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SPIS TREŚCI

Marcin Konarski
LEGAL ISSUES RELATED TO THE FLIGHT OF PEASANTS IN OLD POLAND (14th–19th CENTURY) 7

Joanna Bukowska, Piotr Świat
COOPERATION BETWEEN INSTITUTIONS OF THE EUROPEAN UNION AND ITS MEMBER STATES IN THE CREATION OF CLIMATE PROTECTION POLICY 33

Mateusz Golak
MINIMUM STANDARDS IN THE EUROPEAN ACCOUNT PRESERVATION ORDER 61

Magdalena Małecka-Łyszczek, Radosław Mędrzycki
AXIOLOGICAL PARADIGM OF SOCIAL INCLUSION INTENSIFICATION – SELECTED REMARKS 77

Roberto Cruz
INSTRUMENTAL OFFENCE IN SPANISH CRIMINAL CODE: PROBLEMS OF LEGITIMACY? 99

Mariusz Fras
THE DIRECTIVE 2016/97 ON INSURANCE DISTRIBUTION (IDD) AND PRIVATE INTERNATIONAL LAW 113

Jacek Widło
MORTGAGE IN INTERNATIONAL PRIVATE LAW 145

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LEGAL ISSUES RELATED TO THE FLIGHT OF PEASANTS IN OLD POLAND (14TH–19TH CENTURY)

*Marcin Konarski**

ABSTRACT

In the light of old Polish law, based on the system of norms of peasant slavery, understood as a legal institution, the flight of peasants was qualified as an illegal act, which was subject various to legal sanctions. The reason why peasants chose to become fugitives was usually their desire to improve living conditions. The direction the fugitives took was another village (a different demesne), a town (private or royal); peasants even crossed state borders. This analysis draws attention to the most important legal problems related to the flight of peasants in old Poland concerning the sources of law as regards the flight of peasants, ways of seeking to release a peasant by means of court proceedings, types of sanctions for such flight, and forms of peasants' abandonment of master's property other than flight.

Key words: First Polish Republic, feudalism, peasants, flight of peasants, slave trade, old Polish law

1. INTRODUCTION

There are such problems, as T. Manteuffel once wrote, which – although they have long been the target of academic research and have been seemingly solved – are being revisited by almost every generation of re-

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searchers trying to present it in a new light[1]. Such problems definitely include legal issues related to the flight of peasants, which are of interest to the study of the history of law and sociology of law, and which will be the subject of this article.

The flight of peasants in old Poland can be analysed as a fight against the feudal system as well as a form of economic migration. One should not forget that the flight of peasants is inseparably linked to their attachment to land, which was the most important aspect of limited personal freedom of the serf[2], while other limitations also existed, such as limitations of the choice of a spouse and occcupation[3]. The flight of peasants may also

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[1] See Tadeusz Manteuffel, "Problem feudalizmu polskiego", Przegląd Historyczny 37(1948): 64.

[2] See Jan Rutkowski, Historia gospodarcza Polski, vol. I: Czasy przedrozbiorowe, Poznań: Księgarnia Akademicka, 1947, 267–268. For more about the evolution of land ownership in Western Europe, see Józef Kuliszer, Powszechna historia gospodarcza średniowiecza i czasów nowożytnych, volume I, Warszawa: Książka i Wiedza, 1961, 54–65. It was the legal doctrine of as late as the 18th and early 19th centuries that distinguished two types of domicile and three types of serfdom associated with the basic principle of state affiliation. Apart from the proper domicile, i.e. the place of residence with the intention of permanent residence, quasi-domicile, i.e. the place of residence without the intention of permanent residence, was listed. As for serfdom, a distinction was made between temporary and mixed serfs (sujets mixtes) from permanent serfs (whose legal position was taken for granted). Temporary serfs were people who, while temporarily staying on the territory of a given state state, silently surrendered to its laws. Mixed serfs were a category of people with double domicile, Stanisław Grodziski, Poddani mieszani (sujets mixtes) na ziemiach polskich w latach 1772–1815, In: Prawo wczoraj i dziś. Studia dedykowane Profesor Katarzynie Sójce-Zielińskiej w czterdziestolecie pracy naukowej, ed. Grażyna Bałtruszajtys, Warszawa: Liber, 2000, 83–84, note 1. The "mixed subjects" S. Grodziski mentions, were serfs who owned land estates (and thus nobility), in two countries: the Republic of Poland and one of the partitioning countries, i.e. lands detached from Poland. Although the partition treaties guaranteed the mixed serfs that they would not suffer any persecution or additional tax burdens, none of these acts was effective, see Stanisław Grodziski, Poddani mieszani..., 86 and 91. Interesting observations on the concept of the agrarian issue in Poland are presented by Hipolit Grynwaser, Kwestia agrarna i ruch włościan w Królestwie Polskim w pierwszej połowie XIX wieku (1807–1860). Studium archiwalne, In: Hipolit Grynwaser, Pisma, volume II, Wrocław: Zakład Narodowy im. Ossolińskich, 1951, 7–21.

[3] See Jan Rutkowski, Historia gospodarcza..., vol. I, 268.

be seen as a form of economic migration[4]. and economic mobility was always stronger than servitude bonds. Unlike capitalist migrations, which massively transformed peasants into factory workers, spatial migrations in feudal society were horizontal in nature, i.e. in most cases, peasant circulation took place inside a rural community, rarely led to change of their socio-economic status[5].

The flight of peasants, as one of the forms of fighting against the serfdom system, sometimes made it possible to move permanently to a town[6], where social and economic living conditions were better than in villages[7]. Moreover, fleeing one's village sometimes provided an opportunity to create an economic situation for the fugitive, which later, in the event that he was found by his lord was, made it easier for him to pay for a permanent exemption from servitude for himself, his wife and children[8]. Regardless of how one assesses the flight of peasants, it was certainly a higher form

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[4] See Celina Bobińska, Wieś niespokojna. Studia małopolskie z XVIII–XIX wieku, Warszawa: Książka i Wiedza, 1979, 104.

[5] See ibidem, 91.

[6] Issues the flight of peasants across the boundaries of Poland are analysed in detail by Stanisław Szczotka, Uwagi o zbiegostwie włościan w dawnej Polsce, Rocznik Dziejów Społecznych i Gospodarczych, 11(1949), 132–151.

[7] See Maurycy Horn, Walka chłopów czerwonoruskich z wyzyskiem feudalnym w latach 1600–1648. Part I: zbiegostwo i zbójnictwo karpackie, Opole: Wyższa Szkoła Pedagogiczna im. Powstańców Śląskich w Opolu, 1974, 63–64; Stanisław Szczotka, Uwagi o zbiegostwie..., 127–129; Tomasz Opas, O kierunkach awansu społecznego chłopów z dóbr prywatnych w XVIII wieku, In: Społeczeństwo polskie w XVIII i XIX w., Warszawa: Państwowe Wydawnictwo Naukowe, 1974, 60–76.

[8] A dozen or so examples are given by Stanisław Szczotka, Zwalnianie chłopów z poddaństwa w województwie krakowskim w latach 1572–1794, Czasopismo Prawno-Historyczne 3(1951), 278–285. Apart from location privileges, location documents, documents for village leaders, documents for villages, rural court books, ordinances and rural acts, as well as economic instructors, exemptions from serfdom are interesting sources of knowledge about rural law, see more Stanisław Kutrzeba, Historia źródeł dawnego prawa polskiego, vol. I, Lwów: Zakład Narodowy im. Ossolińskich, 1925, 318–332. However, as Józef Putek notes, the liberation of the peasant from the land subjugation was rarely practiced. In such cases, the liberation documents were entered into court books, and, as Putek stresses, "such entries can be found extremely rarely in the books, because in those times of peasant slavery the nobility's submissiveness to the peasant - personal property of a nobleman was rare", Józef Putek, Miłościwe pany i krnąbrne chłopy włościany. Szkice i sylwetki z dziejów poddaństwa, pańszczyzny, grabieży wojskowych, procesów sądowych

of peasants' struggle against the manor and "it was no longer just a protest against the lord's individual demands, but completely breaking off contact with him"[9].

Growing serfdom burdens on peasants and accompanying brutal practices of the administration of manors, which often assumed the character of absolute physical coercion (beatings of peasants, up to the loss of health or even life by leaseholders and their servants)[10], were the reasons for peasants' resistance, being an expression of an open mass fight against feudal exploitation in the Polish countryside[11], alongside other forms of resistance, such as: evading work on farmland, non-payment of rent, non-payment of tribute, inaccurate and inefficient work of peasants[12]. In addition, the peasants' aspirations to change their material living conditions often manifested themselves in the form of mob action and rebellions[13], which were often joined by journeymen, i.e. permanent manorial service[14].

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i innych form ucisku społecznego na dawnym pograniczu śląsko-polskim, Kraków: Ludowa Spółdzielnia Wydawnicza, 1969, 98.

9 Stanisław Szczotka, Z dziejów chłopów polskich, Warszawa: Ludowa Spółdzielnia Wydawnicza, 1951, 9.

10 Ryszard Orłowski points out the fact that peasants were subjected to this type of abuse, Opór włościan i formy walki klasowej w Ordynacji Zamojskiej w drugiej połowie XVIII stulecia, Annales Universitatis Mariae Curie-Skłodowska. Sectio F 5(1959), 144–146; Maurycy Horn, Walka klasowa i konflikty społeczne w miastach Rusi Czerwonej w latach 1600–1647 na tle stosunków gospodarczych, Wrocław: Zakład Narodowy im. Ossolińskich, 1972, 172–173. Józef Rafacz explicitely writes about "poverty and harm" being the reason for the flight of peasants, Józef Rafacz, "Sprawa niewoli chłopskiej w dawnej Polsce", Przewodnik Naukowy i Literacki 48(1920), 467–468.

11 See Maurycy Horn, Walka chłopów..., 34–35; Historia chłopów śląskich, ed. Stefan Inglot, Warszawa: Ludowa Spółdzielnia Wydawnicza, 1979, 163–164.

12 See Ryszard Orłowski, Opór włościan..., 146–153. An interesting case of the evasion of obligatory free labour for the lord is reported by Krzysztof Ruszel, Sprawy chłopskie przed sądem dominialnym w Nienadowej w latach 1806–1843, Przemyśl: Krajowa Agencja Wydawnicza, 1989, 128–129.

13 See Ryszard Orłowski, Opór włościan..., 160–167; Hipolit Grynwaser, Przywódcy i „burzyciele" włościan, In: Hipolit Grynwaser, Pisma..., vol. II, 213–263. In addition, it should be remembered that some fugitive serfs did not flee to another master, but often became ruffians. For example, runaway peasants from the Podhale region merged with mountain gangs of bandits, consisting mostly of Hungarians, Czechs, Slovaks and Germans, and together with them attacked manors and castles, see Zdzisław Wróbel, Zbójnictwo na Podhalu, Częstochowa: Drukarnia Udziałowa, 1929, 11.

Sometimes peasants' flight resulted in their release from serfdom. This usually happened when peasants about 10 years before, or sometimes even much earlier, fled from their lords' village and settled elsewhere, e.g. in a town[15], where they were granted town citizenship, working

[14] See ibidem, 164–165; Bohdan Baranowski, Ludzie luźni w południowo-wschodniej Wielkopolsce w XVII–XVIII wieku, Łódź: Zakład Narodowy im. Ossolińskich, 1953, 8. Czeladź (manorial servants) were mainly personal service, used more often for needs and services in the manor than for agricultural work on the farm, but we do not mean the "professional" group of farm servants that was established later on. Flight consisted in a group of people giving up working without notice and running away secretly at night, as well as not showing up for work at the manor despite taking a deposit. The flight of czeladź was classified as a crime and prosecuted by the state institutions, but not, as in previous centuries due to the peasant's dependence on the manor, but because of the heirs' financial claims to the fugitives, due to the material losses suffered by the manor farm as a result of an unforeseen loss of labour force. When the fugitive was already in a new place, wójt (the mayor of the gmina district) applied on his behalf for a certificate of resettlement to a new place. The party from which he fled then filed an accusation of flight, demanding that the administrative authorities force him to return and impose a financial penalty on the manorial lord and the wójt of the gmina who accepted the fugitive. The legal ways of leaving the service by czeladź prematurely included, among others, abuse of domestic punishment and bad nutrition, withholding payment or failure to observe other conditions of the agreement, see Halina Chamerska, O położeniu i zbiegostwie czeladzi folwarcznej w Królestwie Polskim 1830–1864, Warszawa: Państwowe Wydawnictwo Naukowe, 1957, 10, 12–13, 27, 35; Bohdan Baranowski, Ludzie luźni..., 10–11. It should be noted that from 1807, czeladź and the entire rural population remained free, because the Constitution of the Duchy abolished serfdom, and the decree of December ensured the freedom of changing the place of residence, after the administrative and police obligations had been met, while in practice the relics of serfdom were more burdensome for this group of the rural population than for peasants. As far as the legislation is concerned, attention should be drawn to the decision of the Administrative Council on servants and czeladź of 26 April 1817 (publication place missing, 1817, p. 40); the decision of the Governor of 30 May 1818 on the organisation of rural gmina districts (Journal of Laws of the Kingdom of Poland, vol. 6, pp. 34–41); regulation of the Commission of the Mazovia Voivodeship of 30 January 1820 prohibiting leaseholders of government property from forcing the population to serve in the manor and from getting servants to the manor by the village leaders of particular communities (Official Journal of the Voivodeship of Mazovia, 1820, no. 203, supplement, p. 7313). For more about the peasant legislation in this period see Konstanty Grzybowski, Burżuazja a obszarnicy w państwie obszarniczo-burżuazyjnym (Z zagadnień ustroju społeczno-gospodarczego), Kwartalnik Historyczny 4–5(1956), 221–244, in particular notes 29, 32–33, 39, 56, 59, 64, 78 and 81.

[15] See Maurycy Horn, Walka chłopów..., 44–45.

in crafts and even reaching considerable wealth. However, when they were found by their former lord or his heirs – not wanting to return to their native village because they were afraid to lose a much more tolerable economic and social situation – they bought out from serfdom[16]. It should be added that fugitives before they settled, had been treated as loose people along the way, because they could not prove their affiliation, but the purpose of their flight was to finally settle down and become a serf subject to better conditions in another village or province[17].

2. ANCIENT SOURCES OF POLISH LAW

As mentioned above, the most important characteristic of serfdom was an attachment to the land, which meant that the surf could not change his place of residence without his master's permission[18], and the master could recover a wilfully fugitive serf with the help of a public authority. Cases of peasants' flight were related to the failure of a peasant to fulfill his obligations towards the landowner (also in the case of abduction) and for this reason only, the master was entitled to seek the fugitive, or possibly entitled to compensation[19].

The legislation of old Poland knows numerous regulations concerning this matter[20]. The nobility tried to prevent the flight of peasants through

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[16] For more see Stanisław Szczotka, Zwalnianie chłopów..., 278–286.

[17] See Stanisław Grodziski, Ludzie luźni: studium z historii państwa i prawa polskiego, Kraków: Uniwersytet Jagielloński, 1961, 32–33.

[18] As Józef Rafacz emphasises, "in principle, from 1496 it was prohibited to leave even for a short period of time one's village, because there was a fear that the serf would use this opportunity to escape. Therefore, on the basis of the Acts of the Polsh Republic, it was required that each peasant, whether they were going to become a servant or move to a city to learn a craft, should have a written permission from their master", Józef Rafacz, Ustrój wsi samorządnej małopolskiej w XVIII wieku, Lublin: Uniwersytet Lubelski, 1922, 122.

[19] Cf. Kazimierz Tymieniecki, Zagadnienie niewoli w Polsce u schyłku wieków średnich, Poznań: Poznańskie Towarzystwo Przyjaciół Nauk, 1933, 18–19.

[20] In Silesia, in the sixteenth and seventeenth centuries the flight became so widespread that, as Stefan Inglot emphasises, "the issue of flight and the recovery of fugitive peasants never left the agenda of the Silesian Sejm in Wrocław", Stefan Inglot, Historia chłopów..., 165.

a system of prohibitions and administrative orders. General Sejm assemblies issued constitutions aimed at hindering the movement of peasants and facilitating the recovery of fugitives. The Sejm's legislation was supplemented by *laudas* and sejmik instructions, in which the nobility postulated a significant tightening of penalties for not issuing fugitives, demanded that trials should be shortened, and that appeals should be prohibited in cases concerning fugitives and that penalties for detaining fugitives should be increased[21]. As M. Horn emphasizes, attempts were also made to reduce the wave of fugitives through internal regulations, i.e. economic instructors and village laws, which contained a number of instructions for property administrators on how to prevent peasants from escaping, set penalties for insufficient supervision, and sometimes even forced their neighbours to bail them out and in case of escape, the fugitive for whom they bailed was forced to participate in the chase[22].

As the first sources of law in the aforementioned area at that time, one should mention the statutes of Casimir III the Great, issued separately for Greater Poland (granted in Piotrków Trybunalski) and Lesser Poland (granted in Wiślica)[23], which, as W. Uruszczak stresses, "were the result of the will to reform the existing customary law"[24]. "In the light of the Stat-

[21] See Volumina Legum, vol. II, Petersburg: J. Ohryzko, 1859, 243 (hereinafter referred to as: VL2); Laudum sejmiku wiszeńskiego z dnia 14 maja 1715 r., In: Akta grodzkie i ziemskie, vol. XXII, prep. by Antoni Prochaska, Lwów: Towarzystwo Naukowe we Lwowie, 1914, 612; Laudum sejmiku ziemskiego w Haliczu z dnia 10 lipca 1774 r., In: Akta grodzkie i ziemskie, vol. XXV, prep. by Wojciech Hejnosz, Lwów: Towarzystwo Naukowe we Lwowie, 1935, 205.

[22] See Księgi sądowe wiejskie klucza jazowskiego z lat 1663–1808, prep. by Stanisław Grodziski, Wrocław–Warszawa–Kraków: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1967, 158–159; Bolesław Ulanowski, Wieś polska pod względem prawnym od wieku XVI do XVIII, Kraków: Akademia Umiejętności, 1894, 31; Maurycy Horn, Walka chłopów..., 58–59 and 192; Stanisław Szczotka, Uwagi o zbiegostwie..., 169–170. In any case, peasants were often used by masters to chase the fugitives, and often peasants on their own initiative, without a warrant, stood up against the fugitives, detained them and returned them to the court, see Stanisław Śreniowski, Zbiegostwo chłopów..., 112.

[23] See Volumina Legum, vol. I, Petersburg: J. Ohryzko, 1859, 1–24 (hereinafter referred to as: VL1).

