydın, Hanife. 2021. *Çekte Muhatap Bankanın Hukuki Sorumluluğu.* Ankara: Seçkin Yayınevi.

Baytemür, Deniz. 2021. *Elektronik Kambiyo Senetleri.* Ankara: Yetkin Yayınevi.

Büyükşişli, Ahmet. 2020. *Karşılıksız Çeke Bağlanan Sonuçlar.* Ankara: Seçkin Yayınevi.

Doğan, Deniz Gür. 2022. *Kambiyo Senetlerinde Bedelsizliğe Dayanan Menfi Tespit Davası ve Bedelsiz Senedi Kullanma Suçu.* Ankara: Seçkin Yayınevi.

Eriş, Gönen. 2016. *Türk Ticaret Kanunu Hükümlerine Göre Kıymetli Evrak Poliçe, Bono, Çek, Makbuz Senedi, Varant.* Ankara: Seçkin Yayınevi.

Günay, Erhan. 2022. *Bono Rehberi.* Ankara: Seçkin Yayınevi.

Gültekin, Özkan. 2020. *Yeni TTK, TBK, HMK ve Çek Kanununa Göre Öğretide ve Uygulamada Kıymetli Evrakın Ziyaı ve İptali En Son Mevzuat Değişiklikleri ve Yargıtay Kararları Işığında.* Ankara: Seçkin Yayınevi.

Kaçak, Nazif. 2010. *Açıklamalı İçtihatlı Tüm Yönleriyle Bono Poliçe Çek.* Ankara: Seçkin Yayınevi.

Karadayı, Merve Kandıralı. 2021. *Çekte Düzenleyenin Hukuki Sorumluluğu.* Ankara: Seçkin Yayınevi.

Kaya, Mustafa İsmail and Tatlı, Burçak. 2022. *Ticaret Hukuku II Kıymetli Evrak Hukuku.* Ankara: Seçkin Yayınevi.

Kendigelen, Abuzer and Kırca, İsmail. 2022. *Kıymetli Evrak Hukuku.* İstanbul: Oniki Levha Yayınevi.

Kurt, Eda. 2021. *Karşılıksız Çek Keşide Edilmesini Önlemek İçin Alınabilecek Hukuki Tedbirler ve Elektronik Çek.* İstanbul: Oniki Levha Yayınevi.

Toros, İrem. 2019. *Aval.* Ankara: Seçkin Yayınevi.

Uslu, Kazım Menderes. 2006. *Kambiyo Senetlerinde Zamanaşımı.* Ankara: Seçkin Yayınevi.

Uzunallı, Sevilay and Yıldırım, Ali Haydar. 2021. *Kıymetli Evrak Hukuku.* Ankara: Seçkin Yayınevi.

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THE POSITION OF THE POLISH CENTRE FOR ACCREDITATION IN THE POLITICAL SYSTEM AND ITS IMPACT ON THE PERFORMANCE EFFICIENCY OF PUBLIC TASKS IN THE FIELD OF ACCREDITATION

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Abstract. This paper examines the position of the Polish Centre for Accreditation within the structure of Polish public administration. On the presumption that the PCA is a specialised administrative entity of a legal nature similar to one of an agency, which performs state tasks by accrediting notified bodies within the product conformity assessment scheme, the article assesses the influence of the Centre's tasks and its position within the political system on the efficiency and quality of public functions it fulfils in the area of accreditation. The study demonstrates that the current structure and position of the Centre in the political system substantially facilitates the efficient implementation of state tasks in respect of accreditation. The research method employed herein in order to achieve the adopted research assumptions is the dogmatic and legal method.

Keywords: agency; accreditation; public administration

INTRODUCTION

Technological advancement and globalisation as well as the resulting increase in specific public tasks have led to the expansion of public administration structures, and thus novel administrative entities have come into being. For the efficient performance of tasks in a specialized economy, it was necessary to establish a new, heterogeneous type of entities. This includes agencies [Gronkiewicz and Ziółkowska 2016, 205; Gronkiewicz 2013, 11]. European integration and the need to accommodate the domestic law to the EU law only intensified the "agencification" of public tasks [Bieś-Srokosz 2016,

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9-20; Idem 2015, 23-26; Idem 2013, 27-37]. Such tasks include the accreditation of entities operating in the field of conformity assessment (laboratories, certification and inspection bodies) assigned with particular activities aimed at demonstrating the compliance of products with the relevant technical standards. Intended to confirm and verify the credibility of entities performing conformity assessment of products placed on the EU internal market, the public task of accreditation has both a domestic and EU dimension. Thus, it serves the implementation of the free movement of goods in the EU internal market, constituting an element of the EU regulatory policy in the realm of product safety.

The problem analysed in this study is the influence of the political position of the Polish Centre for Accreditation on the efficiency and quality of public tasks performed in the area of accreditation. In order to vest the normative competence of an accreditation body in a single national entity, it was necessary to organise its activities so as to ensure objectivity and impartiality towards the entities accredited. The particular nature of accreditation tasks called for an entity exceeding the classic structures of public administration, which would employ qualified specialists who demonstrate technical knowledge and competences. This study aims to determine whether the current position of the Polish Centre for Accreditation within the structures of public administration, i.e. as a quasi-executive agency, enables it to perform public tasks in the field of accreditation efficiently.

Based on the identified problems and established goals, it was possible to put forth the thesis that the Polish Centre for Accreditation is a specialised administrative entity of a legal nature similar to one of an agency, which performs state tasks by accrediting notified bodies within the product conformity assessment scheme. The current structure and position of the Centre within the political system substantially facilitates the efficient implementation of state tasks in respect of accreditation.

The research method employed herein in order to achieve the adopted research assumptions is the dogmatic and legal method.