[24] Wacław Uruszczak, "Statuty Kazimierza Wielkiego jako źródło prawa polskiego", Studia z Dziejów Państwa i Prawa Polskiego 3(1999), 103. Romuald Hube points out the

utes," W. Uruszczak further writes, "customary law descended to the level of the source of law subordinate to royal laws (statutes). It was a statute, i.e. a royal statute – judging the custom as good or bad (*bona sive mala consuetudo*) – that decided whether it was to remain in force as law"[25]. As the time when the statutes of Lesser Poland and Greater Poland were issued, Z. Kaczmarczyk quotes the years 1346–1347, indicating at the same time that their supplementation took place in 1356[26]. However, some of the acts, Z. Kaczmarczyk writes, "were published in the meantime, and even later until the death of Casimir the Great, although not all of them were included in the statutes"[27].

The Statute of Wiślica explicitly mentions *kmetones and villani*, who together constitute a class of people settled in villages, engaged in agriculture, and next to them there are so-called *incolae* (inhabitants of villages) although the Statute does not give any indication of their situation. R. Hube points out that Świętosław called them "stayers"[28]. In relation to the heirs of the village in which they settled, *villani* are called 'serfs' and the heirs of the village are called 'masters' in relation to them. "In order to prevent the devastation of property – R. Hube quotes the provisions of the Statute of Wiślica – as a result of the surfs, i.e. *kmetones* and other villagers (*cmetones aut incolae*) leaving them, it was decided at the request of the barons that at one time, without the permission of the master, no more than one or two of them may move to another village[29]. However, an exception to this rule was made in the following cases: (1) if the master of the countryside rapes the daughter or wife of a *kmeton*, (2) if peasants

difference between the Greater Poland Statute and the Wiślica Statute, see Romuald Hube, Ustawodawstwo Kazimierza Wielkiego, Warszawa: Biblioteka Umiejętności Prawnych, 1881, 75–76.

[25] Wacław Uruszczak, Statuty..., 103–104.

[26] See Zdzisław Kaczmarczyk, Monarchia Kazimierza Wielkiego. Volume I: organizacja państwa, Poznań: Księgarnia Akademicka, 1939, 86.

[27] These are the statutes on transit roads through Poland of 1344, the ordinance on tithes of 1352, the salt ordinance, the statutes on the transport of salt of 1368, the statutes on the duties of starosts of 1368–1370, see Zdzisław Kaczmarczyk, Monarchia..., vol. I, 86.

[28] Romuald Hube, Ustawodawstwo..., 111.

[29] See Antoni Zygmunt Helcel, Starodawne prawa polskiego pomniki, vol. I, Warszawa: Księgarnia Gustawa Sennewalda, 1856, 21.

are taken away from their property (bona) through the fault of the master, or finally (3) if peasants all year long are subject to a curse through the fault of their master. In these cases, not only three or four villani can leave the village, but all the people living there (*omnes inhabitantes ibidem*) and go wherever they like (art. XXXVI. 69)”[30].

According to R. Hube, ”out of the twenty-four articles in Part One of the Statute, nine of them, and therefore more than a third, set out provisions designed to provide care for the poor classes of the nation, the poor knights and peasants, and to improve their social situation. Four of them refer exclusively to *kmetones*[31], including one which lifts *puścina* (or: *pusczina*, *opusczyna*) in *kmeton* estates and therefore ensures that the relatives of a deceased childless *kmeton* receive inheritance[32], while the other increases the fine for a killed *kmeton* and allots a part of it towards his relatives[33]. It is likely that the provisions reducing accidental death and restraining the misuse of court servants when they studied corpses were mainly in favor of peasants, as they had the highest number of accidents”[34]. Moreover, also in Part Two of the Statute, *villani* has been granted more extensive legal protection than hitherto, through: (1) granting *kmetones* ⅔ of the payment for cuts, injuries or murder; 2) consent to defense in the event of assault by the servants of neighbouring masters stealing grain on a field during the night; (3) securing compensation for the destruction caused by the army; (4) regulating the cases of leaving the premises of kmetones and

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[30] Ibidem, pp. 21–22; see Romuald Hube, Ustawodawstwo..., 111. In the opinion of Stanisław Czernik, the first researcher of the history of the Polish peasantry was Szymon Starowolski (d. 1656), who, on the basis of the Wiślica Statute and the Sejm constitutions of the 16th century, tried to demonstrate the difference between the notions of serfdom and slavery, at the same time defining Poland as a “hell for peasants” (Polonia est infernus rusticorum), see Stanisław Czernik, Z życia pańszczyźnianego w XVII wieku: materiały i szkice, Warszawa: Ludowa Spółdzielnia Wydawnicza, 1955, 19–21.

[31] In the Greater Poland Statute, just as in the Wiślica Statute, the term “kmeton” is used to designate a peasant (villanus). He had a master over him, who was the owner of the village (dominus villae) in which the kmeton lived.

[32] Article LIII of the Wiślica Statute is cited in Polish by A.Z. Helcel, Starodawne..., p. 18.

[33] See VL1, 11. Article LV of the Wiślica Statute is cited in Polish by Antoni Zygmunt Helcel, Starodawne..., 18.

[34] Romuald Hube, Ustawodawstwo..., 179.

determining the cases in which the entire peasant settlement could leave the village[35]. Such a wording in relation to peasants certainly puts Casimir the Great in a good light; in order to ensure the economic prosperity of the country, he was able to take care of this social class, which had so far had been ignored. As Z. Kaczmarczyk stresses, "the law was supposed to restore the social balance, the ideal of a Christian monarch", which was reflected primarily in the legal protection of the physically weaker, i.e. women and children, and the socially weaker, such as kmetones and poorer knights[36].

However, we are most interested in the provisions of the Statute concerning the possibility of the expulsion of *kmetones* from their premises. In accordance with Article XXXIV. 134, the exit of a *kmeton* from their premises may actually only take place during Christmas, and under the following conditions: "If he had resided in a *wola* settlement and wanted to displace himself, he should serve his master (*suo domino*) as many years as he was exempted from all rents, fees, and taxes; *kmetones* subject to German law could not leave until they had paid their rent for all the years of freedom (*quot annis habebant libertatem*) and until they had replaced themselves with equally wealthy *kmetones* or until they had cultivated, grubbed up and sown their fields completely with winter cereal and vegetables[37].

However, despite the failure to comply with these conditions, the Statute provided for the possibility of escaping from one's master (a domino suo fugere), in the following cases: "1) when the lord was cursed by the church for his misconduct and for this reason the deceased kmetones could not be buried according to church rites; 2) when a lord have raped a female peasant, in which case not only the parents of the raped peasant, but all the peasants were allowed to move out (recedere), and the lord of the village could not stop them or cause them any harm; 3) when for the guilt of the lord (ob culpan sui domini) kmetones were accused (pignora fuerint ab eisdem), all the peasants could also escape (article XXXIV. 134)"[38].

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[35] See ibidem, 179–180.

[36] See Zdzisław Kaczmarczyk, Kazimierz Wielki (1333–1370), Warszawa: Wydawnictwo S. Arcta, 1948, 129.

[37] See Romuald Hube, Ustawodawstwo..., 185.

[38] Ibidem, 185.

Therefore, as we can see, the provisions of the Greater Poland Statute differ in editorial terms from the provisions of the Wiślica Statute, while the analogy concerning the purpose of the regulation was preserved[39] and both statutes supplement each other.

As far as punishment for *killing* a *kmeton* is concerned, the Greater Poland Statute set it at six *grzywnas*[40], three of which were intended for the wife or children of the killed person (if he had them) and, in the absence of offspring, those three grzywnas were passed on to the relatives (*propinqui*) of the killed *kmeton*, while the other three grzywna (residuae marchae) were paid to the master of the *kmeton*, but only if both the killer and the killed person had been settled with the same master. If they both belonged to two masters, the three grzywnas were split into two halves[41]. The inclusion of such a provision in the Statute significantly strengthened the legal position of peasants.

The statute of Greater Poland stipulated that a peasant who escaped from a village under Polish law could not legally settle down, i.e. could not conclude a legal agreement at a new place, unless his former master, knowing his new place of residence, took no steps within a year to bring him back using legal measures[42]. The fugitive who was found guilty by the

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[39] Romuald Hube points out that the characteristic feature of the Greater Poland Statute is the fact that the Statute of Wiślica usually deals with the extension of the legal care over the Peasantry and where it was possible to equalize the position of its social status with that of the higher classes, whereas Greater Poland Statute mainly deals with the insurance of the rights of the Knights in its higher, exceptional position, see Romuald Hube, Ustawodawstwo..., 220. That's what Kaczmarczyk claims: the Greater Poland Statute is "rather a law for knights, preserving their old rights, not taking care of the lower layers of the nation, leaving many crimes to be solved through family revenge and bearing the traits of archaism", Zdzisław Kaczmarczyk, Monarchia..., vol. I, 96.

[40] In old Polish law, depending on the nature of the offense, fines were usually paid with domestic coins. The best-known ones, which are already mentioned in the statute of Wiślice, include: (1) seventeenth penalty (septuaginta) – paid to the king; (2) fifteenth penalty (poena quindecim) – paid to the court and persons asserting their rights and only to the court; (3) most interesting to us, six grzywnas (sex marcarum), see VL1, 15–16; Romuald Hube, Sądy: ich praktyka i stosunki prawne społeczeństwa w Polsce ku schyłkowi 14 wieku, Warszawa: Biblioteka Umiejętności Prawnych, 1886, 234–239.

[41] See Romuald Hube, Ustawodawstwo..., 201.

[42] See Juliusz Bardach, Historia państwa i prawa Polski do połowy XV wieku, vol. I, ed. II, Warszawa: Państwowe Wydawnictwo Naukowe, 1964, 394. It should be noted that

court could free himself from his return to the village from which he had escaped by paying his master one year's rent and three grzywnas, i.e. by buying himself out. Later legislation, such as the Warka Statute granted by Władysław Jagiełło in 1423 at the General Sejm[43], provided the obligation to call on the fugitive to return for four times, and only then the possibility to have a new settler, whose was legally protected from threats from the fugitive[44]. However, the later Nieszawa Statutes (Privileges) granted by Kazimierz IV Jagiellończyk in 1454 regulated the procedure of handing over the fugitive peasants to their masters in such a way that anyone who did not return, at the request of the master, the fugitive who was staying with him paid a fine of 3 grzywnas to the court, a private fine of the same amount to the master and had to give the fugitive up.

In the cases concerning fugitive peasants, the feudal lords often signed agreements on the mutual surrender of the fugitives[45] (e.g. the agreement of Prince Siemowit III of Mazovia with the Archbishop of Gniezno of 1359) – moreover, the obligation to return the fugitive to the former master at his request resulted from the aforementioned privileges of Nieszawa. Later, for example, the Constitution of the General Warsaw Sejm of 1578 provided that the surfs who fled or violently captured were entitled to be investigated and reinstated[46]. In turn, the Constitution of the General Crown Sejm in Warsaw of 1609, mentioning the serfs who fled to the Prussian cities,

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the heir did not lose his rights to fugitives even after several decades, see Janusz Deresiewicz, Handel chłopami w dawnej Rzeczypospolitej, Warszawa: Książka i Wiedza, 1958, 178–180.

[43] Romuald Hube writes that subject of the legislative convention in Warka was: "to review the legislation remaining after King Casimir [the Great – emphasis mine, M.K.], where it seemed necessary to modify and add new regulations which were deemed necessary", Romuald Hube, Ustawodawstwo..., 84.

[44] Article XXIII of the Warka Statute is cited in Polish by Antoni Zygmunt Helcel, Starodawne..., 322–323; Cf. Kazimierz Tymieniecki, Zagadnienie niewoli..., 29–31.

[45] Conflicts between two lords over a fugitive were often resolved amicably, without a trial. Janusz Deresiewicz points out that "when it was impossible to recover a fugitive, it was even better to give him as a gift, at least it was a honourable solution", Janusz Deresiewicz, Handel chłopami..., 183.

[46] See VL2, 188.

stated that if a fugitive serf would ever be found, he should be released[47]. The Declaration of Emperor Leopold V, dated 5 July 1701, forbade the detention of serfs fleeing from Poland and Hungary, ordering them to be handed over to their masters[48]. However, aforementioned K. Tymieniecki is of the opinion that the general attachment of peasants in Poland to the land at the end of the 15th and beginning of the 16th centuries is out of the question, because it is opposed by the Constitution passed later than the Constitution of Piotrków (1496)[49], i.e. from 1501, according to which there was no universal attachment of peasants at that time[50]. W. Hejnosz points out that "probably in the opinion of the then noble society there was a feeling that the peasant is inseparably connected with the land on

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[47] See VL2, 467. Provisions related to the recovery of fugitive serfs can be found in the parliamentary instructions., see Instrukcja dana posłom na sejm z sejmiku województwa krakowskiego w Proszowicach 27 stycznia 1597 r., In: Akta sejmikowe województwa krakowskiego, vol. I, prep. by Stanisław Kutrzeba, Kraków: Polska Akademia Umiejętności, 1932, 217; Instrukcja dana posłom na sejm z sejmiku przedsejmowego województwa krakowskiego w Proszowicach 9 grudnia 1636 r., In: Akta sejmikowe województwa krakowskiego, vol. II, prep. by Adam Przyboś, Kraków: Polska Akademia Umiejętności, 1953, 217–218; Instrukcja sejmiku wiszeńskiego posłom na sejm z 15 grudnia 1651 r., 19 maja 1654 r., 28 lutego 1659 r., 23 lutego 1662 r., 15 października 1664 r., In: Akta grodzkie i ziemskie, vol. XXI, prep. by Antoni Prochaska, Lwów: Galicyjski Wydział Krajowy, 1911, 94, 154, 273, 343, 396–397; Instrukcja dana posłowi do króla z sejmiku księstw zatorskiego i oświęcimskiego w Zatorze 4 maja 1667 r., In: Akta sejmikowe województwa krakowskiego, vol. III, prep. by Adam Przyboś, Wrocław–Kraków: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1959, 171; Instrukcja sejmiku wiszeńskiego posłom na sejm z 22 sierpnia 1740 r., 23 sierpnia 1756 r. i 21 sierpnia 1758 r., In: Akta grodzkie i ziemskie, vol. XXIII, prep. by Antoni Prochaska, Lwów: Towarzystwo Naukowe we Lwowie. 1928, 199, 345, 373.

[48] See Jan Rutkowski, Studia z dziejów wsi polskiej XVI–XVIII w., Warszawa: Państwowe Wydawnictwo Naukowe, 1956, 163.

[49] The statutes of Piotrków issued by John I Olbracht in 1496, according to which one peasant and one son could be allowed to leave the village in order to pursue another profession for one year, provided that he was not the only son, see Stanisław Śreniowski, Zbiegostwo chłopów..., 76, 78–81, 83, 90–92, 96–97; Chłopskie poddaństwo..., 26.

[50] See Kazimierz Tymieniecki, Sprawa chłopska w Polsce na przełomie XV i XVI w., In: Pierwsza Konferencja Metodologiczna Historyków Polskich. Przemówienia, referaty, dyskusja, vol. I, Warszawa 1953, 309; Cf. Kazimierz Tymieniecki, Zagadnienie niewoli..., 29–31, where this author takes a stand contradicting the thesis about the existence of slavery on Polish lands in the 15th century.

which he was born. Actually, this attachment to a peasant was made on an extra-legal basis. Later, one cannot find a constitution [after the Constitution of the Seym of Piotrków of 1496 – emphasis mine, M.K.] that would clearly specify this issue, but we also know that the peasant was commonly considered to be assigned to the land”[51].

Nevertheless, in L. Kolankowski's opinion, according to the provisions of the Piotrków Sejm, the Polish nobility gained a decisive economic and, simultaneously with it, political advantage[52].

3. SEVERAL REMARKS ON THE COURT PROCEEDINGS CONCERNING THE FLIGHT OF PEASANTS

Despite all the wide-ranging legislation, there was a constant movement of people from one lord to another, which was mainly due to the oppression experienced by the peasants, and thus was dictated by the need to change the economic conditions in which the peasants were living[53]. As S. Szczotka “Initially, peasants flee *en masse* to the Crown lands, because there are no manors there, or they are small”[54]. It should also be added, however, that towns were a strong magnet for Polish peasants, al-

[51] Wojciech Hejnosz, Przypisanie chłopów do ziemi, In: Pierwsza Konferencja Metodologiczna Historyków Polskich. Przemówienia, referaty, dyskusja, vol. I, Warszawa: Państwowe Wydawnictwo Naukowe, 1953, 313.

[52] See Ludwik Kolankowski, Polska Jagiellonów. Dzieje polityczne, Lwów: Księgarnia Gubrynowicz i Syn, 1936, 154.

[53] Kazimierz Tymieniecki stresses that the term “flight” can be used only when a peasant left the land without fulfilling all the obligations or regulations and all the terms of the contract which connected him with the master of the land, while “the fact of large-scale leaving the masters' land by kmetones can be linked to the competition of hired labour, which took place both in towns and in the countryside”, Kazimierz Tymieniecki, Sprawa chłopska..., 310. Janusz Deresiewicz has a similar opinion, Handel chłopami..., 176.

[54] Stanisław Szczotka, Ocena folwarku. Przyczynki do formy oporu klasowego chłopów. Przyczynki do społecznych zagadnień reformacji, In: Pierwsza Konferencja Metodologiczna Historyków Polskich. Przemówienia, referaty, dyskusja, vol. I, Warszawa: Państwowe Wydawnictwo Naukowe, 1953, 492.

though the number of completely certain sources, confirming penetration of the peasant element into the towns, is not large[55].

Fugitive serfs or their offspring constituted the largest number of people who accepted the so-called voluntary serfdom, which in the Old Polish was referred to as "*powzdanie się*"[56]. The acceptance of servitude was in principle intended to last forever, but there were cases of „*powzdanie się*" for a more or less specific period of time[57]. Among the reasons for accepting servitude, as many as 80% of its incidents were caused by wedding female serfs[58]. As this author emphasises, "the fugitives who settled as "free" in another village, in conditions which seemed more favourable to them than before, wanted to become bound to the new environment by stronger knots, to ensure a better existence through marriage with the daughter of the settled kmeton, and after some time even entering his household, and finally to attract a stronger interest of the new master in defending himself against the possible claims of the old one"[59].

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[55] See Kazimierz Tymieniecki, Sprawa chłopska..., 311, where the author points out that a peasant moving to a town was not forced to hide his origin, because the transfer to the town was a kind of social promotion for the peasant, and it should be noted that peasants settling in smaller towns, due to the agricultural character of those towns, often continued to cultivate the land. On the other hand, however, another thesis is put forward by Janusz Deresiewicz, who claims that the runaway subjects often changed their names and surnames in order to cover their traces, because neither a royal village nor a town provided security for them. It was logical because towns did not automatically grant town rights, even after many years, see Janusz Deresiewicz, Handel chłopami..., 193–194; cf. Stanisław Szczotka, Zwalnianie chłopów..., 278–286, and the author's comments on the influence of having a profession in the town before the peasants achieved liberalisation, Stanisław Szczotka, Zwalanie chłopów..., 286–294. For more information on the flight of burghers, see Maurycy Horn, Walka klasowa..., 172–176.

[56] See Janusz Deresiewicz, Handel chłopami..., 134–135.

[57] For more ways of becoming a serf see Włodzimierz Dworzaczek, „Dobrowolne" poddaństwo chłopów, Warszawa: Ludowa Spółdzielnia Wydawnicza, 1952, 43–60.

[58] Cf. Janusz Deresiewicz, Handel chłopami..., 136–138. Włodzimierz Dworzacek analyses more widely the reasons for abandoning freedom, „Dobrowolne"..., 92–126.

[59] Włodzimierz Dworzaczek, Zagadnienie dobrowolnego przyjmowania poddaństwa w XVII i XVIII w. In: Pierwsza Konferencja Metodologiczna Historyków Polskich. Przemówienia, referaty, dyskusja, volume I, Warszawa: Państwowe Wydawnictwo Naukowe, 1953, 496.

Of course, the nobility, while gaining new hands for work, benefited from the "powzdanie się". According to W. Dworzaczek, the same landowner managed to gain even more than 40 new serfs. The remaining reasons (20%) for "*powzdanie się*", except for the ones mentioned above (80%), are cases of renouncing freedom in exchange for food or money given in the years of war disasters, for forbidding the damage caused unintentionally, overdue rents or debts[60], or in connection with obtaining forgiveness for one's misdeeds. In Poland, the mass acceptance of serfdom dates back to 1656, and the greatest intensity was in the years 1720–1730[61].

Leaving the master's land by his serfs is connected, of course, with the fact that the demesne from the very beginning of its existence had in itself negative seeds[62], which, in the opinion of S. Szczotka, resulted in the inhibition of the transition from the feudal system to the bourgeoisie system in Poland and, on the other hand, in the intensification of the peasantry's class struggle against feudalism, thus contributing to a serious threat to the existence the feudal lords[63].

It was not easy to take legal action to recover a fugitive who had run away because of the high costs of the trial[64]. Anyway, pretrial activities such as the detention[65] and arresting a fugitive were not easy. This was not the

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[60] See Janusz Deresiewicz, Handel chłopami..., 138–140.

[61] See Włodzimierz Dworzaczek, Zagadnienie..., 497.

[62] See Stanisław Hoszowski, Rola folwarku pańszczyźnianego, In: Pierwsza Konferencja Metodologiczna Historyków Polskich. Przemówienia, referaty, dyskusja, volume I, Warszawa: Państwowe Wydawnictwo Naukowe, 1953, 490.

[63] See Stanisław Szczotka, Ocena folwarku..., 491.

[64] As Jan Rutkowski writes, according to the popular opinion, trials concerning fugitives were often not even started, because either the fugitive could not be found or the trial would not pay off, Jan Rutkowski, Historia gospodarcza..., vol. I, 268; Maurycy Horn, Walka chłopów..., 43.

[65] The requisitioning of the fugitive meant an official call from the master with whom the peasant had stayed after the escape to surrender him, done by the master from whom he had fled or on his behalf. It could have had direct consequences consisting in the release of the fugitive and then ended the case without trial. Typical pre-trial activities, according to Stanisław Śreniowski, include the announcement of the trial, the so-called arrest of the fugitive peasants and the "handing over" of them to the trial, which means that the master with whom the fugitive had taken refuge would keep the peasant till the trial and deliver him to the court, see Stanisław Śreniowski, Zbiegostwo chłopów..., 157, 161, 165–166.

case when a serf fled to a nearby village – in such a case, trials were often initiated or the fugitive serf was simply brought directly to the village without the involvement of the judicial authorities[66]. It should be added that the flight of peasants was facilitated by manorial lords themselves[67], who willingly accepted refugees, which was of course connected with the need for labour force[68], but often the improvement of the fugitive's fate was only temporary because a similar fate often awaited them[69].

As far as the nature of the trial of fugitive peasants is concerned, if someone who accepted the fugitive and did not want to give him up voluntarily, obviously risked a court dispute over the release of the fugitive[70]. In addition, however, the flight of peasants also led to court case concerning peasants' flight between the manorial lord the fugitive himself, where the lord personally judged the fugitive, found him guilty and decided on the punishment; I shall discuss the types of punishment later in the article.

The parties to a flight case before a public forum case were the lord demanding the fugitive (plaintiff) and the lord requested to release the fugitive (defendant). The subject of the dispute was, of course, the peasant himself. The public fugitive dispute was of a double nature, so it was a debt

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[66] See Janusz Deresiewicz, Handel chłopami..., 185–187; Celina Bobińska, Wieś niespokojna..., 106.

[67] See Stanisław Śreniowski, Zbiegostwo chłopów..., 23–24.

[68] The practice of flight created a separate category of people called "wykotcy", who occasionally or professionally were engaged in organising escapes of peasants, what was called "wykoczowanie". These people most frequently were peasants, who originated either from villages where the fugitives went, or from former fugitives, who knew the situation in the villages. Often wykotcy provided the refugees with their own means of transport, and organized the escape most often at night. Serious penalties (including the death penalty) were imposed for taking part in the organisation of the escape of serfs, but despite this, the practice reached significant proportions, see Stanisław Śreniowski, Zbiegostwo chłopów..., 128–135; Stanisław Szczotka, Uwagi o zbiegostwie..., 121; Maurycy Horn, Walka chłopów..., 53–54; Celina Bobińska, Wieś niespokojna..., 105.

[69] See Historia chłopów..., 164.

[70] According to Józef Putek, in the middle of the 17th century fugitives found it easy to find a place where they could be received, which made it necessary to issue a special constitution on fugitive serfs from the powiat districts of the Kraków Voivodeship, in the light of which the nobleman who employed a serf who was a stranger at his place risked a trial and paying compensation of 1000 grzywnas for accepting each fugitive peasant, Józef Putek, Miłościwe pany..., 94–96.

collection process concerning the fugitive, and on the other hand, it was a lawsuit against the lord of the manor where the fugitive settled after his escape[71]. One should remember, however, about the earlier competence of the patrimonial forum in cases concerning the flight of peasants[72], where the dispute was between the master from whom the peasant had escaped and the peasant, which meant that in this case the peasant was a party to the dispute. However, when the flight case appeared at the public forum – when the patrimonial court in the village where the fugitive was staying did not take into account the claims of his former master; in that situation, the position of the parties in the dispute before the land court was taken by the manorial lords and the peasant became the subject of the dispute[73].

In addition to criminal penalties that affected the life and health of the serf[74], a civil penalty was also imposed on the fugitive, harming his property. In principle, in accordance with the lord's decision, a fleeing serf was exposed to the risk of confiscation of his movable and immovable property[75]. As J. Rafacz emphasises, despite the harsh regulations, the practice was gentler, because neither the punishment of the gallows was applied nor the assets of the escaped peasant were always confiscated. In the worst case, his farm was taken away from him and his children, and handed over to his closest relative, thus recognizing the right of the family to the land that

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[71] See Stanisław Śreniowski, Zbiegostwo chłopów..., 177.

[72] It is also important to remember about the Peasant Courts of Appeal in most Crown Starosties. These courts met at the royal court at the place where the king was staying. Such a court issued criminal acts for rural courts in the royal estates, see Ignacy Tadeusz Baranowski, Sądy referendarskie, Przegląd Historyczny 1(1909), 82–96.

[73] For more on the competition of the competencies of public courts and patrimonial courts in peasant flight cases see Stanisław Śreniowski, Zbiegostwo chłopów..., 178–181, 190–204; Stanisław Szczotka, Uwagi o zbiegostwie..., 124–125; Kazimierz Tymieniecki, Sądownictwo w sprawach kmiecych a ustalanie się stanów na Mazowszu pod koniec wieków średnich, Poznań: Księgarnia Gebethner i Wolf, 1922, 6–13, 127–171. The forum agenda was often included in parliamentray instructions, see Instrukcja sejmiku wiszeńskiego posłom na sejm z 16 grudnia 1682 r., In: Akta grodzkie i ziemskie, volume XXII, prep. by Antoni Prochaska, Lwów: Towarzystwo Naukowe we Lwowie, 1914, 166.

[74] See Księgi sądowe wiejskie klucza jazowskiego..., 158–159; Historia chłopów..., 165; Stanisław Szczotka, Uwagi o zbiegostwie..., 156–157.

[75] See Józef Rafacz, Ustrój wsi..., 125–126; see Stanisław Szczotka, Uwagi o zbiegostwie..., 155–156; Kazimierz Tymieniecki, Sądownictwo..., 145.

had been taken away[76]. Of the penalties applied against captured fugitives, prisons and shackles should be highlighted, in addition to forced labour, as they were often administered[77].

4. WAYS TO LEAVE A VILLAGE OTHER THAN FLEEING

Obviously, peasants did not only flee or use "*wychodzenie*" [walking away][78], or were abducted[79], but also left villages when they were expelled against their will ("wyświecenie"), which was usually a punishment applied to thieves or persons who were accused of offenses against morals (rural harlots)[80], or through sale. However, as J. Rafacz points out, the right to sell peasants should be understood in two ways. Firstly, one can sell a peasant with land and a cottage, "where he stays for a new owner", or secondly, "one gets rid of a peasant himself, separating his legal personality from the real estate". A peasant can either be sold with his land and house,

[76] Księga gromadzka wsi Golcowa z lat 1618–1744, In: Księgi sądowe wiejskie, vol. I, Starodawne prawa polskiego pomniki, vol. XI, prep. by Bolesław Ulanowski, Kraków: Polska Akademia Umiejętności, 1921, 614–615; Księga gromadzka wsi Lubcza z lat 1457–1603, In: Księgi sądowe wiejskie, vol. II, Starodawne prawa polskiego pomniki, tom XII, prep. by Bolesław Ulanowski, Kraków: Polska Akademia Umiejętności, 1921, 216; Księga sądowa Uszwi dla wsi Zawady z lat 1619–1788, prep. by Adam Vetulani, Wrocław: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1957, 195–198, 203–204, 209–210, 215–216, 218–220; Księgi sądowe wiejskie klucza *łąckiego* z lat 1744–1811, prep. by Adam Vetulani, Wrocław–Warszawa–Kraków: Zakład Narodowy im. Ossolińskich Wydawnictwo Polskiej Akademii Nauk, 1963, 30–31, 70–71; Księga sądowa wsi Iwkowej z lat 1581–1809, prep. by Stanisław Płaza, Wrocław–Warszawa–Kraków: Zakład Narodowy im. Ossolińskich, 1969, 148–149; Ignacy Tadeusz Baranowski, "Ze studiów nad dziejami agrarnymi Polski. Stosunek chłopa do ziemi we wsi Małopolskiej w ostatnich wiekach Rzeczypospolitej", Przegląd Historyczny 1(1912), 61.

[77] See Józef Rafacz, Ustrój wsi..., 126.

[78] Sometimes the manor house did not make it difficult for peasants who were not subject to serfdom to leave their village to earn their living. So the peasants did not run away, but simply "went out" to earn money and usually came back after the summer work season, after a year or several years, see Stanisław Śreniowski, Zbiegostwo chłopów..., 89–92; Celina Bobińska, Wieś niespokojna..., 98–99.

[79] See Maurycy Horn, Walka chłopów..., 55–56.

[80] See Jan Rutkowski, Studia z dziejów..., 163–164; Józef Rafacz, Ustrój wsi..., 84.

or only the peasant is removed, detaching his legal personality from his property[81]. In the latter case, the peasant fell into the category of things, “objects which are freely disposed of with the application of certain legal provisions only, changing according to the era, economic conditions and race”[82]. It should be noted that the alienation of peasants took place in Poland mostly in the form of donations, whereas the object of the donations is peasants with or without land, and in the latter case the peasants are disposed of both without families and with families. However, in most cases the person who was sold a peasant without any immovable property[83].

As J. Deresiewicz noted, the transfer (donation or resignation) could have been either a donation or an actual sale, because “in old Polish law less importance was attached to the issue of remuneration, while what was put in the foreground was the fact whether the transaction was perpetual or temporary. A less important issue was whether it was a sale (*traditio seu venditio*), a donation (*donatio*) or exchange (*commutatio*); these terms were used side by side in the same sense. By way of contrast, eternity and hereditability were emphasised”[84]. The author also points out that the form of the donations in question was often based on payment (remuneration), which is an argument that peasants were nevertheless sold and that the boundaries between donation and sale were sometimes fuzzy[85].

As for the monetary value for which surfs were sold (*taxa capitis*), J. Deresiewicz states that “this taxa for a male peasant was 120 grzywnas, which was an equivalent of 192 zlotys, and for a woman 60 grzywnas, i.e. 96 zlotys”, while depending on the region these *taxa* were lower (e.g. 100 and 50 grzywnas)[86]. However, payment in money by a surf was not a rule, because often remuneration took the form of remuneration in kind, such as various types of objects, livestock or even services in the form of e.g. renovation of a building[87].

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[81] Józef Rafacz, Ustrój wsi..., 94.
[82] Ibidem, 95.
[83] See ibidem, 97–98; Józef Putek, Miłościwe pany..., 96.
[84] Janusz Deresiewicz, Handel chłopami..., 210–211.
[85] See ibidem, 217.
[86] See ibidem, 228.
[87] See ibidem, 245–248.

Apart from the forms of payment for surfs mentioned above, there were, of course, non-cash transactions, i.e. a form of exchange of surfs ("a head for a head"), but sometimes some objects or livestock were added as compensation for the price for people[88]. In addition, what also happened was that surfs were lent – especially those specializing in some kind of work, leased with land, and pledged as a security for a cash loan, usually for a period of one year, where the peasant was a security (guarantee) for the return of this loan[89]. However, in all the cases mentioned above (sale, donation, exchange), a peasant who was the subject of the transaction ultimately often opted for an escape, which he saw as the only way to improve his material and economic situation, and often also his legal situation.

5. CONCLUSION

To conclude the discussion above, a number of key issues need to be addressed. First of all, it should be remembered that among the causes of peasants' flight from the power of feudal lords were both material considerations (poverty and various kinds of injustice suffered from the feudal lord) and those resulting from economic nature, i.e. a natural desire of a human to improve his or her economic situation. Both types of these causes should be treated as forms of social struggle of a class character and constitute a form of resistance to the system of feudal power and are thus subject to academic analysis. Secondly, it should be emphasized that despite the existence of broad legislation aimed at curbing the practice of becoming a person fleeing one' manorial lord, it did not diminish in the following centuries, but was even becoming more widespread, resulting in more detailed and repressive legal regulations relating to the problem of the flight of peasants, often being an expression of the personal legislation of the feudal lord[90]. Thirdly, attention should be paid to the modest amount of re-

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[88] See ibidem, 258.

[89] See ibidem, 259–273.

[90] It should be remembered that the manorial lord was a legislator and a judge, a guardian of the serfs and the holder of administrative, law enforcement and executive powers. He issued lord's ordinances, which appear e.g. in Kasina books (the village of Kasina) – the oldest gromada books dating back to 1513, under the name of statutes or de-

search conducted so far into the nature of the trial of fugitive peasants, and in particular to the procedural forum in court cases concerning the flight of peasants[91], which is, however, an excellent field of research for further legal analysis of the issue of the flight of peasants in the old Poland.

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crees. Next to them, gromadas issued the following collection resolutions, see Bolesław Ulanowski, Wieś polska..., 14–15, 20–21.

[91] In addition to the research made in this area years ago by Stanisław Śreniowski, Zbiegostwo chłopów..., 171–204, these threads were only discussed in the study by Aniela Kiełbicka, where the author presented interesting source material in the form of a table containing 1649 cases of flight in the area of the Kraków Voivodeship in a selected period. In a tabular list, the author included a topography of property territories according to their belonging to historical administrative units from which peasants fled, quoted the names and surnames of the owners and lease-holders of property and the names of the peasants who fled (their origin, family ties, status in the social structure of the village, etc.), as well as information about the towns to which a given peasant fled and the ownership of the village to which he fled, see Zbiegostwo chłopów w województwie krakowskim na przełomie XVI i XVII wieku, prep. by Aniela Kiełbicka, Wrocław: Zakład Narodowy im. Ossolińskich, 1989, 37–155.

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COOPERATION BETWEEN INSTITUTIONS OF THE EUROPEAN UNION AND ITS MEMBER STATES IN THE CREATION OF CLIMATE PROTECTION POLICY

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ABSTRACT

The climate policy is a complex area of cooperation between Member States and the European Union institutions. The ambitious goals that the EU sets for itself in this matter are not always possible to be met by all Member States, hence the ability to work out compromise solutions is of great importance. Member States have various internal conditions, which determine the objectives of their economic and energy policies, therefore they do not always have convergent interests in this area.

The decision-making centre where the EU climate protection policy is created is: the European Council, where key elements of this policy are agreed (such as reduction targets), and the so called an 'institutional triangle', i.e. the EU Council, European Parliament and European Commission which are directly involved in the legislative process. This configuration is a platform where cooperation of the Member States manifests itself in various forms and intensity and where those countries may attempt to force their interests in the process of creating the EU policy.

The article presents the legal bases of the European Union's competences in the field of the climate policy and the role of the EU institutions in its creation with particular focus on mechanisms that allow Member States to influence the shape of that policy.

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Key words: Climate protection policy, conclusions of the European Council, conferred competences, the European emission allowance trading system (EU-ETS), institutional triangle, pre-emption effect, shared competences.

1. INTRODUCTION

The leader's position in tackling climate change, to which the European Union aspires, requires not only efficiency in negotiating ambitious international agreements but also a strong commitment to build foundations for their implementation at the internal European level with the necessity to consider fairly different levels of development and divergent interests of 28 Member States.

Those objectives have been framed in diverse timelines and action plans combining various targets and tools. A key element and, at the same time, a tool for achieving the objectives of the EU climate protection policy is the European emission allowance trading system in which the EU has developed the largest global market of allowances for emissions of carbon dioxide, a greenhouse gas of the highest significance. The consequences of the climate policy may also be seen in other areas of the EU policy, for instance in the promotion of the use of renewable energy sources by the Member States, the energy efficiency policy, the promotion of electromobility, etc. This has created a specific model of integration of diverse policies subordinated to the need to achieve the set greenhouse gas emission reduction targets[1].