1. LEGAL STATUS OF GOVERNMENT AGENCIES

Government agencies,[1] also referred to as administrative agencies and state agencies by legal academics and commentators, are an example of entities with a special legal status. Their main legislative objective resulted primarily from the implementation of new public tasks of an economic nature. Administrative agencies, namely, were established to modernise

[1] For more information on government agencies in Poland, see: Bieś-Srokosz 2020.

and innovate on agriculture and defence in particular. Several of them, such as the Agency for Restructuring and Modernization of Agriculture, emerged from the Community legal regulations which obliged the Polish state to establish these entities.

It is important to stress that the notion of a government agency, regardless from the terms used herein, denotes an agency organised in the form of a state legal entity. For this reason, the term "government agency" is recommended[2]. Of course, the use of the term "agency" alone is appropriate, but on condition that the interpretation of this concept has been provided beforehand. Therefore, when referring to the definition of the concept of an agency in the *strict sense,* as presented in the literature, it is worth noting that this entity is perceived as an institution established by law in the form of a state legal entity in order to perform the economic tasks of the state within the scope of its competences and powers [Sawicka 2008, 445]. K. Sawicka also emphasises that agencies are state legal persons established on the basis of acts that define their organisational and legal structure, objectives of operation, and principles of financial management. According to J. Niczyporuk, the concept of an agency in the *strict sense* should denote state legal persons or state organisational units with legal personality, established on the grounds of statutory provisions, subject to specification in acts of a lower rank. The purpose of these government agencies is to implement the economic tasks of the state within the scope of competence and authority granted [Niczyporuk 2000, 341]. Whether it is a government agency or not is determined primarily by its organisational and legal form, the scope of the tasks performed, and the method of managing the property of the State Treasury. It is obvious, therefore, that the use of the term "government agency" does not necessarily denote such an entity in fact. In this context, it is essential to indicate the features that distinguish government agencies from other typical public administration entities. First, the legal personality of a government agency is a constitutive feature. A state agency obtains legal personality by means of an act. The act automatically endows this entity with state property. Having obtained legal personality, a government agency is empowered to participate in civil law transactions. The fact that state agencies are granted legal personality stems from their objective, i.e. to perform public functions while supporting the implementation of their tasks with their own economic activity. Nevertheless, it should be emphasised that granting legal personality to an administrative agency means that it has the capacity to perform acts in law and legal capacity conferred by civil law. A state agency may therefore be the subject of rights and obligations, as well as a party to an obligation relationship. At the same

[2] It is not a mistake to also use the term "administrative agency" or "state agency".

time, the fact that a government agency is established by means of an act, entrusted with public tasks, and that administrative authority is employed thereto leads to the conclusion that such an agency it is a subject of public and administrative law and has administrative [Filipek 2005, 184-85] legal capacity [Łaszczyca, Martysz, and Matan 2003, 292; Niczyporuk 2009, 182-85]. Secondly, it should be pointed out that government agencies are established and operate on the basis of statutes. By means of this normative act, the legislator decides on the organisational structure, organs, tasks and financial management of a government agency. Nevertheless, the statutory regulations are of a framework nature which complements and clarifies the statute of the administrative agency. The internal organisational structure is centralised. Being one of its bodies, the president of the agency has the authority to determine the internal organisation of individual organisational units and departments of the agency on the basis of its internal regulations. In addition, the president manages the state agency and represents it externally. The catalogue of the president's tasks is quite vast, which implies considerable impact on the operation of the government agency in general. The centralised system of the agency consists of a headquarters with the president as the main body, regional offices of a lower level supervised by area directors, and then the district (field) offices led by managers. Although these bodies are subordinate to the agency president, they have a separate catalogue of tasks and competences in their area of operation.

Thirdly, state agencies are hierarchically dependent (subordinate) to government administration bodies. At this point, it should be clarified that it is permissible to use the terms "dependence" or "subordination" in relation to the supreme organs of state administration. Pursuant to the provisions of the law establishing a government agency, this entity is subject to and supervised by the competent minister in the matter. In almost all cases, the relationship of supremacy and subordination of a government agency to the competent minister takes the form of a management system. Should the competent minister, however, pass the statute of an administrative agency by way of an order, it is the case of organisational subordination, where the supreme body is entitled to issue legal acts binding its subordinate entities, defining their general structure, tasks, competences, procedures, etc. This issue will be elaborated on in the chapter on supervision over the activities of government agencies. Another criterion which differentiates government agencies from other public administration entities is the specific scope of the public tasks they conduct. These tasks relate largely to the following fields: innovation, modernisation of agriculture and financing the development of the economy, which contribute to reinforcing the position of the administrative agency at the national and European level. A characteristic feature that distinguishes state agencies from other public

administration entities is their variety of legal forms of operation. When implementing public tasks, these entities use legal forms of activity characteristic both of public (administrative decisions and material and technical activities) and private law (civil law contracts). They have not been empowered by law, however, to freely choose between these two forms of activity, as it is provided for in a specific legal provision in every case. In the current legal state, each administrative agency employs civil law contracts on the basis of specific provisions regulating the creation and operation of government agencies. On the basis of the research conducted, it should be stated that this particular form of activity is most frequently used in the implementation of public tasks by government agencies.