The current EU action plan in the field of promotion of the so-called low-emission economy provides that by 2050 the EU should reduce green-

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[1] The EU climate protection policy model corresponds with the general concept of environmental policy integration within which various policies are functionally interconnected. The main strand of this policy involves the commitment to reach a goal consisting in the limitation of greenhouse gas emissions in the economy, the limitation of the use of fossil fuels and the efficient consumption of energy and environmental resources. Moreover, the achievement of those objectives is supported by relevant investment projects and the financial policy of the EU Funds, which is integrated with them. For more on this issue see David Langlet and Said Mahmoudi, *EU Environmental Law and Policy,* Oxford University Press, 2016, 58–61.

house gas emission levels by 80% as compared with 1990. This objective is to be achieved by means of mid-term reduction targets of 40% by 2030 and of 60% by 2040. The European Union programme also provides that the reduction targets will be achieved by the whole economy of its Member States and all its sectors[2].

The climate protection policy objectives are developed by the EU at the international level within the framework of the Convention on Climate Change, the Kyoto Protocol (subsequently modified by the Doha Amendment), the Paris Agreement, as well as within the internal EU policy where the objectives related to combating climate change are one of the key elements of the EU's environmental policy as defined in Art. 191 Paragraph 1 of the TFEU. International commitments in the field of climate protection (i.e. the commitment to achieve emission reduction targets, to conduct systematic inventories of antropogenic emissions) undertaken by the EU and its Member States translate into the development of the EU and national policies aimed at the mitigation of and adaptation to climate change.

One of the EU's most advanced instruments designed in order to meet its global commitments on reduction greenhouse gas emissions is the Emissions Trading System (EU ETS)[3] created in 2003 on the basis of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community[4]. This has applied market solu-

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[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Roadmap for moving to a competitive low carbon economy in 2050, COM(2011) 112 final, also Jos Delbeke, Peter Vis, EU climate leadership in a rapidly changing world (in:) EU Climate Policy Explained, Jos Delbeke, Peter Vis, eds., European Union 2016: 21, see https://ec.europa.eu/clima/sites/clima/files/eu_climate_policy_explained_en.pdf .

[3] Henri de Waele, 'Leyered Global Player. Legal Dynamics of EU External Relations', Springer, Berlin Heidelberg 2011: 91. However, it should be noted that the EU ETS is defined by the EU legislation and operates independently from the actions of other parties of the Climate Convention, underlining the EU commitment to tackle climate change. The EU ETS does not have an end date and continues beyond deadlines for the implementation of obligations under international agreements.

[4] Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ [2003] L 275/32 (as amended).

tions such as „cap and trade" scheme to induce entrepreneurs to reduce carbon dioxide emissions.

Even this brief description already indicates that the climate protection policy created at the EU level imposes significant constraints and financial effects on the Member States, especially on their economies and societies[5].

The climate protection policy created by the EU is not an area of easy cooperation between the EU institutions and its Member States; quite on the contrary, in this regard, there are many areas where disputes arise. One of such areas entails the long- and medium-term objectives which the EU has declared in respect of greenhouse gas emission reductions. Another area involves the effect of the European Union policy on the energy security of the Member States and the right to decide on the use of energy resources, as well as the principles on the basis of which emission allowances are allocated as part of the above-mentioned EU emission allowance trading system. The Member States also oppose the so-called carbon leakage caused by the transfer of production in energy-intensive sectors to other countries where less restrictive emission reduction policy is in effect.

The broad compromise concerning in these matters among Member States is difficult to achieve and certain measures are adopted despite an objection from some of them, while the failure to consider the reservations voiced by them sometimes causes the Member States to take legal action against the EU legislator.

2. THE EUROPEAN UNION'S COMPETENCE IN THE FIELD OF CLIMATE PROTECTION POLICY

The EU's competence derives from the principle of conferred competences, which is laid down in Article 5 of the TEU. In accordance with this principle, the EU acts only within the limits of the competences conferred upon it by the Member States in the Treaties and exercises them to achieve

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[5] For more on this issue see Janina Ciechanowicz-McLean 'Prawne problemy umów międzynarodowych z zakresu ochrony klimatu' ['The Legal Problems of International Agreements on Climate Protection – in Polish] Gdańskie Studia Prawnicze 26 (2015): 115–116.

the objectives set out in them. All the competences which have not been conferred upon the European Union remain with the Member States. In turn, the manner of exercise of the EU's competences is governed by the principles of subsidiarity and proportionality, which limit the freedom of the EU legislator in the lawmaking process[6]. It is important to note that both the European Union and its Member States have shared competence to formulate the objectives and assumptions of the environmental policy as well as the climate protection policy, which is part of the former policy (the area of shared competences)[7]. Thus, in light of Article 2(2) TFEU, both the EU and the Member States may legislate and adopt legally binding acts in a given area. However, the Member States may exercise their competence only to the extent that the EU has not exercised its competence. Indeed, competences are not divided between the EU and the Member States in accordance to specific areas but they are delineated functionally, meaning that in regulatory terms the Union occupies those areas that are necessary to achieve the objectives laid down in the Treaties and indispensable for the implementation of the tasks of the European Union. Thus, the exercise of the shared competences by the Union means that the competences of the Member States are diminished, leading to their loss[8] (the so-called pre-emption effect).

The Treaty has not laid down a sectoral division which would indicate which environmental issues fall within the EU competence and which are subject to the Member States' competence. There is no such division, either, in the sphere of the climate protection policy. Moreover, the EU climate policy does not derive from the climate policies created in the

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6 Thus eg Sacha Garben and Inge Govaere, eds., The Division of Competences Between the EU and the Member States. Reflections on the Past, the Present and the Future, Hart Publishing, 2017, 6 and the literature cited there.

7 Art. 4 of the TFEU indicates that shared competences are neither exclusive competences laid down in Art. 3 of the Treaty nor the supporting, coordinating and complementary competences laid down in its Art. 6.

8 Przemysław Saganek, 'Komentarz do Art. 2 TFUE' ['A Commentary on Art 2 TFEU'] In: Traktat o funkcjonowaniu Unii Europejskiej. Komentarz [The Treaty on the Functioning of the European Union. A Commentary – in Polish] vol I arts 1–89 [online] Wolters Kluwer Polska, 2012 and the literature cited there <http://sip.lex.pl/#/komentarz/587327076/124516>.

Member States. It is the policy created by the EU that shapes the internal policies of the Member States[9]. Although the Member States are involved in policy making through the participation of their representatives in decision-making bodies and centres, still the policy created by the EU does not derive from national policies. The Member States only adapt to the objectives of the EU policy which penetrates into the policies of the Member States and shapes them through its increasingly strict and direct application[10].

It is at the EU level that the greenhouse gas reduction target is set for the Member States, the EU legislator also sets the greenhouse gas emission ceilings for the particular Member States with respect to the sectors which are not subject to the EU regulations on the emission allowance trading system (the so-called non-EU ETS sectors)[11] and also sets the standards for the share of energy from renewable sources in the energy mix of those Member States.

However, the 'Europeanisation' in its fullest dimension manifests itself in the assumptions of the emission allowance trading system (the so-called EU ETS) which was established under Directive 2003/87/EC[12]. The EU regulations have come to dominate this area of the climate policy, with a large share of the EU Regulations, i.e. the regulations directly effective

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[9] Robert Ladrech, 'Party politics and EU climate policy' in S Minas and V Ntousas, eds., EU Climate Diplomacy. Politics, Law and Negotiations, Routledge, 2018, 14.

[10] However, this feature is not specific to the climate policy only. Similar conclusions may be drawn for the environmental policy of the European Union. A substantial part of the Member States only adopt the minimum measures of environmental protection which the EU law requires from them, without going beyond these requirements (so-called *gold-plating*). See eg Ludwig Krämer, EU Environmental Law*,* Sweet&Maxwell, 2016, 384–385.

[11] These sectors include, inter alia, transport, agriculture and the municipal and housing sector. The national emission allocations were set for the greenhouse gas emissions from these sectors by the Commission Implementing Decision of 31 October 2013 on the adjustments to Member States' annual emission allocations for the period from 2013 to 2020 pursuant to Decision No 406/2009/EC of the European Parliament and of the Council [2013] OJ L292/21.

[12] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32 (as amended).

and applicable in the national legal regimes. In addition, bearing in mind the fact that this system covers almost all the economic sectors of the Member States, including the energy sector, which in the case of certain countries is responsible for more than 70% of national carbon dioxide emissions, it must be concluded that the national policy on climate change mitigation in this area does not practically play any major role as it has been dominated by the EU policy.

It may also be noted that the EU climate policy is not always created by a consensus. Quite often its objectives reflect preferences of relatively powerfull European countries which influence the EU decisions taken at different levels[13].

The main decision-making centre where the EU climate protection policy emerges is the so-called institutional triangle, consisting of the Council of the European Union, the European Parliament and the European Commission. In this field, the European Council plays a significant role, too. Together with the Council of the European Union, it forms an intergovernmental core of the EU. The operations of those institutions provide, at the same time, a platform on which the Member States cooperate in various forms and with varied intensity.

Activity of the European Council in the Creation of the Climate Protection Policy

The position of the European Council as an EU institution is laid down in Article 13(1) and 15 of the TEU. In accordance with Article 15(1) TEU, the European Council gives the Union the necessary impetus for its development and defines its general political directions and priorities. The very composition of the European Council somehow implies the need for the Member States to cooperate among themselves and reach consensus when taking decisions.

The Members of the Council are *ex officio* the Heads of State or Government of the Member States (Article 15(2) TEU)). Its composition also includes the President of the European Council and the President of the

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[13] Robert Ladrech, Party… 14.

Commission, but – as persons who do not represent the Member States – they do not part in voting[14].

Those attributes make it possible for the European Council to determine key issues of strategic importance for the European integration and, as is often the case, problematic matters which have turned out to be politically too sensitive for the ministers making up a specific formation of the EU Council, e.g. fundamental decisions of the economic and monetary union, common foreign and security policy, as well as in matters in respect of which the EU Council has no horizontal coordination or when detailed issues going beyond the sectoral divisions need to be agreed[15]. Sometimes a decision of the European Council is needed to overcome an impasse in the decision-making process in the EU Council with regard to important issues related to the European integration[16].

The so far-reaching competences of a political nature do not mean the corresponding legislative competences since the Treaty confers them upon the Council or the Council acting together with Parliament. Therefore, in principle, the European Council may not participate in the legislative process[17].

On the basis of those general competences laid down in Article 15(1) TEU, formally non-binding political decisions[18] are taken which are called

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[14] The case is familiar for the High Representative of the Union for Foreign Affairs and Security Policy who takes part in the sessions of the European Council.

[15] Kamil Ławniczak, Rada Unii Europejskiej. Organizacja i sposób działania [The Council of the European Union. Organisaton and the Mode of Operation – in Polish] University of Warsaw, 2014, 58; Neill Nugent, The Government and Politics of the European Union, Palgrave Macmillan, 2010, 163–165.

[16] Anna Doliwa-Klepacka and Zbigniew M. Doliwa-Klepacki, Struktura organizacyjna (instytucjonalna) Unii Europejskiej [The Organisational (Institutional) Structure of the European Union – in Polish] Temida, 2009, 84.

[17] In the area of the police and judiciary cooperation in criminal matters and in the area of social security, the European Council may exceptionally – at the request of the Member States – be involved in the process of negotiations on a given legal act.

[18] It should not be confused with legally-binding decisions stated (e.g.) in Article 22 (1) and Article 26 (1) TEU.

[19] Although the provisions of the conclusions of the European Council are formally non-binding they oblige the institutions, in particular the EU Council, to act in accordance with them. Thus Jarosław Sozański, Prawo Unii Europejskiej [The Law of the Europe-

'conclusions of the European Council'. In certain cases (e.g. in matters related to the European integration), those are 'guidelines'. Although the legal effect of those conclusions is not obvious[19], this body has the right to adopt a position on practically all the issues related to the European integration and to take decisions in these matters, also in the form of legally binding political decisions to conclude international agreements of the EU. Pursuant to Article 22(1) TEU, the European Council is one of the main decision-making bodies as part of the common foreign and security policy and takes decisions in that matter, while pursuant to Article 21(2)(f) TEU, one of the objectives of this policy is to help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

Given the manner in which the European Council takes political decisions, those that are taken at its level must express a common position of all the Member States. It is all the easier for the European Council to reach such consensus as usually its decisions only concern matters of a general nature for which it is often much easier to reach a common position of the Member States than later when they work on detailed provisions of a draft legal act at the level of the EU Council.

The European Council is quite active in the scope of the environmental policy, especially in the field of air and climate protection. A review of its conclusions adopted in recent years indicates a number of significant decisions which the representatives of all the Member States managed to agree[19]. In addition, it should be noted that apart from strategic decisions,

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an Union – in Polish] Iuris, 2010, 87. Other authors indicate that as the European Council does not directly participate in the EU legislative process it has no competence to adopt independent and generally applicable legal norms. Thus, for instance, Aleksandra Szczerba-Zawada, 'Funkcje Rady Europejskiej w sferze unijnej władzy ustawodawczej' ['The Functions of the European Council in the Sphere of the EU Legislative Power' – in Polish] Przegląd Sejmowy 114(2013): 49.

19 See European Council conclusions (2004 – to date) https://www.consilium.europa.eu/register/en/content/out/?typ=SET&i=ADV&RESULTSET=1&DOC_ID=&DOS_INTERINST=&DOC_TITLE=&CONTENTS=&DOC_SUBJECT=CONCL&DOC_DATE=&document_date_single_comparator=&document_date_single_date=&document_date_from_date=&document_date_to_date=&MEET_DATE=&meet-

e.g. those that laid down the 2030 climate and energy policy framework[20], including the key decision in this respect – indicating the greenhouse gas emission reduction target for all the Member States, the European Council adopted a number of detailed arrangements to improve the emission allowance trading system, which has been recognised to be the main European instrument to achieve the reduction targets[21].

However, essentially the political priorities in the sphere of the climate protection policy, which are set in the provisions of the conclusions of the European Council retain a general direction-setting nature. In its conclusions of 17 and 18 December 2015, the European Council invited the Commission and the Council to assess the results of COP 21, in particular in view of the 2030 climate and energy framework and to prepare the next steps. The Council also called on the Commission to swiftly submit legislative proposals to ensure the full implementation of the legislation on renewable energy and energy-efficiency and the preparation of an integrated strategy for research, innovation and competitiveness[22].

In turn, in its conclusions of 22–23 June 2017, the European Council reaffirmed the commitment of the EU and its Member States to swiftly and fully implement the Paris Climate Agreement on climate, expressed its support for the idea of the EU leading in the fight against climate change and undertook to finance actions to protect the climate. It obliged the EU and its Member States to strengthen the cooperation with their inter-

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[20] The European Council laid down the 2030 climate and energy policy framework in its conclusions of 23–24 October 2014. See https://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf.

[21] The European Council formulated guidance on the principles of the allocation of emission allowances to installations in the energy sector and announced that it would introduce the so-called market stability reserve. The Council presented its guidelines for the European Commission on the development of instruments and measures for technology neutral reduction of emissions from transport. It also announced that it would establish the policy on how to include land use, land use change and forestry into the 2030 greenhouse gas mitigation framework and also set a target of at least 27% for the share of renewable energy consumed in 2030 in the EU.

[22] https://data.consilium.europa.eu/doc/document/ST-28-2015-INIT/en/pdf.

national partners under the Paris Agreement, in particular with the most vulnerable countries, and also called on the Council and the Commission to examine all means to achieve those goals[23].

In its conclusions of 22 March 2018, it invited the Commission to present by the first quarter of 2019 a proposal for a Strategy for long-term EU greenhouse gas emissions reduction in accordance with the Paris Agreement, taking into account the national plans[24]. In turn, in its conclusions of 13-14 December 2018, following the presentation of the Commission Communication 'A Clean Planet for All' and taking into account the outcome of the United Nations Framework Convention on Climate Change, 24th Conference of the Parties in Katowice, the European Council invited the Council to work on the elements outlined in the Communication and undertook to provide guidance on the overall direction and political priorities in the first half of 2019, to enable the Union to prepare a long term strategy by 2020 in line with the Paris Agreement[25].

Even the guidelines of the European Council in the matters related to the European integration include a strand of the protection against climate change. The guidelines adopted in March 2018 on the conditions of the withdrawal of the United Kingdom of Great Britain and Northern Island indicated that the future partnership with the United Kingdom should address global challenges, in particular those in the areas of climate change, sustainable development and transboundary pollution in which the EU and the UK should continue their close cooperation.

The European Council continuously demonstrates its interest in the EU policy on climate protection. As indicated by the examples given above, the European Council is quite active in setting the policy directions and priorities in this field. Sometimes the European Council not only indicates the strategic goals in this field but also takes a position on certain detailed issues, e.g. the ways of improving the EU emission allowance trading system.

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[23] https://data.consilium.europa.eu/doc/document/ST-8-2017-INIT/en/pdf.

[24] https://data.consilium.europa.eu/doc/document/ST-1-2018-INIT/en/pdf.

[25] https://data.consilium.europa.eu/doc/document/ST-17-2018-INIT/en/pdf.

The Role of the Council of the European Union and Member States' Interests to Influence the Council's Decisions in the Process of Creation of the Climate Protection Policy

The Council of the European Union holds a central position in the institutional system of the European Union. The Treaties have conferred upon it competences in the scope of legislation, budget, policy creation, control and international relations. It is a body which deals with all the EU policies, including its environmental policy, which for many years has included the policy on climate change mitigation.

The Council of the European Union is a platform for negotiations among the Member States and, at the same time, the main centre of power in inter-institutional arrangements. The Presidency of the Council plays a key role in working out a compromise solution[26].

The Council of the European Union is a body where the interests of the particular Member States clash to the greatest extent. The members of the Council, designated by the national governments, represent, on the one hand, the interests of the respective Member States and, on the other, take decisions as the legislative body of the EU, seeking to serve a common interest.

The legislative function of the Council of the European Union is of key importance for its creation of climate protection policy.

Although the Council legislates in response to a proposal from the Commission, nevertheless the legislative proposals of the Commission are only the beginning of a long process of negotiations which are crowned by a vote on the adoption of a given legal measure. In many cases the Council has to assess the Commission proposals considering the economic situation of the Member States as well as their ability to achieve expected regulation objectives. It also assesses the adequacy, scope and effects of the

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[26] After the entry into force of the Lisbon Treaty the Presidency of the Council operates in a system of 18-month terms held rotationally by specified groups of three countries. This solution contributes to building a more consistent and more effective strategy of the European Union in a given field, to developing compromise solutions and to processing draft normative acts.

solutions which are adopted. In this way, it verifies to a certain extent the priorities of the policy pursued or the manner of their implementation.

The Council of the European Union has the right to ask the Commission to carry out any analyses which it deems desirable for the achievement of common goals and to submit any relevant proposals. In this way, the Council can force the Commission to submit a proposal for the adoption of a legal measure in a matter on which, in its opinion, action needs to be taken.

The EU Council is not an autonomous body as the Ministers of whom it is composed follow the instructions adopted by the governments of the Member States and are accountable to them. They are also accountable to their national Parliaments[27]. Due to this dependence, the decisions taken by the representatives of the Member States in the EU Council are influenced by the current policy of the government of a given Member State and the political priorities it implements. Nevertheless, the overriding goal is to reach consensus and seek a compromise solution. This is the duty of both the States which support the adoption of a given measure and those that oppose it. Therefore, the Council decisions may be characterised as efforts to respect the national interests of the Member States, on the one hand, and, on the other hand, those seeking to serve a common interest.

The process of agreeing the contents of legal acts often reveals that the interests of the respective Member States do not always coincide and compromise solutions need to be worked out. It should be noted that although the need to reach consensus dominates the negotiations in the Council, following the principle *nihil novi sine communi consensu*, in the case of measures adopted to protect the climate, objections voiced by some Member States are not always taken into account. Sometimes the wish to swiftly adopt a measure outweighs the need to respect the interests of all the Member States as fully as possible. Such a situation took place in the

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[27] Cezary Mik, Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki [European Community Law. Issues of Theory and Practice – in Polish] C.H. Beck, 2000, 17. The EU Council, as the body composed of representatives of the Member States' governments, enables those governments to play an important role in shaping the EU position in most of the matters that the EU deals with. See Neill Nugent, Unia Europejska. Władza i polityka [original English title The Government and Politics of the European Union] Wydawnictwo UJ, Kraków 2012, 177.

case of the vote on the Decision of the European Parliament and of the Council concerning the establishment and operation of a market stability reserve for the EU greenhouse gas emission trading scheme and amending Directive 2003/87/EC[28], which was adopted in spite of objections of certain Member States.

In the matters of the EU climate policy, the Council essentially takes decisions by a qualified majority of votes as part of the so-called ordinary legislative procedure. The essence of this procedure is that decisions are taken jointly by the Council and the European Parliament after consultations with the Economic and Social Committee and the Committee of the Regions. This decision-making procedure is of basic importance in the adoption of measures in the field of the UE climate protection policy (Article 191, in conjunction with Article 192(1) TFEU). Although this procedure enables the adoption of a given act by the decision of a majority, it is quite generally held that in the legislative practice the States should seek to fully agree to adopt a given measure[29].

It should also be noted that in the field of the environmental policy, the Treaty has laid down the above requirements for certain categories of legal measures adopted by the European Union (Article192(2)). Those requirements are reflected in the special legislative procedure which is reserved, inter alia, for the EU measures that would significantly affect the energy mix of a Member State and which requires a unanimous decision of the EU Council. In the special legislative procedure, the EU Council is the main legislator which adopts a legal act unanimously in response

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[28] Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC [2015] OJ L264/1. The main points of contention among the States were objections to amendments proposed by the Parliament with a view to introducing the reserve in question 2 years earlier and the doubts, which had not dispelled during the legislative process, as to the choice of the Treaty basis for the adoption of that Decision (some States claimed that the correct basis for this legal measure should be Art. 192(2)(c) TFEU, given the fact that the introduction of the market stability reserve may significantly affect the energy mix in certain Member States).

[29] Thus Maria Kenig-Witkowska, ed., Adam Łazowski and Rudolf Ostrihansky, Prawo instytucjonalne Unii Europejskiej [The Institutional Law of the European Union – in Polish] C. H. Beck, 2017, 115.

to a proposal of the Commission after consultations with the European Parliament, the European Economic and Social Committee and the Committee of the Regions[30].

It is important to note, too, that to date the legal acts which have created the EU climate protection policy have been adopted in the ordinary legislative procedure. The acts expected to contribute to a change in the energy mix of a Member State, e.g. the Directive on the promotion of energy from renewable energy sources, have also been proceeded in the ordinary legislative procedure rather than in the special legislative procedure[31]. Perhaps this situation may be explained by the tendency to enhance the role of the European Parliament in the process of creating the EU environmental policy, still it should be emphasised that this detracts from the powers of the Council and partly from the rights of the members of the Council, i.e. the representatives of the Member States.

In the special legislative procedure the role of a single Member State is growing, since an act of the Union may only be adopted by a unanimous

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30 It seems that the assignment of the legislative function to the Council, combined with the requirement for unanimity, should be associated with the division of competences under the EU energy policy in accordance with which the Member States have the right to determine their energy mix (see Art. 194(2) second indent TFEU).

31 The Directive on renewable energy sources laid down binding targets on renewable energy for the respective Member States to be attained by 2020 (the target for Poland is 15%). It is deemed that with respect to the countries for which the highest targets have been set one can speak of a significant effect on the structure of energy supply and the choice between diverse energy sources (thus; Marcin Nowacki, Komentarz do art 194 Traktatu o funkcjonowaniu Unii Europejskiej, In: Traktat o funkcjonowaniu Unii Europejskiej Komentarz. Tom II ['Article 194' In: The Treaty on the Functioning of the European Union, vol II Art. 90-222 – in Polish], eds. Krystyna Kowalik-Bańczyk, Monika Szwarc-Kuczer, Andrzej Wróbel], Lex Omega, 2012. Cezary Mik, Wyb*ó*r w*łaściwej* podstawy prawnej akt*ó*w wsp*ó*lnotowego prawa wt*ó*rnego, ze szczeg*ó*lnym uwzględnieniem projekt*ó*w akt*ó*w należących do pakietu klimatyczno-energetycznego [w:] Pakiet klimatyczno-energetyczny. Analityczna ocena propozycji Komisji Europejskiej [The choice of the appropriate legal basis for the secondary Community legislation, with particular emphasis on draft acts belonging to the climate and energy package In: Climate and energy package. Analytical evaluation of the European Commission proposals – in Polish]. Warszawa 2008, 18. Kim Talus, EU Energy Law and Policy: A Critical Account, Oxford University Press, 2013, ch 5.2; and, indirectly, Marjan Peeters, 'Governing Towards Renewable Energy in the EU: Competences, Instruments and Procedures' Maastricht Journal 1 (2014): 43.

decision of all the Council members[32]. Therefore in the field of the environmental policy, the choice of the legal basis essentially affects the Union's ability to make decisions and thus the implementation of the climate policy.

Given that the EU climate protection policy and regulations adopted in this field are often aimed directly at decarbonising Member States' economies and their energy mix towards low-carbon fuels[33], the choice of the legal basis for the EU's act of law directly affects the interests of Member States[34]. There is also a natural need for States to push for legal solutions that will be less severe for their economies.

The main instruments for the exercise of the competences conferred upon the EU Council are various types of legal acts (regulations, directives and decisions)[35]. The core of the EU climate protection policy consists of several legal acts adopted by decisions of the Parliament and the Council. They are as follows:

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[32] Konrad Łuczak, Norma art. 192(2)(c) TFUE jako podstawa prawna: skutki aktu prawnego i miks energetyczny państwa członkowskiego, [Article 192(2)(c) TFEU as a Legal Basis: Consequences of a Legal Statute and Energy Mix of a Member State – in Polish], Przegląd Legislacyjny 107.1/2019: 37.

[33] For example, such assumptions formed the basis of Decision (EU) 2015/1814 of the European Parliament and of the Council on the establishment and operation of a market stability reserve for the EU greenhouse gas emission allowance trading scheme and amendment of Directive 2003/87 / EC, OJ. Office. EU L 264, 9/10/2015, p. 1, as demonstrated by *travaux préparatoires* developed by the Commission during the legislative process. See Commission Staff Working Document - Impact assessment accompanying the document Proposal for a Decision of the European Parliament and of the Council concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC (SWD / 2014/017 final), pp. 14, 15, 49.

[34] Unfortunately the jurisprudence of the EU courts is not very helpful in decoding the premises for using the special legislative procedure when designing acts in the field of environmental policy. One cannot resist the impression that the Court's guidelines are intended to authorise the current practice of the EU legislator rather than to seek a solution that will protect the rights of Member States in shaping the energy mix while exercising legislative powers in the field of the climate policy. See the conclusions on the ECJ judgment in case C-5/16 Poland vs. European Parliament and Council of The European Union, presented in the article of Konrad Łuczak, Norma art. 192(2)(c)….

[35] Although the Council may express its position in the form of opinions, recommendations, conclusions or resolutions defining and coordinating policies, those measures are not applied in the area of the EU climate policy.

a) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community;
b) Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020,[36] which will be replaced from 2021 by Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013[37];
c) Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and EU level relevant to climate change and repealing Decision No 280/2004/EC[38];
d) Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU[39];
e) Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU

[36] OJ [2009] L140/136 (as amended).

[37] OJ [2018] L156/26 (as amended).

[38] OJ [2018] L156/26 (as amended). Regulation (EU) No 525/2013 of the European Parliament and of the Council is to be repealed and replaced by the provisions of Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.

[39] OJ [2018] L156/1.

of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council[40].

Those legal acts form the backbone of the EU climate protection policy and they are tools for fulfilling the EU commitments to reduce greenhouse gas emissions. Their list indicates that in the EU climate protection policy the law harmonisation principles diminish in importance in favour of methods for unifying regulation standards[42]. Moreover, this unification has a cross-cutting nature, covering all the key issues of the climate policy, starting by setting the limits for greenhouse gas emissions, through the principles of monitoring these emissions, their reporting and accounting for them, to sanctions imposed on units for failure to meet the obligation to account for emissions and measures to encourage the Member States to comply with the set emission limits.

The Council also plays an important role in the process of shaping the external relations of the EU by taking key decisions in the procedure of negotiations and signing international agreements of the EU. Article 191(4) TFUE provides the basis for concluding international agreements in the field of environmental protection. The agreements concluded by the European Union are binding for the EU institutions and the Member States. Pursuant to Article 218(2) TFEU, the Council authorises the Commission to open negotiations, adopts negotiating directives, authorises the signing of agreements and concludes them, acting in this respect, inter alia, together with the European Parliament. The Member States are particularly interested in laying down the negotiating directives for the Commission as those directives should reflect the real capacity of the Member States to meet the commitments which the EU makes in an international agreement.

Initiative of European Commission

In the institutional system of the EU the European Commission is an institution with a supranational profile[41]. In its activities, the Commis-

[40] OJ [2018] L328/1.

[41] Neil Nugent, *The European Commission* (Macmillan 2001); David Spence, *The European Commission* (Longman 2006). The footnote after Maria Kenig-Witkowska (n 23) 119.

sion has executive and control competences as well as those related to the lawmaking process, including the important power of exclusive and direct legislative initiative and the power to issue legal acts under the authorisation conferred in the legislative act.

The key power of the Commission in the sphere of creation of the integration policy entails the power of legislative initiative. In this way, the Commission externalises and operationalises the objectives of the EU policy in a given area. Although the legislative proposals of the Commission are then processed and amended in the course of the procedure by the entities which constitute the legislative body of the European Union (the EU Council and the European Parliament) the proposal for an act submitted by the Commission begins and gives shape to successive draft integration acts[42]. As an institution, which supports the general interest of the European Union and, in addition, an institution independent of the Member States, the Commission has a relatively large margin of discretion in exercising its legislative initiative. Many regulatory initiatives of the Commission originate from the environmental action programmes which have been drafted since the early 1970s, however, they have not been the only and exhaustive programming basis for it[43]. Suggestions concerning new legislative initiatives of the Commission may also come from other sources. A large part of them is prepared in relation to a resolution issued by the Parliament or the Council in which the institutions may call on the Commission prepare and submit a proposal for a legal act. Similarly, in any matter the Member States may notify the need for a legislative proposal to be submitted or for existing legal acts to be amended.

A general principle of the climate protection policy is the adaptation of its objectives, assumptions and instruments to the changing conditions, including the commitments to reduce greenhouse gas emissions as well as to the experience gained in the scope of emission reduction methods and measures. As a result, a number of the EU legal acts in the field of climate

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[42] See eg Paul Craig and Grainne de Burca, EU Law. Text, Cases and Materials, Oxford University Press, 2008, 43.

[43] Ludwig Krämer, EU Environmental Law…, 55. The Commission quite often submits regulatory initiatives which are not related to the environmental action programmes.

policy include provisions obliging the Commission to perform a review of the mechanisms implementing the assumptions of this policy and to submit relevant conclusions to the Parliament and the Council.

The Commission oversees the application of the EU law and controls the Member States' compliance with the EU law and their obligations under the Treaties. As part of the control function, the Commission collects all the necessary information and verifies it. When it considers that a Member State fails to meet its Treaty obligations it may launch the infringement procedure under Article 258 TFEU. In the field of the climate protection policy, the infringement procedure has been seldom launched against the Member States for failure to comply with their obligations under the Treaty, although the Commission has undertaken controls many times. The reason for this is probably the special regulatory policy of the EU in this area which makes it easier for the Commission to exercise its control powers. This policy is characterised by a large share of unifying regulations (EU Regulations), with a small share of Directives which leave a certain margin of regulatory discretion to the Member States in the transposition process. This method of integration (a large share of unifying norms) enhances the ability of the Commission to control how the Member States execute the EU regulations. In addition, the regulations in the field of the climate policy give the Commission a large set of measure, by means of which it can continuously verify various types of information and data. Those measures ensure that for the control bodies the course of the integration processes in the Member States is almost fully transparent. Due to such a manner of exercising control and given the preventive instruments at the disposal of the Commission (the requirement for the consent of the Commission to a specific activity of a Member State), there is no justification for taking legal action against the Member States.

The Commission is a legislative body as many legal regulations entrust it with the acts of an implementing nature. The Commission exercises its legislative competences by issuing delegated and implementing acts.

In the discharge of its legislative functions, the Commission is supported by Committees which provide their opinions on the proposals for implementing acts before they are adopted by the Commission. The Committees, which are headed by an official from the Commission, con-

sist of the representatives of all the Member States of the EU[44]. It is generally considered that the Committees enable the Member States to exercise control over the manner in which the Commission uses its executive powers[45]. However, a negative opinion of a Committee is not always binding for the Commission. Depending on the procedure, in case a negative opinion is provided the Commission is obliged either to take the position of the Committee into account when it issues a relevant implementing act, although it is not formally bound by the position, or decide not to adopt the act on which the Committee has provided a negative opinion.

A committee seldom provides a negative opinion on a proposal for an implementing act as in practice before a proposal is formally submitted for an opinion of the relevant committee the Commission consults the planned solutions with representatives of the Member States, thus verifying the rationale for a given proposal and the degree of its acceptability among the Member States. The Committees often establish working groups, consisting of its members who are interested in given proposals. Subsequently, they are formally submitted as proposals of the European Commission.

Essentially, the Member States have no influence on the exercise of delegated powers by the Commission. The European Commission has a very strong position in the political system of the EU. It is a body which is internally coherent and hierarchised; it has excellently organised information

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[44] After the reform implemented in 2011 the comitology committees have operated in accordance with three standardised procedures laid down in a Regulation of the European Parliament and of the Council: advisory and examination procedures, as well as a regulatory one combined with control.

[45] Thus eg David Langlet and Said Mahmoudi, EU Environmental Law and Policy…, 24. Opinions provided by the Committee constrain to some extent the decision-making freedom of the Commission. Moreover, the choice of the procedure depends on the type and scope of implementing measures which the Commission is to adopt (the importance of the issues to be regulated by the Commission and the degree of freedom which the legislator is willing to confer on the Commission in its exercise of the implementing powers provided for in a primary act). Thus eg Cezary Herma, 'Komitologia – system wykonywania aktów prawnych we Wspólnocie Europejskiej' ['Comitology – System of Legal Act Execution in European Community' – in Polish] International Journal of Management and Economics 2 (2007): 16.

resources, financial and human resource support, which ensure that it is best prepared in substantive and analytical terms compared with the other institutions involved in the legislative process. In the environmental policy and, in particular, in the climate protection policy, the Commission sometimes pushes measures which are inconsistent with the interests of the respective Member States. The more the States cannot agree in a given case the easier it is for the Commission to develop its own policy, autonomise and escape the control of the Member States[46]. In order to implement the policy solutions which it recommends, the Commission often seeks support from certain Member States which represent preferences close to those proposed by the Commission, at the expense of the achievement of a broad compromise among all the Member States.

The Member States have limited capabilities of affecting the manner of implementation of the competences entrusted to the European Commission. Essentially, their activity only consists in their participation in the procedures whereby the Commission exercises its legislative competences. However, such powers are gradually diminished as at present the legislative powers of the Commission much more frequently take the form of delegated rather than implementing acts. Such a tendency may also be seen in the field of the EU climate protection policy.

Influence of the European Parliament on the Creation of the Climate Protection Policy

The participation of the European Parliament in the creation of the EU internal policy entails its implementation of the legislative function, where, in addition to the Council, it acts as a lawmaking body in the ordinary legislative procedure, the consultative function, as well as the exercise of political control (Article 14(1) first sentence TEU).

It is also important to note the appointment function of the Parliament related to the election of the President of the Commission (Ar-

[46] Janusz Ruszkowski, Ponadnarodowość w systemie politycznym Unii Europejskiej [Supranationality in the Political System of the European Union – in Polish] Wolters Kluwer, 2010, 212.

ticle 14(1) second sentence TEU) and the approval of its members[47]. Bearing in mind the role of the President of the Commission, including his influence on the choice of policy priorities, inter alia, their environment-friendly approach, by exercising its appointment function the Parliament may to some extent determine the direction of the EU policy in a given field. In turn, the participation in the procedure to appoint the President of the European Commission (the election of the candidate for its President) is itself an example of cooperation between institutions – one with a supranational profile and the other being an emanation of the will of the Member States. At the interface between the appointment and control functions, there is the power of the Parliament to carry a motion of censure of the Commission, which results in the resignation of its members as a body (Article 17(8) TEU (and Article 234 TFEU)). This power ensues from the responsibility of the Commission as a body to the European Parliament and applies to the Commission as a whole rather than its respective members. The Treaties do not provide for the control powers of the Parliament with respect to the Council, although the members of the Council are accountable to the national Parliaments in their Member States (article 10(2) TEU).