2. POLISH CENTRE FOR ACCREDITATION – – ORGANISATIONAL STRUCTURE

The Polish Centre for Accreditation (PCA) was established pursuant to Article 12(1) of the Act of April 28, 2000, *on the system of conformity assessment, accreditation and the amendment to certain acts,*[3] which created the legal grounds for the establishment of a national accreditation body as an impartial and independent body with the aim of performing accreditation tasks. The PCA was established on the basis of the Accreditation Office of the Polish Centre for Testing and Accreditation and the Accreditation Team of Measuring Laboratories of the Central Office of Measures. It began its activity on 1 January 2001, assuming the liabilities and receivables of its predecessors in respect of accreditation, as well as their experienced personnel, operational procedures, a vast group of auditors, and international contacts.[4] It was already this act that endowed the PCA with legal personality. In terms of its function and organisation, it remained within the structures of the central administration, subordinate to the Prime Minister. The Prime Minister determined the organisation and operation of the unit and appointed and dismissed the head of the PCA. In view of the planned accession of Poland to the EU and the adjustment of Polish law to comply with the *acquis communiataire,* the Act on the Conformity Assessment System was passed on August 30, 2002,[5] pursuant to which the supervision over the PCA was transferred to the minister competent for economy. No specific changes were made to the status of this entity or the catalogue of its tasks.

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[3] Journal of Laws of 2000, No.43, item 489.

[4] https://www.pca.gov.pl/o-pca/wydarzenia/aktualnosci/akredytacja-i-gospodarka-tworza-system-naczyn-polaczonych,558.html [accessed: 22.09.2022].

[5] Journal of Laws of 2002, No. 166, item 1360 as amended.

Under the current legal environment, the status of the PCA within public administration structures is regulated by the Act of April 13, 2016 on Conformity Assessment and Market Surveillance Systems.[6] It stipulates that the PCA is a national accreditation body authorised to accredit conformity assessment bodies. This act was the result of the "new legal framework" of technical harmonisation, comprising Regulation 765/2008/EC,[7] which established the legal framework for accreditation, market surveillance and CE marking, as well as Decision 768/2008/EC,[8] which defined common rules for all harmonisation legislation as regards definitions, criteria for designating notified bodies, conformity assessment procedures, and obligations of entities participating in the production and distribution chain.

Pursuant to Article 4(1) relating to Article 2(11) of Regulation 765/2008 (EC), each Member State is to appoint one accreditation body to be considered as the only authoritative body in that Member State to provide accreditation authorised by the state. Pursuant to Article 38(1) of the Act on Conformity Assessment and Market Surveillance Systems, the Polish Centre for Accreditation was designated as the only national accreditation body. The Centre is a state legal person subordinate to the minister competent for economy.

The documents governing the activity of the PCA include its statute, the Act on Conformity Assessment and Market Surveillance Systems, Regulation 765/2008 (EC), and an annual action plan. The statute of the Centre is passed by the minister responsible for economy by way of an ordinance. The current statute was issued on July 15, 2016.[9] It defines the internal structure of the unit and the management control system.

The bodies of the Centre are the director as the executive body and the accreditation board as the consultative and supervisory body. The body managing the activities of the Centre is the director appointed by the minister from among candidates selected in a competition organised by the minister for a 4-year term (Article 41 of the Act). At the director's

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[6] Journal of Laws of 2016, item 542 as amended.

[7] Regulation (EC) No. 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (Official Journal of the European Union, L 218, 13 August 2008, p. 30) [hereinafter: Regulation 765/2008/EC].

[8] Regulation (EC) No. 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC (Official Journal of the European Union, L 218, 13 August 2008, p. 30) [hereinafter: Regulation 768/2008/EC].

[9] The statute of the Polish Centre for Accreditation is specified in the Regulation No. 39 of the Minister of Development of 15 July 2016 on granting the statute to the Polish Centre for Accreditation – consolidated text (Official Journal of the Ministry of Entrepreneurship and Technology of 2018, item 45).

request, the minister appoints two deputies selected in a competition organised by the director. The tasks of the director include: 1) financial management of the Centre and the management and management of its assets; 2) independently performing legal acts on behalf of the Centre, 3) preparing the Centre's annual financial plan and financial plan in a task-oriented system for a given budgetary year and for 2 subsequent years and presenting it (after obtaining a positive opinion of the Council) for approval to the Minister, 4) preparing the annual financial statements of the Centre together with an audit report drawn up by an audit firm, by March 31 each year and presenting it (after obtaining a positive opinion of the Council) for approval to the Minister, 6) preparing and presenting it to the Minister responsible for economy, by March 31 each year, the draft annual activity plan of the Centre approved by the Council, covering the issues of implementation of the specific tasks of the Centre, and the annual report on the implementation of the tasks of the Centre approved by the Council (Article 47 of the Act).

The Accreditation Council is a collective body with up to 20 members. This number ensures a balance of votes in the Council among delegates of government administration bodies and organisations representing conformity assessment units, spokespersons of nationwide organisations representing consumers, employers, as well as economic, scientific and technical organisations, a representative of the Polish Committee for Standardization, and a representative of the President of the Central Office of Measures. Council members are appointed by the minister from among candidates proposed by the above-mentioned bodies and institutions for a five-year term (Article 49 of the Act). The tasks of the council include: 1) examining the status and directions of accreditation development; 2) scrutinising the substantive activity of the Centre; 3) reviewing and approving projects, annual financial plans and financial statements prepared by the director; 4) assessing the applications regarding the distribution of the Centre's profit; 5) appraising the appointment and dismissal of members of the Appeal Committee operating at the PCA.

There is an accreditation council functioning at the PCA, with 3 to 10 members appointed by the minister upon consulting non-council members. The task of the Appeal Committee is to consider appeals against decisions refusing to grant, suspend, withdraw or limit the scope of accreditation (Article 57 of the Act).

In terms of financing, the PCA is an independent and self-sustained non-profit entity, covering its operating costs from its own revenues. This includes employee salaries and investments. The income sources for the Centre are revenues from service fees charged on the accreditation of conformity assessment bodies, fees for supervision of accredited conformity assessment

bodies, and other revenues. Profit from the accreditation activity conducted may be allocated to its development.