The control function of the Parliament entails primarily its right to submit questions to the Council or Commission. This right is exercised by a committee, a political group or a group of at least 40 Members of the Parliament (Rule 128 of the Rules of Procedure of the European Parliament). Control is also exercised by the right to accept petitions in the matters falling within the scope of activity of the EU.

As part of its consultative function, a number of opinion-providing powers has been conferred upon the European Parliament, both of a specific nature – especially where it does not participate in the legislative procedure (see in particular Article 192(2) TFEU cited below) – and a general

[47] In this respect, Art. 17(7) TEU is particularly important. In accordance with it, the European Council, acting by a qualified majority, proposes to the European Parliament a candidate for President of the Commission. The candidate is elected by the Parliament by a majority of its members. Subsequently, the European Commission as a whole (its President, its other members and the High Representative of the Union for Foreign Affairs and Security Policy) are approved by the European Parliament by a vote of consent. This procedure has been specified in Rule 118 of the Rules of Procedure of the European Parliament.

one (Rule 133 of the Rules of Procedure of the European Parliament provides that any Member of the Parliament may table a motion for a resolution on a matter falling within the scope of activity of the EU).

The legislative function of the European Parliament is of key importance for the creation of the environmental policy and the climate policy as its part. Its legislative function is limited to some extent by the fact that it has no power of legislative initiative[48] and that it has no influence on the choice of the procedure to adopt a legislative act. This is important as – although, in principle, legal acts on the environment under Article 192(1) TFUE are adopted in the ordinary legislative procedure – the special legislative procedure is applied to the matters referred to in Article 192(2)(a)-(c) TFUE. In this procedure, the participation of the European Parliament is limited to consultations.

The competent committee of the European Parliament in environmental matters is the Committee on the Environment, Public Health and Food Safety. However, in many cases those matters may also fall within the scope of activity of the Committee on Industry, Research and Energy with powers in particular in the scope of the EU measures related to the energy policy in general and the establishment and functioning of the internal energy market.

Taking into account the supranational profile of the European Parliament, the members of which represent the European nations rather than the Member States, the latter have limited influence on the activity of the European Parliament.

Participation of the National Parliaments in the Process of Creation of Secondary Law

The Lisbon Treaty enabled the Parliaments of the Member States to participate in the legislative process and in the implementation of certain EU policies.

[48] Pursuant to Art. 225 TFEU, the European Parliament may only request the European Commission on a non-binding basis to submit a proposal for an act of law which it deems to be necessary to implement the Treaties.

Pursuant to Article 12 TEU, the national Parliaments contribute actively to the efficient functioning of the European Union. For this purpose special powers have been conferred upon them, including the right to be informed by the institutions of the EU, to receive draft legal acts of the EU as well as the competence to ensure that the principle of subsidiarity (and to a lesser extent the principle of proportionality) are respected.

In order to implement those powers, two protocols have been annexed to the Founding Treaties. The purpose of the Protocol on the Role of National Parliaments in the European Union is to enable the Parliaments to take a position on the matters which are the subject matter of legislative work in the EU[49]. To this end, the EU institutions are obliged to forward to the national Parliaments consultation documents (inter alia, green and white papers), annual legislative work programmes, any other instruments of legislative planning or policy and any draft legislative acts.

The other document is the Protocol on the Application of the Principles of Subsidiarity and Proportionality[50]. Pursuant to its Article 6, any national Parliament may by a certain date send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. In turn, Article 7(1) provides that the insti-

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[49] Moreover, Art. 10 of the Protocol provides that a special conference of Parliamentary Committees for Union Affairs may submit any comments it deems appropriate for consideration by the European Parliament, the Council and the Commission. Such a conference may also organise interparliamentary conferences on specific topics, in particular to address matters of the common foreign and security policy, including the common security and defence policy.

[50] Each institution ensures constant respect for the principles of subsidiarity and proportionality, as laid down in Art. 5 of the Treaty on European Union. Art. 5 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality provides that draft legislative acts are to be justified with regard to the principles of subsidiarity and proportionality. In turn, each of them should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality (so as to enable at least an assessment of the financial impact of a given proposal for an act and, in the case of a directive, of its implications for the regulations to be laid down by the Member States). The argument that a EU objective can be better achieved at the EU level must be substantiated by qualitative and, wherever possible, quantitative indicators.

tutions of the EU which have initiated the legislative process should take into account the reasoned opinions adopted by the national Parliaments.

3. CONCLUSIONS

Bearing in mind that cooperation in developing the climate policy is so challenging in political terms given the economic and social implications of the implementation of its assumptions, the achievements of the EU in this area should be appreciated. This policy is characterised by a very high level of ambition in the scope of greenhouse gas emission reductions, which is outstanding in itself, in light of the large differentiation of its Member States in terms of their energy structure and the technological advancement of various industrial sectors.

There is no doubt that the cooperation between the European Union and the Member States in creation of the climate protection policy is supported by the institutional arrangements presented here, which have originated from the division of competences laid down in the Treaties and the Treaty rules on the exercise of the competences entrusted to the Union.

However, it should also be added that the ability of the Member States to influence the directions and range of the EU policy on climate change mitigation is also determined by factors other than legal ones, such as the capacity to convincingly present policy preferences, the ability to form alliances with other States with coincident interests or the continuity of the national policy in a given field.

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MINIMUM STANDARDS IN THE EUROPEAN ACCOUNT PRESERVATION ORDER

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ABSTRACT

The article is devoted to minimum standards in the new procedural instrument – the European Account Preservation Order. The main purpose of the preservation proceeding is to grant an interim order of creditor's claim on debtor assets, without overburdening his property. Due to the complicated procedure established by Regulation (EU) No 655/2014, the European Account Preservation Order should serve as an additional and optional measure for the creditor, the examination of the minimum standards is essential. The Author indicates the relation between the above-mentioned regulation and other regulations and gives an explanation why this instrument is another symptom of the new EU legislator's approach to cross-border civil matters. Since the debtor is a person whose interests are most affected by the preservation of the bank account, it is necessary to specify his rights and obligations in these proceedings.

Key words: civil procedure, European Account Preservation Order, minimum standards, protective measure

1. INTRODUCTION – THE CONCEPT OF UNIFORM PRESERVATION ORDER

Considering the increased amount of cross-border civil and commercial cases, the role and importance of securing claims in these proceedings, it is therefore necessary to conduct a fundamental analysis of the

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new legal instrument – the European Account Preservation Order[1]. It was conceived as a very important element of the development of the EU civil procedure and as the Uniform Protective Order. The theoretical and practical attractiveness of the subject matter, combined with the lack of a broader discussion of the matter in Polish literature, makes it a fully justified argument for choosing this institution. Until recently, the above-mentioned issue has existed exclusively in the national law of a Member State. It is only in recent years that the development of the Internal market has forced the establishment of legislation within the European Union. The issue of swift and effective protective measures that are effective within the Union is very important in economic activity, particularly by the businesses in the Internal Market of the European Union. It also has implications for consumers who increasingly use cross-border services. It is necessary to indicate only minimum standards, whereas maximum standards are probably impossible to achieve in 28 different legal systems in all EU member states.

Since the last century there are certain principles which might be adopted by nations wishing to assume the Uniform Protective Order. Those principles adopt the essence of freezing injunctions and civil search orders. The best way of meeting this need for inter-jurisdictional coordination is to combine:

(1) an international uniform law of protective and ancillary relief – which should be adopted by leading trading nations and gradually extended beyond such jurisdictions; and

(2) a reciprocal system of recognition of such judicial order – even when they are surprise remedies, made *ex parte*, or without notice to the respondent[2].

The question is whether the model of the EAPO meets the requirements? In the two upcoming chapters of this paper, there is an attempt to answer this fundamental question. The presented article is, therefore, aiming to fill the gap that exists in the EAPO research in Poland and across the whole of Europe. The research should also answer the question if the

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[1] Hereinafter „EAPO".

[2] Neil Andrews, Provisional and Protective Measures: Towards an Uniform Protective Order in Civil Matters, Uniform Law Review – Revue de droit uniforme 6 (2001): 932.

present European Account Preservation Order is balanced between rights of the creditor and the debtor. This topic refers to material that is very important in doctrinal and practical terms and in addition very intricate on the legal side, which has not yet reached its monographic development in Polish or European literature. In particular, there is no description of this issue in the context of legislative solutions used in other EU instruments (the European Enforcement Order for Uncontested Claims; the European Order for Payment Procedure and the European Small Claims Procedure). There have been few detailed analysis of the Regulation No 655/2014 in the national literature, but none of them were dedicated to the minimum standards. The available study was issued before the date of application of the provisions herein and left this topic without deep analysis[3]. The state of research of the institution in foreign literature is also not exhaustive.

2. INTERNATIONAL UNIFORM LAW OF PROTECTIVE AND ANCILLARY RELIEF

In view of the ever-increasing level of free movement of goods, services, and judgments in civil matters in the European Union, cross-border protective measures may become a key element in the process of debt recovery from foreign counterparts. Thus, it was necessary under the European Union to create an instrument allowing the bank account to be secured in parallel with those provided for in the legal systems of the Member State for temporarily securing the receivables[4]. The Commission's Proposal on the preservation of bank accounts had three aims[5]:

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[3] Alicja Aseńko, Transgraniczne zabezpieczenie wierzytelności na rachunku bankowym – nowe rozporządzenie (UE) 655/2014, Monitor Prawniczy 8 (2015) (dodatek): 37–41; Justyna Piasecka, Europejski nakaz zabezpieczenia na rachunku bankowym – nowy instrument prawny wprowadzony rozporządzeniem Parlamentu Europejskiego i Rady (UE) nr 655/2014, Przegląd Prawa Egzekucyjnego 9 (2017): 5–15.

[4] Franz W. Urlesberger, Europarecht: Das Neueste auf einen Blick, Wirtschaftsrechtliche Blätter 23/4 (2011): 483.

[5] Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and

(1) to enable creditors to obtain account preservation order on the basis of the same conditions irrespective of the country in which the competent court is located;
(2) to allow creditors to obtain information on the whereabouts of their debtors' bank accounts;
(3) to reduce costs and delays for creditors seeking to obtain and enforce an account preservation order in cross-border situations.

Considering this scope The Regulation meets requirements to be an international uniform law of protective and ancillary relief. The issue of cross-border preservation order has been recognized by the EU legislator by providing a comprehensive legal instrument for both civil and commercial cases. Regulation (EU) No 655/2014 establishes a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters[6]. There was a parallel initiative to issue an EU legislative act aimed at protective measures to ensure bank account freezing and to enhance the mere enforcement against the debtor's assets stage[7]. This Regulation does not provide for the establishment of a new way of enforcing monetary claims, but only for the preservation of monetary claims[8]. In recital 7 in the preamble to the Regulation (EU) No 655/2014 it is worth notice that a creditor should be able to obtain a protective measure in the form of the European Account Preservation Order preventing the transfer or withdrawal of funds held by his debtor in a bank account maintained in a Member State if there is a risk that, without such a measure, the subsequent enforcement of his claim against the debtor will be impeded or made substantially more difficult. This regulation has general application, is binding and directly applicable in all Member States, as stated in Article 288 of the Treaty on the Functioning

commercial matters, COM(2011) 445 final of 25 July 2011: 4.

[6] The European Parliament and of the Council Regulation (EU) 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (2014) OJ L189/59.

[7] Mirela Župan, Cross-border recovery of maintenance taking account of the new European Account Preservation Order (EAPO), ERA Forum 8 (2015): 169.

[8] Alicja Aseńko, *op. cit.*: 1.

of the European Union[9]. Since this Regulation is applicable in the European Union only from 18 January 2017, it is justified and highly valid to analyze this EU instrument. This law is nowadays adopted by all of the Member States except the Denmark. This country is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

3. THE RELATION BETWEEN EAPO AND OTHER EUROPEAN REGULATIONS

The initial purpose of the article is to question on the concept of a EAPO, its function and its relation to other European Regulations. The instrument is just another symptom of the new EU legislator's approach to cross-border civil matters in the form of full jurisdiction of the court of origin, based on the minimum standards of the regulation and including the abolition of *exequatur*[10]. The other elements are the European Enforcement Order for Uncontested Claims[11], the European Order

[9] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012: 47–390.

[10] Maciej Taborowski, Wojciech Sadowski, Wybrane problemy stosowania rozporządzenia Nr 805/2004 w sprawie utworzenia Europejskiego Tytułu Egzekucyjnego dla roszczeń bezspornych, In: Współpraca sądowa w sprawach cywilnych i karnych, ed. Władysław Czapliński, Andrzej Wróbel, Warsaw: C.H. Beck 2007, 184.

[11] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.4.2004, pp. 15–39); by means of the enforcement order: judgments, court settlements and authentic instruments on uncontested claims can be recognised and enforced automatically in another Member State, without *exequatur*. This regulation would not apply to any preservation measures because they do not fall within the scope of the term "judgment" in the light of Art. 4 point 1 Regulation (EC) No 805/2004, while issued in the *ex parte* proceedings (*cf*. Karol Weitz, Europe ski tytuł egzekucyjny dla roszczeń bezspornych, Warsaw: Lexis Nexis 2009, 83-85). The principle rule under Article 11 of the Regulation 655/2014 is that the debtor shall not be notified of the application for a Preservation Order or be heard prior to the issuing of the Order.

for Payment Procedure[12] and the European Small Claims Procedure[13]. EU regulatory strategy considers the general abolition of *exequatur* proceedings as the next step of the integration of European procedural laws[14]. As a consequence, the EAPO is just a part of the whole new European concept, described implicitly in Article 22 of the Regulation No 655/2014 as non-*exequatur*[15]. The EAPO is based on the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement.

It is also important to indicate the relationship between Regulation No 655/2014 and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[16]. Brussels I (recast) also establishes procedure of recognition and enforcement of the protective measures. The choice of the procedure belongs to the applicant, but it must be remembered that they are separable. Recognition and enforcement are carried out either on the basis of the Brussels (recast) or Regulation 655/2014. While looking for jurisdiction under Brussels I (recast) one option to the creditor is to grant a motion for a protective measure to the court having jurisdiction as to the sub-

[12] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006, pp. 1–32); regulation permits the free circulation of European order for payment which is recognised and enforced in all EU countries without any intermediate proceedings.

[13] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, pp. 1-22); The Regulation ensures that judgments are recognised and enforceable in another Member State, without *exequatur*.

[14] Draft multi-annual programme for the area of Freedom, Security and Justice, 16 October 2009, Doc. 14449/09: 4.

[15] Explicitly: „A Preservation Order issued in a Member State in accordance with this Regulation shall be recognised in the other Member States without any special procedure being required and shall be enforceable in the other Member States without the need for a declaration of enforceability".

[16] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012: 1; hereinafter: „Brussels I (recast)".

stance of the matter[17]. As EU Regulator mentions in recital 33 in the preamble to the Brussels I (recast): protective measures which were ordered by such a court without the defendant being summoned to appear can only be recognized and enforced unless the judgment containing the measure is served on the defendant prior to enforcement. Secondly, it should be noted that the creditor has been allowed to apply for a provisional protective measure also to the court which has no jurisdiction as to the substance of the matter. As per this article 35 Brussels I (recast) application may be made to the courts of a Member State for such provisional measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter. Neither provision contains any restrictions on *lis pendens*, nor excludes the preservation of a claim by a court other than the one before which proceedings are pending as to the substance of the matter[18]. As in the first option, the second one needs to provide the defendant with a ruling before its execution (Article 2 (a) of Brussels I recast). It approaches to not enough surprising effect, which is very important in securing monetary claims. But it challenges needs with regard to the protection of the defendant in cross-border litigation. The case-law of the Court of Justice on the interpretation of jurisdiction in protective measures creates an additional premise. The Court of Justice indicates that the granting of provisional or protective measures is conditional on, *inter alia*, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Member State of the court before which those measures are sought[19]. What is more under recital 33 in the preamble to the Brussels I (recast) the effect of measures ordered by a court of a Member State not having jurisdiction as to the substance of the matter should be confined only to the territory of that Member State. In the latter case, the effect is limited due to avoid forum-shopping. It should be noted that definition of forum shopping

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[17] Alicja Aseńko, *op. cit.*: 2.

[18] Decision of Court of Appeal in Poznań of 11 October 2017, case I ACz 1333/17, Portal Orzeczeń Sądów Powszechnych.

[19] Judgment of the Court of 17 November 1998, case C-391/95, *Van Uden Maritime BV,* ECLI C 1998: 543.

was made by Advocate General Léger as a decision of the applicant to bring his action in a particular court purely in order to benefit from the application of a law, or even of case-law, that is more favorable to the protection of his own interests, to the detriment of those of the defendants, and not in order to meet an objective need from the point of view of proof or the effective organization of the proceedings[20]. The minimum procedural standard relating to forum shopping is comprised in article 3 point 1 of Regulation No 655/2014. This provision states the definition of the cross-border case which prevents easy evasion from the national rules unfavorable to the creditor (enforce shopping)[21].

The ambiguous regulation of Recital 8 of Regulation No 655/2014 requires a short examination. The scope of EAPO Regulation should cover all civil and commercial matters apart from certain well-defined matters. In particular, Regulation should not apply to claims against a debtor in insolvency proceedings. The widely differing national laws on security interests to be found in the Member States was acknowledged in recital 22 in the preamble to the new bankruptcy regulation[22]. Under this regulatory framework, there are two important issues of the relation between Regulation No 655/2014 and insolvency proceedings which should be indicated here. On the one hand, the EAPO should not apply to claims against a debtor in insolvency proceedings[23]. On the other hand, the exclusion should allow the EAPO to be used to secure the recovery of detrimental payments made by such a debtor to third parties. This regulatory approach entails the need for specific and comprehensive research which cannot be done in this paper due to its character and limited volume.

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[20] Opinion of Advocate General Léger delivered on 8 December 2005, case C-539/03, Roche Nederland BV vs. Primus and Goldenberg, C 2005, 749, point 96.

[21] A. Aseńko, *op. cit.*: 3.

[22] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19, 5.6.2015.

[23] *Verba legis*: *…as defined in Council Regulation (EC) No 1346/2000,* but Regulation (EU) 2015/848 repealed Regulation (EC) No 1346/2000.