The minister responsible for economy exercises substantive and financial supervision over the PCA's activities. This entails the following: financial inspection on the terms and in the manner stipulated by the regulations on inspecting government administration; approving of the Centre's draft annual financial plan; appraising any changes to the Centre's financial plan; approving of the Centre's annual accounts; accepting the report on the activities of the Centre presented by the Director; evaluating the activities of the Centre on the basis of the reports submitted (Article 57 of the Act).

3. POLISH CENTRE FOR ACCREDITATION AS A GOVERNMENT AGENCY?

The legal status of the Polish Centre for Accreditation can be likened to that of an executive agency. While it is true that the legislator does not directly state that the Polish Centre for Accreditation (PCA) is an executive agency in the Act on Conformity Assessment and Market Surveillance Systems, its features are fully consistent with those of executive agencies. This is mainly due to the fact that the PCA is a state legal person established on the basis of an act.[10] Furthermore, its activity is aimed at implementing specialized public tasks and is supervised by the competent minister.

The legal status of by the Polish Centre for Accreditation is a state legal person, which results from Article 38(2) of the Act on Conformity Assessment and Supervision. It stipulates that the PCA has legal personality in the light of the provisions of civil law. State legal entities, which also include government agencies, are established mainly in order to shift the actions taken in the field of civil law economic relations from the State Treasury bodies to specialists performing the functions of state bodies of legal persons [Radwański 2011, 193]. State legal persons perform public tasks of an economic nature, bringing economic benefits to the state. They are defined by legal academics and commentators [Bednarek 1997, 78; Klein 1983, 128; Frąckowiak 2012, 1176] as entities by virtue of which the economic interests of the state are safeguarded.

Consideration of the legal situation of PCA only from the private law perspective should first of all review the legal personality of this entity. In the light of civil law,[11] the fact that a given entity has acquired legal

[10] Act of 13 April 2016, Journal of Laws of 2022, item 5.

[11] Article 33 of the Civil Code stipulates that legal persons include the State Treasury and organisational units granted legal personality by virtue of a special provision. It follows, therefore, that the State Treasury is not an organisational unit, and the term "granted legal

personality implies that it is an organisational unit with legal personality. In such case, it is appropriate to regard the PCA as the embodiment of the state in property relations. It is, therefore, a completely separate unit, the structure of which resembles the construction of a typical organisational unit with legal personality, comprising an element of organisation, property, and people. Legal personality not only allows PCA to enter into civil law relations and participate in economic transactions in the broad sense but also to conclude civil law contracts. Therefore, it is worth considering that the legal personality of the Polish Centre for Accreditation is a means needed for the state to perform public tasks rather than a means to satisfy its own needs [Szydło 2008, 103]. In civil law transactions with the State Treasury, the PCA as a state legal person should act as an autonomous legal person, equal to the other party. Legal personality indicates its empowerment, allowing the PCA to function in civil law transactions as well as endowing it with the capacity to perform acts in law and legal capacity conferred by civil law. Therefore, it may be a subject of rights and obligations, as well as a party to obligatory relations. At the same time, it is a subject in terms of public and administrative law [Filipek 2005, 185-86] and has legal capacity in terms of administrative law [Łaszczyca, Martysz, and Matan 2003, 292; Niczyporuk 2009, 182-85].

It should be recalled that it is a normative act of the rank of a bill that must clearly recognize the entity as a legal person [Frąckowiak 2012, 1140]. Moreover, the issue of liability does not arise in relation to legal persons that are created by means of a normative act. The linguistic interpretation of the term "endowment" of a legal person with property stipulates that it should arise free from any burden of debt. As to assigning the legal consequences of certain actions to a given organisational unit, including PCA, it is possible only when there is a basis for marking it and separating it from other organisational units, i.e. indicating its name and seat. Additionally, what makes it possible to consider an organisational unit as a whole is that it has its own structure. For this reason, it is, indeed, possible to distinguish the Polish Centre for Accreditation from other organisational units.

While there is no doubt that the PCA is an organisational unit with legal personality, it should be emphasized that it is a "fictional" creation nevertheless [Pazdan 1968, 202]. Its rights and obligations are performed, namely, by an entity separated from the PCA's structure, on the terms specified in the legal act establishing the Polish Accreditation Centre.[12] These entities

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personality" should be understood in the strict sense. It should be noted that legal personality is determined only by a legal provision. In Article 33 of the Civil Code, the legislator does not directly *grant legal personality to* government agencies, but only makes reference to individual legal regulations that determine the organisation and structure of an agency.

[12] This is due to Article 38 of the Civil Code.

act for and on behalf of the PCA, taking legal actions only in those forms which are provided for in a specific legal provision. In the case of PCA, we can define permanent bodies[13] whose position in the system was set out in the founding legal act. This suggests that the scheme of the PCA's bodies results from the legal norm, while the actions of a specific natural person acting as one of its bodies must not exceed the scope of the behaviour designated for this particular PCA body in general.

It is also worth mentioning the supervision that the Minister of Economy exercises over the Polish Centre for Accreditation. Taking into account the fact that the Minister appoints and dismisses the Director of the PCA and establishes the entity's statute by way of an ordinance, it is a hierarchical dependence (subordination) towards government administration bodies, and even organisational subordination, that constitutes the PCA's position. Within this relationship, the supreme body is empowered to issue additional legal acts binding the PCA. These may define its general structure, tasks, competences, procedures, etc. There is a certain similarity to government agencies in relation to financial supervision, where the minister supervises their budget by issuing opinions, approving or consenting to changes to the PCA's financial plan. The visible difference, however, lies in the PCA's Appeals Committee. Constituting an additional organisational form, it is to consider appeals in cases of decisions refusing to grant, suspend, withdraw or limit the scope of accreditation.

3. ACCREDITATION AS A PUBLIC TASK

Public tasks do not constitute a uniform category and do not have a normative definition. They are often equated with legal forms of administration activities [Stahl 2011, 41], and are the subject of many scientific studies. Legal academics and commentators define them as tasks of the state, which it conducts independently or by means of its bodies; it may also transfer these tasks to other entities of public administration [Stahl 2011, 41; Chruściel 2014, 95-120]. A detailed record and review of the standpoints presented by different legal theorists has been advanced by L. Zacharko. In an attempt to capture the essence of a public task, he adopted a functional approach, according to which a public task means an administrative obligation which constitutes a specific purpose of an administrative body [Zacharko 2000, 13-17]. It is this approach that will be adopted in this study. However, it should be noted that public economic law also recognizes the public task

[13] Centre Director and the Council for Accreditation, Article 40 of the Act on Conformity Assessment and Supervision Systems.

as a function [Popowska 2006, 80; Lissoń 2006, 91], yet this context goes beyond the scope of this study and, therefore, will not be analysed.

When considering the issue of accreditation as a public task, attention must be drawn to the wider context, as it is the cause of its intensive development both at the national level and, above all, the EU level, where its principles undergo harmonisation. Accreditation is an element of the EU regulatory policy in terms of product control, adopted by the EU under the "New Approach" to technical harmonisation. The dynamics of market processes occurring in the economy (technological development, introduction of new processes, systems, technologies, and the production of various products used in various areas of life) have triggered new trends and challenges. This includes the need to introduce uniform regulations regulating the principles of controlling the safety of new technologies and products by accreditation. These complex consequences (also in terms of the law), which imply technological development in various spheres of social and economic life, have imposed new tasks in the economy on the state and its bodies [Żywicka 2017, 266]. Given the intensified trade between countries within the EU internal market, it was necessary to create an appropriate legal scheme of product safety control to include accreditation. From the institutional point of view, product safety control is a public task and the manner of its implementation is determined by particular Member States in their domestic law.

The normative definition of accreditation is stipulated by Article 2(10) of Regulation 765/2008 (EC), pursuant to which "accreditation" shall mean an attestation by a national accreditation body that a conformity assessment body complies with the requirements set out in harmonised standards and, if applicable, any additional requirements, including requirements set out in the relevant systems sector measures necessary to carry out specific conformity assessment activities.

When describing the essence of accreditation as a public task, one can use the definition formulated by Ł. Gorywoda, whereby accreditation is a formal system ensuring independent and authoritative certification of the competence, impartiality and integrity of the conformity assessment body [Gorywoda 2011, 72]. Certification of the competence of a conformity assessment body (notified body) is the basis for establishing and maintaining confidence in the results of work of these bodies and for specific certificates, tests and the results of the inspections conducted within the entire conformity assessment system [ibid.].

Taken in a broad sense, accreditation as a public task serves to increase the safety of products placed on the market as well as build and reinforce the trust of users, both in notified bodies and in products (certificates) that have been assessed by them, thus contributing to economic development. Regulation 765/2008 (EC) introduced a coherent framework for accreditation

at the EU level, laying down the principles of its functioning and organisation. This has had an impact both at the national and EU level. The implementation of this task gave rise to a single EU safety certificate, recognised by all EU Member States. It is worth stressing that a coherent accreditation framework requires that each notified body is reported to the European Commission and the European NANDO database during accreditation.[14] This is to fulfil the information duty regarding notified bodies which perform conformity assessment tasks in the EU.

In line with the intention of the EU legislator, accreditation is not classified as an economic activity. It may therefore only be performed non-for-profit.[15] While accreditation bodies may charge fees for their services or receive income, they are not intended to maximize or distribute profits. Any excess revenue resulting from the provision of services may be used to invest to develop the activities of the national accreditation bodies further, provided it is compatible with their primary activities. The EU legislator emphasises that accreditation should be a self-financing activity in principle. Member States should provide adequate financial support for the implementation of any special tasks. Should an accreditation body generate revenues exceeding its operating costs, it is recommended to take steps to reduce profits by reducing accreditation fees or expanding its scope of activities.

Pursuant to Article 38(1) of the Act on Conformity Assessment and Market Surveillance Systems, all public tasks in the field of accreditation in Poland are executed by the Polish Centre for Accreditation. The tasks related to accreditation conducted by the PCA include the following activities: 1) accreditation of conformity assessment bodies; 2) supervising accredited conformity assessment bodies in terms of their compliance with statutory requirements; 3) keeping a record of accredited conformity assessment bodies; 4) conducting activities aimed at promoting accreditation, including the organisation of non-commercial training and publishing activities; 5) international cooperation in the area of accreditation, in particular within the European Cooperation in the Field of Accreditation. The Centre may also conclude agreements with foreign accreditation bodies on mutual recognition of the competences of accredited conformity assessment bodies.

[14] Website – Nando search engine. Nando (New Approach Notified and Designated Organisations) is a European Commission database of all the notified bodies: https://ec.europa.eu/growth/tools-databases/nando/index.cfm?fuseaction=notifiedbody.main [accessed: 22.09.2022].

[15] Recital No. 14 of Regulation 765/2008 (EC).