4. THE MINIMUM STANDARDS IN THE REGULATION NO 655/2014

The essential part of this article is devoted to selected minimum standards covering by the Regulation No 655/2014. As well as the scope of rights of entities involved in EAPO proceedings, especially the procedurally weaker party – the debtor. According to B. Hess there are two ways of formulating minimum standards: on the one hand, they can be decided from constitutional or treaty principles. On the other hand, it is possible to find precise rules in the existing instruments of European procedural law[24]. With respect to minimum fundamental standards from the Charter of Fundamental Rights of the European Union[25], the Regulation notably relied on the idea of safeguard the debtor's right to a fair trial and his right to an effective remedy (Recital 44).

The minimum procedural standards start with the conditions for issuing the Preservation Order. This should be strictly balanced between the interest of the creditor in obtaining an EAPO and the interest of the debtor in preventing abuse thereof. The recitals comply with regulation established by article 7 which requires submission of sufficient evidence to satisfy the court that there is an urgent need for a protective measure because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim will be impeded or made substantially more difficult. As the Regulation does not detail how the „urgent need" and „real risk" should be proved by a creditor and measured by a court, there is there is a concern that different interpretations of these prerequisite standards will arise throughout the EU Member States[26]. However, it is helpful to ask the Court of Justice whose case law consolidates the application of EU law. Above-mentioned Recital indicates what should be taken into account by court: the debtors' conduct in respect of a claim; the debtors' credit history; the fact that there are more creditors; as well as the fact that mere non-payment or contesting of the claim should not

[24] Burkhard Hess, "Towards minimum standards in European civil procedural law", In: Aurea Praxis. Aurea Theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego, ed. Jacek Gudowski, Karol Weitz, Warsaw: Lexis Nexis 2011 (1): 1083.

[25] OJ C 326/391, 26.10.2012.

[26] Mirela Župan, *op. cit.*: 172.

be considered sufficient evidence to justify issuing of an EAPO. As stated in Recital 14 the creditor should be required in all situations, including when he has already obtained a judgment, to demonstrate to the court that there is „urgent need" and „real risk". The clue point is that these two factors should be demonstrated through the evidence provided but not only verbalized[27]. The real risk is a certain objective condition regarding the behavior of the debtor[28]. Whereas the creditor in a Member State has obtained a judgment that requires the debtor to pay the creditor's claim, the scope of protection of debtor should be more pursuant to creditor's rights (Article 7.1. Regulation). As opposed to the situation when the creditor initiates procedure for obtaining a preservation order before he initiates proceedings in a Member State against the debtor on the substance of the matter (Article 7.2 and Article 12 of the Regulation).

The other minimum standards set up by Regulation No 655/2014 concern the security to be provided by the creditor (Article 12), the liability of the creditor (Article 13), amounts exempt from preservation (Article 31) and remedies (Chapter 4). The debtor is safeguarded by article 12 which provides security for an amount sufficient to prevent abuse of the procedure if the creditor has not yet obtained a judgment. The bail judgment can, therefore, be considered as a rule in this procedure, which may not be applied by way of exception. The recitals give a comprehensive explanation for this new approach. These include: the creditor has a particularly strong case but does not have sufficient means to provide security; that the claim relates to maintenance or to the payment of wages; the size of the claim is such that the EAPO is unlikely to cause any damage to the debtor, for instance, a small business debt (Recital 18). The creditor should make probable the lack of sufficient means to provide security by the court. This exception might become a principle in maintenance cases[29]. In case of small debts, the definition from the European Small Claims Procedure can be indirectly applicable, where the value of a claim

[27] Decision of District Court in Bydgoszcz of 23 March 2017, case XII Co 1446/17, Portal Orzeczeń Sądów Powszechnych.

[28] Decision of Court of Appeal in Katowice 22 May 2018, V AGz 317/18, Portal Orzeczeń Sądów Powszechnych.

[29] Mirela Župan, *op. cit.*: 173.

does not exceed 5000 EUR nowadays[30]. Where the creditor has already obtained a judgment, security is an optional instrument to the court-connected with necessity and appropriateness in the circumstances of each case (Article 12.2). Even if the debtor provides the security, there should be no issue of the EAPO when the conditions for its issuance as set out in Article 5 in conjunction with article 7(1) of Regulation No 655/2014 are not met[31].

Article 13 has been framed in the light of the relatively valid burden of proof in respect of the liability of the creditor for the damage caused to the debtor by the Preservation Order due to fault on the creditor's part and the mandatory presumptions of the creditor's fault. Whereas the burden of proof lies with the debtor, the Regulation points towards four facts that have to be taken into account to the presumed liability of the creditor (Article 13.2). The catalogue is open for national law to establish grounds for liability and types of liability other than those specified in this Regulation. Polish legislators did not decide to introduce additional premises in Polish civil procedure law[32]. The premises in Regulation are mostly related to creditor's inappropriate behavior, which is:

(1) revocation of the EAPO due to failure to initiate proceedings on the substance of the matter, unless that omission was a consequence of the debtor's payment of the claim or another form of settlement between the parties;
(2) negligence of the obligation to release over-preserved amounts as provided for in Article 27;
(3) founding that the issue of the Order was not appropriate or appropriate only in a lower amount due to a failure on the part of the creditor to comply with his obligations under Article 16;

[30] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341, 24.12.2015: 1-13.

[31] Decision of Court of Appeal in Katowice 22 May 2018, V AGz 317/18, Portal Orzeczeń Sądów Powszechnych.

[32] *Cf.* art. 1144(3) – art. 1144(13) Polish civil procedure code (Act of 15 December 2016, Dz. U. 2017, pos. 85).

(4) revocation of the EAPO or its enforcement terminated due to failure to comply with obligations under this Regulation with regard to service or translation of documents or with regard to curing the lack of service or the lack of translation.

The minimum standards of remedies contained in the Regulation are very detailed. Chapter 4 describes several different modes of remedies of the debtor against an EAPO. There is not enough space in this article to explain every single part of its structure. While it should be a reason for another such a publication, it is necessary to indicate some of the remarks about remedies. The Regulation divides remedies into two types: first upon application by the debtor to the court of origin and second upon application to the court of enforcement. This approach is characteristic of the European Union regulations, such as the European Enforcement Order. The debtor has the right to grant a motion for revocation or modification of an EAPO to the competent court of the Member State of origin. The most essential remedies are based on the prerequisite of an EAPO issuing (point an of Article 33.1). This provision makes it possible in principle to verify the basis for the issue[33]. Remedies by Article 33.3&4 are connected to the validation of service. The debtor's remedies against enforcement of the Preservation Order are limited to the amounts in accordance with Article 31(2) and Article 31(3). These amounts exempt from preservation are connected with national law of the Member State of enforcement which regulates its seizure. The Regulation provides for a minimum standard aimed at the request from the debtor to exempt amounts in seizure under national law from preservation. Specific provisions are provided for by point (a) of Article 34(1) of the Regulation. There are four termination grounds which are divided as follows: the scope of application of the Regulation, a refusal to issue the Preservation Order, suspension of the enforceability of the judgment and other indicated by point b (iv) Article 34.1. Last but not least, Regulation states the public-policy clause. Pursuant to Article 34.2. the enforcement of the Preservation Order would be terminated if it is manifestly contrary to the public policy of the Member State

[33] Marcin Walasik, Europejski nakaz zabezpieczenia na rachunku bankowym, na tle prawa krajowego, In: Egzekucja Sądowa w Świetle Przepisów z Zakresu Międzynarodowego Postępowania Cywilnego, ed. Andrzej Marciniak, Sopot: Currenda, 2016, 244.

of enforcement. The Court of Justice does not define the content of the public policy but is competent to review the limits within which the courts of a Member State may have recourse to the concept of the public-policy clause for the purpose of refusing recognition to a judgment emanating from a court in another Member State[34].

Finally, there is no down transference of an application for remedies. Just both parties have the right to appeal to the court of the second instance against a decision issued pursuant to Article 33, 34 or 35, under following article 37 of the Regulation. It is worthy of notice that the Regulation does not indicate a specific time limit for presenting an objection against EAPO. The statutory time limit for the decision revoking, modifying, limiting or terminating the Preservation Order is very restricted – without delay, but no later than 21 days after the court has received all the necessary information. What is more such, a decision is enforceable immediately.

5. CONCLUSION

The fresh issuing of the EAPO requires verification that the minimum standards collected above have been respected by the Member States. The unquestionable influence of the courts on this matter will, in the course of the research carried out in the future, lead to the sharing of experience and support for the interpretation of the provisions of the European Union regulations applicable in other cases by the courts of the Member States. The assembly, use, and dissemination in this field of judicature of the courts of the Member States and of the Court of Justice shall not be overestimated. For the time being there is only one published decision of the Polish court under Regulation 655/2014 and no pertinent case law of the Court of Justice.

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[34] Judgment of the Court of 28 March 2000, case C-7/98, *Krombach,* par. 23; more about the public-policy clause in case law of CJ – Agnieszka Knade-Plaskacz, Naruszenie klauzuli porządku publicznego i pozbawienie strony możliwości obrony jako przesłanki odmowy uznania orzeczenia zagranicznego w sprawach cywilnych i handlowych w świetle orzecznictwa Trybunału Sprawiedliwości, Europejski Przegląd Sądowy 3 (2015): 34–39.

As has been shown above, the present EAPO Regulation performs certain principles that should be adopted across the European Union wishing to assume a Uniform Protective Order. The Regulation 655/2014 is binding in its entirety and directly applicable in all Member States. A vast catalogue of remedies is a crucial element of minimum standards. As B. Hess mentioned „for everyday business (and litigation) it seems to be more useful to implement precise standards directly into the specific procedural laws"[35]. Even The Regulation establishes *ex parte* proceedings, a reciprocal system of recognition of the EAPO is framed (abolition of *exequatur* proceedings under Article 22). It has been demonstrated that precise minimum standards in the existing instrument of European procedural law are possible to find. On the one hand, there are plenty of the conditions for issuing the Preservation Order, on the other hand, the Regulation points towards catalogue of remedies. There has also been indicated the procedure of extraordinary review in the Member State of enforcement the EAPO. It should be noticed that the stricter requirements for the granting of the EAPO and the need for the creditor to provide security may deter many, including smaller businesses, from applying for the Preservation Order. All in all, the present European Account Preservation Order is balanced between the rights of the creditor and the debtor. It fills the gap in the creditor's protection left open by the Brussels I (recast) which has unnecessarily abolished the surprise effect[36]. Then again, it is accompanied by procedural safeguards protecting the rights of the debtor.

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[35] Burkhard Hess, *op. cit.*: 1085.

[36] Burkhard Hess, Katharina Raffelsieper, "Die Europäische Kontenpfändungsverordnung: Eine überfällige Reform zur Effektuierung grenzüberschreitender Vollstreckung im Europäischen Justizraum", IPRax. Praxis des Internationalen Privat- und Verfahrensrechts 1 (2015): 46.

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AXIOLOGICAL PARADIGM OF SOCIAL INCLUSION INTENSIFICATION – SELECTED REMARKS

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ABSTRACT

This paper elaborates upon the values forming the axiological paradigm of social inclusion intensification. At its core, the analysis focuses on the examples found within the Polish legal system. The analysis has been conducted in consideration of such inclusive values as: dignity, freedom, equity, common welfare and social solidarity, which are commonly accepted as fundamental to all social inclusion actions of civil societies within countries established on the democratic rule of law. The analysis is to show that those values create the basis for actions performed in order to achieve social inclusion.

Key words: inclusion, axiology, dignity, common welfare

1. PRELIMINARY REMARKS

Our societies – the ones we live in, which we collectively establish and maintain within the emerging interconnected web of co-dependency and interaction of entities – are based on common principles and function in order to achieve and implement certain values. Those values bind our modern societies and their strength is tested by various hardships and crises which, in the end, prove the level of integrity and

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the will to overcome such critical emergencies by a society. Emergencies show whether or not a group is willing to fight, engage in solving the problem and, crucially, protect the values themselves. The values shared and followed by a group also directly influence and modify the inclusive activities dedicated towards the excluded members within a society. Consequently, when societies and groups are investigated, a certain margin is maintained in the form of an area in which some entities are not fully included within the structure of a given society. Such marginalisation does exist in varied shapes and forms[1], nevertheless it is disadvantageous both to the excluded entity and the whole community (especially within societies based on the principles of solidarity). Social marginalisation, without any doubt, causes the society to be dysfunctional, especially if the community endeavours the maximisation of social inclusion and mitigation of exclusion. However, when the exclusion begins to increase, it is possible that it might grow uncontrollably and cross a critical point at which a society can no longer inhibit or stop it using its own resources (including both public administration and the various forms of a civil society). Such extensive exclusion could then stop being marginal and concern the majority of the society leading to an unstable societal condition. Consequently, societies rely on inclusive activities in order to remain healthy and effective. Such activities are, therefore, a necessity and must necessarily be included within any society in order to ensure proper co-existence. Such prevention mechanisms are thus formed by appropriate legislation and public policies – both nationwide and locally within various self-government structures (within the framework of specific national solutions)[2]. Meanwhile, the activities taken in order to empower the excluded are heavily axiologically pre-conditioned. The

[1] For a comprehensive definition of exclusion consult: Jane Millar, "Social Exclusion and Social Policy Research: Defining Exclusion", In: Multidisciplinary handbook of social exclusion research, ed. Dominic Abrams, Julie Christian, David Gordon, Hoboken: Wiley-Blackwell, 2007, 1-15.

[2] The specific activities may vary to a vast extent because inclusion does not mean the same to everyone. Not only can views of equity, participation and inclusion take different forms but they are also ideas that are continually evolving and developing. See also Jonathan Rix, Melanie Nind, Kieron Sheehy, Katy Simmons, John Parry, Rajni Kumari, Equality, Participation and Inclusion 2. Diverse Context, London, New York: Routledge, 2010.

extent to which a society notices the issue of social exclusion indicates its respect for values which do (or should) lie at the core of a given society. Therefore, any and all inclusive activities constitute a demonstration of respect for human dignity, solidarity, common welfare, personal freedom and equity. Those values may be investigated from diverse angles and by various disciplines. This paper presents an analysis from the perspective of jurisprudence with reference to the Polish legal system. The ambiguity of the subject matter requires the study to be limited to positive law only – those social norms which are considered by the state to be common and applicable, i.e. referring to the regulation of those human activities which are performed in relation to other people[3]. Positive law gives a lawyer proper research opportunities for an adequate evaluation of the axiological bases for inclusion.

The paper attempts to present values which form the paradigm of social inclusion intensification with respect to Polish legislation. On the one hand, Polish solutions are rooted within the European civilization heritage, and on the other build and enhance it. From a broad perspective, the investigated phenomena touch upon general values shared by all the humanity, global principles existing regardless of cultural and legal variations.

Investigating values within law is not an easy task, and the difficulties appear to be universal regardless of place and culture. They mostly relate to the fundamental question of science: "what, how and why is anything investigated?"[4] Such a study, contrary to potential justified expectations, is not an attempt to redefine *values* (which may, in the end, happen or be considered), but concerns the elementary ontological dilemmas: is *value* an element of the norm, an extra-normative category, a supposition on legislators goal, a fact in terms of social phenomena, or a motif shaping interpersonal relations? The literature also mentions methodological and teleological issues. The former is linked to the relation between values

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[3] Antoni Peretiatkowicz, Wstęp do nauk prawnych, Poznań: Księgarnia Wł. Wilak w Poznaniu, 1932, 15.

[4] Zbigniew Cieślak, „Podstawy aksjologiczne administracji publicznej w Polsce – próba oceny", Studia Iuridica 38(2000): 60.

and legal regulations[5]. The latter concerns the distinction of functionality and efficiency postulates, acknowledged especially within the study of administrative law. The administrative law study specifically aims at presenting the relation between values and the competence of legal regulations, specifically whether and to what extent they may be successfully implemented[6].

Given the aforementioned observations, it is crucial to specify that from the ontological perspective the study of law is focused primarily on norms and regulations themselves. However, it does not imply an artificial division of the branches of law and legal study, e.g. the distinction between administrative and constitutional law. Since the study concerns the regulations, no other source should be necessary to reach conclusions other than the regulations themselves. Such an approach, as shall soon be proven, is not at odds with the existence of extra-legal values, which are simply not investigated herein. At this point, no philosophical approach to values (i.e. axiological objectivity or subjectivity[7]) must be adopted to provide a comprehensive study of the subject matter. Given those ontological presuppositions, values should only be investigated through an interpretation of law and regulations. It does imply a certain well-known difficulty – an analysis based solely on the interpretation of the law. This may lead to an extreme (but not baseless) objection, namely that every interpretation is strictly based on the interpreter's own views on the law, while the actual estimation is a result of the functional evaluation[8]. At this stage the investigator's bias may easily override the values intended to be represented within a regulation by the legislator. However, the *ratio legis*

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[5] Zbigniew Cieślak, „Podstawy aksjologiczne administracji publicznej w Polsce – próba oceny", Studia Iuridica 38(2000): 60.

[6] See: Jan Zimmermann (Ed.), Aksjologia prawa administracyjnego, T. 1 and 2, Warszawa: Wolters Kluwer Polska 2017.

[7] Tomasz Barankiewicz, „Aksjologiczna problematyka prawa", Roczniki Nauk Prawnych 1(2004): 50. See also: Sławomir Fundowicz, „Aksjologia prawa administracyjnego", In: Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego. Zakopane 24-27 września 2006, ed. Jan Zimmermann, Warszawa: Wolters Kluwer Polska 2007, 636-637.

[8] Jerzy Leszczyński, „Wartości prawa w teorii Jerzego Wróblewskiego", Filozofia Publiczna i Edukacja Demokratyczna 2(2013): 260.

of a regulation alone should prevent such far-reaching, presumably unintentional, manipulation[9], although the functional evaluation remains the crucial point of the analysis for the aforementioned reasons. Another issue, apart from proposing an unbiased description, relates to providing a certain hierarchy of values. On the surface, such an operation introduces subjectivity into the study, however, the law itself limits subjectivity of evaluation – each legal system uses certain axiomatic properties of the sources of law (e.g. the primary role of the constitution, generally accepted magnitude of properties of an investigated legal act *inter alia*). Therefore, the evaluation is always conducted with respect to the legislator, assuming their rationality in the legislative procedure.

Finally, the teleological bases for the analysis must be drawn. The aim of this paper is to reconstruct the values lying at the core of social inclusion and their reflection in both the constitutional matter and the administrative-law regulations.

By the will of the constitution lawmaker[10], the Polish Constitution is the supreme law and legal act in Poland. The Constitution is thus the source of law in the positive law sense and takes precedence over any other legal acts and is a normative act as a whole[11]. From the formal perspective, the Constitution consists of the Preamble and 243 Articles. From the point of view of substantial systematics, it contains norms, rules and values[12]. Rules and values are specifically difficult to distinguish as, according to the Polish jurisprudence, rules may also bear values, while not being values themselves[13].