4. THE POSITION OF THE POLISH CENTRE FOR ACCREDITATION IN THE POLITICAL SYSTEM AND THE EFFICIENCY OF ACCREDITATION

In order to present the role of the Polish Accreditation Centre within the political system as an entity performing public tasks in the area of accreditation, it is necessary to illustrate the framework rules for placing products on the EU market. In principle, prior to placing a product on the EU market, a manufacturer is obliged to ensure that their product complies with the requirements set out in the relevant provisions (EU directives and regulations) which implement harmonised standards. This ensues through conformity assessment. Compliance with a harmonised standard provides a presumption of conformity. Admittedly, the application of harmonised standards is voluntary. Should, however, other standards be used, the manufacturer is still obliged to confirm the compliance of the product with the requirements by subjecting the product to the conformity assessment procedure. The structure of conformity assessment involves eight basic modules constituting various conformity assessment procedures, according to which product tests are performed. The choice of a given module is contingent on the product class and the level of risk it generates [Cieśliński and Zymonik 2007, 291-93]. Depending on the product classification and safety risk assessment, it is required that the conformity assessment be conducted by an external and impartial notified body. Its impartiality and competence must be previously confirmed in the accreditation process by the accreditation body in accordance with the principles set out in Regulation 765/2008 (EC) [Żywicka 2019, 195-203]. The notified body is also regularly monitored by the accreditation body in order to verify the quality of its product conformity assessment. The verification of the competence of a commercial conformity assessment service provider through accreditation by an independent body is therefore crucial for the credibility of the conformity assessment results.

It is noteworthy that some of the tasks in the conformity assessment system, particularly the assessment of product conformity, have been subject to the privatization process [Żywicka 2020, 135-53; Fleszer 2012, 7; Kieres 2012, 86; Zimmermann 2016, 210-11; Zacharko 2000, 31; Błaś 2000, 23; Biernat 1994; Bieś-Srokosz 2018, 509-22]. Therefore, these activities are performed mainly by non-public entities, i.e. entrepreneurs for whom conformity assessment is the subject of their economic activity. With this fragment of the conformity assessment system privatised, the impartiality and independence of the entity performing these tasks from the entities assessed is the *sine qua non* for reliable conduct of accreditation. The above-mentioned postulate was formulated in Regulation 765/2008 (EC) in relation to national

accreditation bodies. In order to prevent any competition between particular accrediting bodies, the EU legislator also requires the Member States to establish only one accrediting body per state. In the Polish legal system, this requirement has been fulfilled by entrusting accreditation tasks to the Polish Centre for Accreditation. As an agency-type entity, it remains within the structures of public administration. It may seem, therefore, that this position guarantees the PCA's independence and impartiality to supervised entities in respect of the accreditation services provided.

Taking into account the considerations presented herein, it is finally possible to assess whether the position within the political system as determined by the legislator allows the PCA to efficiently perform the tasks with which it was entrusted, and whether it ensures high quality of the services the PCA provides in the field of accreditation. At this point, attention should be drawn to the organisational structure of the PCA as a state agency. In this type of administrative entities, one party (supervisor) delegates work to the other (agent). The superior party in this relationship is the state (represented by the minister for economy), whereas the agent is a specialized unit, i.e. the Polish Centre for Accreditation. This has been identified as the agency's disadvantage, as such a relationship may lead to a goal conflict between the state and the superior party.[16] This, in turn, may reduce the task performance in terms of the superior party's goals, harm the final recipients of a given service, i.e. the agent's clients, and generate high costs related to supervision and verification of the agent's activity (agency costs, transaction costs).

The instrument applied by the legislator under the Act on Conformity Assessment and Market Surveillance Systems with the aim of limiting the problem described above is granting the Accreditation Council independence from the PCA director. The Accreditation Council is an expert body with specific competences, which include appraising plans and financial

[16] Upon analysing the content of the legal provisions examined, it is possible to conclude that authorising the competent minister to issue binding guidelines or orders is an example of a management system. As a result, the relationship of superiority and subordination between an organisational unit and a minister is based on the principle of management, which is regulated by management acts, i.e. guidelines, instructions, circulars or ordinances. The minister issues management acts on the basis of the competence standard stipulated in Article 34a of the Act on the Council of Ministers. Their managerial value lies in the fact that they order subordinated entities to act or perform a task in a specific way or assume a particular legal form of their performance by virtue of a directive. Although addressed to a specific recipient, they normalise the situation of entities outside the organisational system of the subordinated entity in most cases (e.g. in relation to government agencies). In this regard, it seems appropriate to claim that government agencies are an example of centralised entities subordinated to a higher body on the basis of management rather than supervision [Korczak 1991; Pakuła 1991].

reports, approving plans and substantive reports, reviewing applications regarding profit distribution, evaluating candidates for members of the Appeal Committee. It consists of expert representatives of the community involved in the accreditation process, who demonstrate substantive knowledge in this field and who have been appointed by the minister. An independent assessment of the functioning of the unit provided by experts and conducted with the participation of a wide range of entities interested in the PCA activities contributes to the efficiency and quality of accreditation services. The Council is also the basic forum for discussion and exchange of views as well as organisation of the environment involved in the accreditation and conformity assessment process, i.e. conformity assessment bodies, economic organisations and public administration bodies.

The quality of tasks performed by PCA is also increased by the legal mechanism for the control of PCA's decisions in the second instance (Appeal Committee of experts at the PCA) and the admissibility of submitting a complaint to the administrative court against final decisions (Articles 25 and 26 of the Act). In the event of the PCA granting, refusing to grant, withdrawing, suspending or limiting the scope of accreditation, a conformity assessment body may appeal to the Appeal Committee of experts operating at the PCA. After considering the appeal, the Appeal Committee may state that it is justified and refer the case to the PCA for reconsideration, or dismiss the appeal. In this case, the conformity assessment body seeking accreditation may file a complaint to the administrative court through the Appeal Committee. Moreover, the Polish Centre for Accreditation is obliged to inform the ministers and heads of central offices relevant with regard to the subject of conformity assessment about the restriction, suspension, or withdrawal of accreditation to a notified body or a recognised third party organisation (Article 24(8) of the Act).

CONCLUSIONS

The analysis presented in this article, demonstrating the position of the Polish Centre for Accreditation within the political system in the context of its impact on the efficiency and quality of public tasks in respect of accreditation activities it performs, does not exhaust the issue at hand. It may be regarded merely as an introduction or a contribution to a discussion. However, the findings hereof make it possible to formulate several remarks or signal the crucial issues and doubts which arise in connection with the subject presented. First of all, it is becoming noticeably common in the system that the state seeks novel forms for the performance of public tasks. This is closely related to the growing social needs as mentioned at the beginning and aimed at increasing the efficiency of task performance

by public administration [Jagielski, Wierzbowski, and Wiktorowska 2005, 211-19].

Despite being a state legal person, which results directly from legal provisions, the Polish Centre for Accreditation has an ambiguous legal status compared to other public administration entities in Poland. This article has attempted to demonstrate that the PCA may be described as a quasi-government agency. Although not entirely so in the sense stipulated by legislation or by legal academics and commentators, its characteristics correspond to those of government agencies in many cases. It can be concluded, therefore, that the quasi-agency nature of the PCA reflects the economic needs as to the efficient and independent conduct of accreditation by an entity which employs qualified personnel within its structures. Remaining somewhat beside the classic forms of the administrative apparatus, and, more importantly, being able to finance its activities on its own, the PCA maintains relative independence and impartiality, both towards accredited entities and public authorities.

All things considered, an accreditation scheme executed according to binding regulations contributes to developing mutual trust among Member States as regards the competence of conformity assessment bodies and, consequently, the certificates and test reports they prepare. Thus, this scheme upholds the principle of mutual recognition of accreditation results. It is about the quality of certificates and test reports issued by notified bodies throughout the European Union. Therefore, accreditation is an equally important task at both the European and national level. Hence the need of an administrative entity with a new structure, similar to the one of an agency. It may be concluded that the model adopted by the Polish legislator fulfils the role assigned by the EU legislator as the structure of the Polish Centre for Accreditation facilitates the efficient implementation of these tasks.

REFERENCES

Bednarek, Małgorzata. 1997. *Mienie. Komentarz do art. 44-53³ kodeksu cywilnego*. Kraków: Wolters Kluwer.

Bieś-Srokosz, Paulina. 2013. "Nadzór nad działalnością agencji rządowych sprawowany przez właściwego ministra." In *Agencje i podmioty podobne w strukturze administracji publicznej*, edited by Anna Gronkiewicz, and Agnieszka Ziółkowska, 27-37. Katowice: Forma Studio.

Bieś-Srokosz, Paulina. 2015. "Tworzenie agencji rządowych – odpowiedź ustawodawcy na potrzeby społeczeństwa." In *Administracja publiczna wobec wyzwań i oczekiwań społecznych*, edited by Małgorzata Giełda, and Renata Skałecka-Raszewska, 21-36. Wrocław: E-Wydawnictwo Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.

Bieś-Srokosz, Paulina. 2016. "Uagencyjnianie administracji publicznej – przykład procesu tworzenia agencji rządowych w Polsce." In *Współczesne kierunki zmian administracji publicznej*, edited by Paulina Bieś-Srokosz, 9-20. Częstochowa: Wydawnictwo Uniwersytetu Humanistyczno-Przyrodniczego im. Jana Długosza.

Bieś-Srokosz, Paulina. 2018. "Prawne formy realizacji zadań publicznych we współczesnej administracji publicznej. Kilka uwag na temat tworzenia przez ustawodawcę hybrydowych prawnych form działania w administracji publicznej." In *Stulecie polskiej administracji. Doświadczenia i perspektywy*, edited by Wojciech Federczyk, 509-22.Warszawa: KSAP.

Bieś-Srokosz, Paulina. 2020. *Agencje rządowe jako szczególne podmioty administracji publicznej*. Warszawa: C.H. Beck.

Biernat, Stanisław. 1994. *Prywatyzacja zadań publicznych. Problematyka prawna*. Warszawa–Krakow: PWN.

Błaś, Adam. 2000. "Formy działania administracji w warunkach prywatyzacji zadań publicznych." In *Administracja i prawo administracyjne u progu trzeciego tysiąclecia. Materiały Konferencji Naukowej Katedr Prawa i Postępowania Administracyjnego*, edited by Tomasz Bąkowski, et al., 23-35. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Chruściel, Anna. 2014. "Rola zlecania zadań publicznych w realizowaniu koncepcji dobrego rządzenia." *Administracja: teoria, dydaktyka, praktyka* 3(36):95-120.

Cieśliński, Aleksander, and Krzysztof Zymonik. 2007. *Wspólnotowe prawo gospodarcze*. Vol. II. Edited by Aleksander Cieśliński. Warszawa: C.H. Beck.

Filipek, Józef. 2005. "Podmiotowość w prawie administracyjnym." In *Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z konferencji jubileuszowej Profesora Eugeniusza Ochendowskiego*, 184-85. Toruń: Dom Organizatora.

Fleszer, Dorota. 2012. "*Umowne powierzenie realizacji zadań z zakresu gospodarki komunalnej jako forma prywatyzacji wykonywania zadań publicznych*." *Samorząd Terytorialny* 7:25-41.

Frąckowiak, Józef. 2012. "Osoby prawne." In *Prawo cywilne – część ogólna. System prawa prywatnego*, vol. I, edited by Marek Safjan, 1176. Warszawa: C.H. Beck. Legalis.

Gorywoda, Łukasz. 2011. "Instytucjonalne ramy akredytacji w Unii Europejskiej." In *Administracja publiczna wobec procesu globalizacji*, edited by Maciej Rudnicki, and Maciej Jabłoński, 65-76. Warszawa: C.H. Beck.

Gronkiewicz, Anna. 2013. "Desygnaty administracji w założeniach państwa prawnego." In *Organizacja prawna administracji publicznej*, edited by Lidia Zacharko, 11-42. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Gronkiewicz, Anna, and Agnieszka Ziółkowska. 2016. "Agencje w strukturze administracji publicznej na przykładzie Polskiej Agencji Żeglugi Powietrznej." In *Struktury administracji publicznej: metody, ogniwa, więzi*, vol. I, edited by Artur Mezglewski, 205-22. Rzeszów: Towarzystwo Naukowe Organizacji i Kierownictwa Oddział w Rzeszowie.

Jagielski, Jacek, Marek Wierzbowski, and Anna Wiktorowska. 2005. "Nietypowe podmioty administrujące – kilka refleksji na tle organizacyjnych form wykonywania administracji publicznej." In *Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z konferencji jubileuszowej Profesora Eugeniusza Ochendowskiego*, 217-19. Toruń: Wydawnictwo Dom Organizatora.

Kieres, Leon. 2012. "Prywatyzacja – zagadnienia prawa publicznego, prawa prywatnego i polityki gospodarczej." In *Prawne aspekty prywatyzacji*, edited by Jolanta Blicharz, 61-87. Wrocław: E-Wydawnictwo Prawnicza i Ekonomiczna Biblioteka Cyfrowa Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.

Klein, Anna. 1983. "Ewolucja instytucji osobowości prawnej." In *Tendencje rozwoju prawa cywilnego*, edited by Ewa Łętowska,128. Wrocław: Ossolineum.

Korczak, Jerzy. 1991. "Akty kierowania w systemie terenowych organów administracji państwowej." *Acta Universitatis Wratislaviensis*, vol. CLXXX, 1142.

Lissoń, Piotr. 2006. "Funkcje administracji gospodarczej a wyspecjalizowane organy administracji." In *Funkcje współczesnej administracji gospodarczej. Księga dedykowana Profesor Teresie Rabskiej*, edited by Bożena Popowska, 87-111. Poznań: Wydawnictwo Uniwersytetu Adama Mickiewicza.

Łaszczyca, Grzegorz, Czesław Martysz, and Andrzej Matan (eds.). 2003. *Postępowanie administracyjne ogólne*.Warszawa: C.H. Beck.

Niczyporuk, Janusz. 2000. "Rządowe agencje gospodarcze." In *Administracja i prawo administracyjne u progu trzeciego tysiąclecia*, edited by Małgorzata Stahl, Jan Tarno, and Marcin Górski, 341. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Niczyporuk, Janusz. 2009. "Podmiotowość administracyjnoprawna a zdolność administracyjnoprawna –delimitacja pojęć." In *Współczesne zagadnienia prawa i procedury administracyjnej. Księga jubileuszowa dedykowana Prof. zw. dr hab. Jackowi M. Langowi*, edited by Marek Wierzbowski, Jacek Jagielski, Anna Wiktorowska, et al., 177-85. Warszawa: Wolters Kluwer.

Pakuła, Andrzej. 1991. "Podporządkowanie pionowe w organizacji terenowych organów administracji państwowej." *Acta Universitatis Wratislawiensis* vol. CLXXX, no. 1142.

Pazdan, Maksymilian. 1968. "Niektóre konsekwencje teorii organów osoby prawnej." *Prace Naukowe Uniwersytetu Śląskiego, Prace prawnicze* vol. 1, 202.

Popowska, Bożena. 2006. "Klasyfikacja funkcji administracji publicznej w nauce publicznego prawa gospodarczego." In *Funkcje współczesnej administracji gospodarczej. Księga dedykowana Profesor Teresie Rabskiej*, edited by Bożena Popowska, 61-86. Poznań: Wydawnictwo Uniwersytetu Adama Mickiewicza.

Radwański, Zbigniew. 2011. In Zbigniew Radwański, and Adam Olejniczak, *Prawo cywilne – część ogólna*. Warszawa: C.H. Beck.

Sawicka, Krystyna. 2008. "Gospodarka finansowa niektórych jednostek sektora finansów publicznych." In *Finanse publiczne i prawo finansowe*, edited by Cezary Kosikowski, and Eugeniusz Ruśkowski, 445. Warszawa: Wolters Kluwer.

Stahl, Małgorzata. 2011. "Zagadnienia ogólne." In *Podmioty administrujące, System prawa administracyjnego*, vol. 6, edited by Roman Hauser, Zygmunt Niewiadomski, and Andrzej Wróbel, 8-126. Warszawa: C.H. Beck.

Szydło, Wojciech. 2008. "Charakterystyka Skarbu Państwa jako szczególnego rodzaju osoby prawnej." *Rejent* 6:96-124.

Zacharko, Lidia. 2000. *Prywatyzacja zadań publicznych gminy. Studium administracyjnoprawne*, Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Zimmermann, Jan. 2016. *Prawo administracyjne.* 7th edition. Warszawa: Wolters Kluwer.

Żywicka, Agnieszka. 2017. „W sprawie redefinicji funkcji administracji gospodarczej w warunkach społecznej gospodarki rynkowej (na przykładzie funkcji administracji miar)." *Annales UMCS, sectio G Ius*, vol. LXIV, no 1:265-76.

Żywicka, Agnieszka. 2019. "Ochrona interesów jednostki notyfikowanej w systemie oceny zgodności z zasadniczymi wymaganiami w prawodawstwie polskim i unijnym-wybrane zagadnienia administracyjnoprawne." *Opolskie Studia Administracyjno-Prawne* vol. XVII, no. 1:195-203.

Żywicka, Agnieszka. 2020. "Prywatyzacja zadań publicznych w metrologii – na przykładzie zadań administracji miar." *Studia Prawno-Ekonomiczne* vol. CXVI, 135-53. Doi: 10.26485/SPE/2020/116/8

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