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[9] Jerzy Leszczyński, „Wartości prawa w teorii Jerzego Wróblewskiego", Filozofia Publiczna i Edukacja Demokratyczna 2(2013): 260.

[10] The constitution has been approved by the National Assembly of Poland (a joint chamber meeting of Sejm and Senat), approved by a national referendum on 25 May 1997.

[11] Kazimierz Działocha, „Komentarz do art. 8", In: Konstytucja Rzeczpospolitej Polskiej. Komentarz, ed. Leszek Garlicki, Marek Zubik, Warszawa: Wydawnictwo Sejmowe, 2016.

[12] See. e.g. Marek Zubik, „O przewrotnych interpretacjach przepisów Konstytucji dotyczących władzy sądzenia", Państwo i Prawo 10(2017):14.

[13] Małgorzata Kordela, „Zasady prawa jako normatywna postać wartości", Ruch Prawniczy, Ekonomiczny i Społeczny 1(2006): 39.

Given the theses presented above, especially the purely normative view on values, it is crucial to address the specificity of Polish law, especially the horisontal and vertical effects of legal norms. Such an analysis is necessary from the perspective of hierarchy of values and presenting internal relations between those values, as shown in the further sections of this paper. The following sections will focus on respective values which have created the legal background for social inclusion.

2. INCLUSIVE VALUES AND RELATED LEGAL SETTING

2.1. Dignity

One of the most important values shared globally by the whole humanity, regardless of cultural or normative diversification is human dignity, and it must thus be recognised and protected for the security and development of the whole human kind. Various legal systems emphasise various aspects of human dignity, which reflects the understanding of this specific value within a community. Inclusion, as understood herein, is initiated and fuelled by the principle of respecting the human dignity. Inclusive actions are performed in order to restore one's dignity, granting them their lost agency, reinstating their self-worth, and encouraging them to actively participate in social life of a community, including the establishment of its internal structure and functioning. Inclusive actions are always grounded in the most elementary human values – the strongest ones which build the axiologically-rich sphere of human interaction within a society. Any analysis of social inclusion entails the question about the respect for human dignity, which brings us back to the Polish Constitution of 2997, which is the basis for all specific in-depth studies. The tenet of respecting the human dignity is one of the basic principles expressed within the Constitution *expressis verbis*, and is presented as the fundamental rule, one on which all other corresponding values may develop and flourish (Article 30). The related issue of the origin of humanity (i.e. when a being becomes a human being and a person) is linked to the philosophical and religious beliefs which form the basis for any legal system, especially: does dignity require only the emergence of a human being, or something more – a moral agent

and experiencer capable of feeling[14]? The discussions rooted in various normative systems are reflected in respective legal solutions, for instance, the legal limitations concerning abortions. In this regard, Polish regulations are strongly influenced by the Christian worldview and philosophy. Thus, human dignity is undoubtedly both a value and a supreme law which takes precedence over all other values and laws. Moreover, it sets a universal and substantial axiological and normative perspective in relation to statutory law. It therefore determines the actions of the lawmakers and entities which apply the law[15]. All individual human rights stem from inherent human dignity, which makes human rights (ones attributed to every human being, regardless of nationality and other distinctive features) supranatural (primary, original), inalienable and inviolable[16]. In other words, the modern view on human rights derives all human rights from a single supreme and central value – the dignity of a human being[17]. Human dignity is therefore the source, the foundation, the primary norm (*Grundnorm*) in a logical, ontological and hermeneutical sense. All the other norms, rules and values found within the Constitution must be interpreted and applied in respect to dignity[18]. This marks dignity as special and sets it apart from any other concept, and makes it the reference point for the interpretation of any other values and norms related to the complexity of social inclusion and related issues and phenomena.

[14] Alina Miruć, „Godność człowieka jako wyznacznik prawa administracyjnego stanowionego na szczeblu centralnym", In: Aksjologia prawa administracyjnego, ed. Jan Zimmermann, Warszawa: Wolters Kluwer Polska: 2017, 420.

[15] Alina Miruć, „Godność człowieka jako wyznacznik prawa administracyjnego stanowionego na szczeblu centralnym", In: Aksjologia prawa administracyjnego, ed. Jan Zimmermann, Warszawa: Wolters Kluwer Polska: 2017, 420.

[16] Wojciech Zakrzewski, „Podstawowe wolności, prawa i obowiązki człowieka i obywatela", In: Polskie prawo konstytucyjne, ed. Wiesław Skrzydło, Lublin: Morpol 2001, 165. See also: Jack Donnelly, Universal Human Rights in Theory and Practice. Third Edition, London: Cornell University Press 2013, 1-4.

[17] Bożena Gronowska, „Wolności, prawa i obowiązki człowieka i obywatela", In: Prawo konstytucyjne, ed. Zbigniew Witkowski, Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa. Stowarzyszenie Wyższej Użyteczności "Dom Organizatora" 2006, 173.

[18] Leszek Garlicki, Polskie prawo konstytucyjne. Zarys wykładu, Warszawa: Liber 2007, 89.

2.2. Freedom

Dignity is not the only value important to the issue of social inclusion. In this section we will focus on Freedom, which on the surface is of little to no importance to the discussed topic, however, the selected examples will show that it should be a point of reference to social inclusion. In the case of the critically excluded, the relation between dignity and freedom, which may appear as a conflict between the two, may be successfully analysed.

One of the significant attributes of dignity, which makes it one of the basic laws in Poland, is the individual's freedom. This value is strongly linked not only to a person and dignity but also to the country and society, as it is the source of the right to be free on the one hand, and the obligation for the state to respect one's freedom, on the other[19]. How should the state respect and protect freedom? The state should address the issue of freedom primarily through its complex system of interconnected institutions; by establishing appropriate substantial laws, and finally through adequate procedures. Inclusive actions on all three aforementioned levels must be motivated by the value of human freedom. The following section presents all three levels from the perspective of freedom protection.

Freedom, as an element of social inclusion, is related to the situation of some people who face the issue of homelessness. It is worth mentioning that the erroneous classification of some homeless people as ones who chose homelessness as their way of living (homelessness by choice) is not specifically Polish but a global misunderstanding of the issue. Numerous sociological studies as well as experience shared by entities and organizations that provide help for the homeless have justly criticised the concept of "homeless by choice"[20]. Homelessness by choice is solely a type of a social rationalisation for the position of those who suffer long-term homeless-

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[19] Krzysztof Horubski, Leon Kieres, Tadeusz Kocowski,Marek Szydło, Artur Żurawik, „Podstawowe pojęcia publicznego prawa gospodarczego", In: System prawa administracyjnego, 8A, ed. Roman Hauser, Zygmunt Niewiadomski, Andrzej Wróbel, Warszawa: C.H. Beck, 2018, 98.

[20] Ann Saltzman, Fred Curtis, "Social Distress Theory and Teaching About Homelessness: A Retrospective Analysis", Journal of Social Distress and the Homeless 2(1994): 118 and cited sources; Andrzej Przymeński, "Zjawisko bezdomności w Polsce współczesnej", Polityka Społeczna 4(1998): 10.

ness[21]. A homeless person is thus never truly free[22]. Attempting to restore (true) freedom becomes a major determinant of social inclusion. A proper organizational structure responsible for the protection of basic human rights in the context of axiological unity of law is required. Such a structure in Poland consists *de iure* of the central administration and the local municipal government, although it is the latter which, by the principle of subsidiarity, is expected to directly work to help the citizens escape homelessness. In reality, the administration outsources many of its tasks to non-public entities, with whom it is obliged to cooperate in a form of a partnership[23].

From the perspective of the substantive law, freedom shall provide the opportunity to freely choose the available instruments provided by law in order to help one shape legal standing and fulfil demands. In a democratic rule-of-law state, solidarity and respect for human dignity cannot deprive one from claiming the rights solely due to living in social exclusion. The factual observation of exclusion must be separated from the legal realm in which social exclusion simply cannot exist. The merger of those two realms is a direct threat to democracy and the rule of law. Inclusive actions should lead to granting an individual the right to freely shape one's own legal situation.

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[21] Radosław Mędrzycki, Zadania w zakresie przeciwdziałania bezdomności. Studium administracyjnoprawne, Warszawa: Wydawnictwo UKSW 2017, 35 and cited sources especially Irena Lipowicz, "Uwagi wstępne: ku zmianie polityki publicznej w przeciwdziałaniu bezdomności", In: Bezdomność – problemy prawne, innowacyjne rozwiązania, ed. Irena Lipowicz, Warszawa: Fundacja Didactics, 2017, 11; Jakub Wilczek, "Has the standardisation of homelessness services in Poland facilitated access to shelter?", Homeless in Europe Magazine Spring 2018: 4-6; Susan Yeich, The Politics of Ending Homelessness, Lanham: University Press of America, 1994, 5; on chronic homelessness: Craig Willse, The value of Homelessness. Managing surplus life in the United States, Minneapolis: University of Minnesota Press, 2015, 139-168.

[22] The first suggests that homelessness is the result of an individual's actions and choices. The second, that it is the result of wider structural problems outside one's control: Graham Tipple, Suzanne Speak, The hidden millions: homelessness in developing countries, London, New York: Routledge, 2009, 4.

[23] It is, naturally, an international tendency: Jeanne M. Wolfe, William Jay, "The Revolving Door: Third-Sector Organizations and the Homeless", In: Housing the Homeless and Poor. New Partnerships among the Private, Public and Third Sectors, ed. George Fallis, Alex Murray, Toronto: University of Toronto Press, 1990, 197-226.

Last but not least there is the procedure which should be a value on its own during the application of any law, although it cannot limit or in any way hinder a person's ability to exercise the right due to social exclusion. In the case of the homeless, the *questio diabolica* of the procedure is found in the procedural requirement of a formal residence registration in order to be granted other laws. Although this issue has become less severe in recent years in Poland, mostly thanks to numerous open discussions about the consequences of a possible abolition of obligatory residence registration, it clearly remains the major issue of the procedure (in fact, such problems exist in other states as well[24]). On the other end of the spectrum there remains a justified reluctance, shared by a considerable number of the homeless, to undergo inclusive activities performed in the place where their homelessness originated. In a way, mandatory relocation of such a person (with no respect to one's freedom) to the last official place of residence, in case the procedural limitations prevent providing specialist care in the place of one's current residence (typically a city of one's choice), is at odds with the very idea of social inclusion and violates it. As such, the inclusive procedure must respect one's freedom.

2.3. Equity

The two values discussed so far were the background for inclusion. In this section equity as a goal of inclusivity is investigated. The Polish Constitution merges the principles of equity and non-discrimination into one normative unit[25]. The principle of equity originated in Ancient Greece (Plato, Aristotle) and refers to the achievements on the international (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights) and EU (Charter of Fundamental Rights of the European Union, Treaty on European Union, Treaty on the Functioning of the European Union) level[26]. It is

[24] Aarolina Bednarz, Kwiaty w pudełku. Japonia oczami kobiet, Warszawa: Wydawnictwo Czarne, 2018, 180.

[25] The 23 October 2001 Constitutional Tribunal ruling K 22/01, OTK ZU 2001 r., no 7.

[26] We assume that inequity and equity refer to how fairly services, opportunities and access are distributed across groups of people or places, according to the need of that

expressed not only in Articles 32 and 33[27] but also in the Preamble to the Constitution where it is declared that all citizens are equal in their rights and responsibilities for their common welfare – Poland. In relation to groups of higher risk of exclusion, equity may take the form of a preferential treatment designed to improve their disadvantageous (exclusive) social situation. This concerns, among the others, national and ethnic minorities[28], children[29], pregnant women, people with disabilities[30] and the elderly[31], families who have found themselves in a difficult financial and/or social situation (especially large and incomplete families[32]). Such diversity stems directly from the application of the principle of justice, which allows for a differentiation of the social situation of specific units[33]. From the perspective of the values lying at the core of the inclusive actions, setting such compensatory privileges is in fact an axiologically determined

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group. Mary Shaw, Bruna Galobardes, Debbie A. Lawlor, John Lynch, Ben Wheeler, George Davey Smith, The Handbook of Inequity and Socioeconomic Position: Concepts and Measures, Bristol: Bristol University Press, 2007, 13; Jay M. Shafritz, E.W. Russel, Christopher P. Borick, Albert C. Hyde, Introducing Public Administration, London, New York: Routledge, 2013, 433.

[27] Article 32: 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.; Article 33: 1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland. 2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

[28] Art. 27 par.2 and art. 35 pt. 2 of the Constitution.

[29] Additionally protected by art. 71 pt. 2 of the Constitution.

[30] Additionally protected by Art. 69 of the Constitution.

[31] Art. 68 pt. 3 of the Constitution.

[32] Art. 71 pt. 1 par. 2 of the Constitution.

[33] Consult the following constitutional Tribunal rulings: 3 September 1996 (K 10/96, OTK 1996, Nr 4, poz. 33), 24 February 2010 (K 6/09, OTK-A 2010, Nr 2, poz. 15). Regardless of the specific views on the principle of justice, it is agreed that internationally „the concept of social equity in public administration" is inextricably linked to J. Rawls's A Theory of Justice": Susan T. Gooden, "Social Equity in Public Administration. The Need For Fire", In: The Future of Public Administration Around the World: The Minnowbrook Perspective, ed. Rosemary O'Leary, David Van Slyke, Soonhee Kim, Georgetown: Georgetown University Press, 2010.

duty of the lawmaker. The idea of the so called "positive discrimination" becomes an inseparable aspect of a society in which all groups and social categories can fully exercise their rights, regardless of their status. Only by expressing one's consideration for the weak can one show respect and acceptance of the diversity of the whole humankind[34].

Although being two independent values, equity and solidarity are often strongly correlated with one another. Equity does not have to mean justice. In terms of inclusiveness, one tends to aim at just equity – equal opportunities. Those, however, do not have to have equal bases. Sometimes, in order to achieve equal opportunities, one must abandon equal bases in favour of positive discrimination.

2.4. Common Welfare

It is not possible to achieve inclusiveness without understanding the significance of the common welfare. This value allows for a deeper understanding of the goals of inclusiveness and compensatory actions leading to equity. Inclusive actions may be provided to any person suffering from social exclusion. The authors of this paper share a belief that Article 1 of the Polish Constitution stating that "The Republic of Poland shall be the common good of all its citizens" is limited and applies only to the citizens of Poland. An attempt to provide an axiological justification for an extension of inclusion to citizens of Poland and all foreigners or stateless persons must be based on the value of human dignity. Such an approach implies that every human being has dignity, regardless of citizenship. Moreover, inclusion – understood as reintegration of a unit with local community – introduces a person into the whole realm of a unique value, which is the Republic of Poland. It might appear that the Republic of Poland on its own cannot serve as a justification for social inclusion. However, as a common welfare it "shall constitute the general conditions of a social existence which, either through associations or individual members of the community, allow for a full and easier achievement of individual perfection"; the common welfare, therefore, is the source of solidarity and the principles

[34] Marek Safjan, Przemysław Mikłaszewicz, „Granice uprzywilejowania wyrównawczego", Przegląd Sejmowy 6(2011): 36.

of democracy[35]. Human dignity, freedom and solidarity must be unconditionally respected if the state – the Republic of Poland – is to prevail as the common welfare, and must be enforced if the bodies of the state are to be in full servitude to the citizens[36].

2.5. Social Solidarity

Last, but not least, the value of solidarity, which is strongly associated with common welfare and other values presented so far, needs to be elaborated upon. Solidarity is important for respecting other inclusive values. It is also one of the values mentioned in the Polish Constitution.

Social inclusion with full respect to dignity and freedom inevitably leads to certain objections. Why should the majority participate in the costs of inclusion of those who have "removed themselves" outside the bounds of society and become excluded? Why should the general community want to restore freedom, equity and do it in the name of common welfare? Inclusion would not be possible if not for social solidarity, which is the underlying source of inclusion and shows the actual worth of all other values.

The legal understanding and expression of solidarity is, in a way, paradoxical. The notion itself has gone a long way from the Roman law, through the immense philosophical and political discourse of modern times to be defined anew (both in its role and characteristics) and enter the legal systems[37]. Clearly, neither are the authors of this publication focused on a full investigation of the philosophical aspects and context in which

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[35] Such a definition of the common welfare is expressed in the encyclic Gaudium et spes. Sławomir Fundowicz, „Aksjologia prawa administracyjnego", In: Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego. Zakopane 24-27 września 2006, ed. Jan Zimmermann, Warszawa: Wolters Kluwer Polska 2007, 647.

[36] Irena Lipowicz, „Dobro wspólne", Ruch Prawniczy, Ekonomiczny i Socjologiczny 3(2017): 19.

[37] Dariusz Dobrzański, „Nowożytna idea solidarności", In: Idea solidarności w kontekstach filozoficzno-historycznych, ed. Dariusz Dobrzański, Andrzej Wawrzynowicz, Poznań: Wydawnictwo Instytutu Filozofii UAM, 2006, 13.

solidarity is found, nor would such a brief description be possible[38]. Suffice to say that due to this long and complex way from the ancient to modern concept of solidarity, full of philosophical twists and turns, this concept and value has diverged from the simple notion of joint liability. This recognised history of the idea, however, hinders the ability to propose a simple explication, especially that solidarity is an ideological and a normative concept found both on the individual and collective level[39]. The semantic and pragmatic complexity granted to solidarity by philosophy makes the concept non-uniform: the more information is discovered, the less defined it becomes. For the purpose of this paper, only general attributes of solidarity shall be selected and used for future reference. Such an approach will underline only the most important themes, while presenting the diversified approach to social inclusion.

The "core" of solidarity, or the common understanding of solidarity, is the relation of mutual dependency between individual members of a community[40] and the community as a whole[41]. Any further investigation into the notion of solidarity requires it to be expressed as a legal concept. It is thus a relation which becomes substance; an internal interdependence of community members and the care of ones for the others is a direct result of shared responsibility for all members of the same community[42]. Naturally, the "whole" may be defined in many ways depending on the context: as family, self-governed community, nation, international community, the humanity or even all living beings. Solidarity may also apply

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[38] Those have been investigated in detail in: Dariusz Dobrzański, Zasada solidarności. Studium z filozofii społecznej, Poznań: Wydawnictwo Naukowe UAM, 2013.

[39] Also consult: Arto Laitinen, Anne Birgitta Pessi, "Solidarity: Theory And Practice. An Introduction", In: Solidarity. Theory and Practice, ed. Arto Laitinen, Anne Birgitta Pessi, London: Lexington Books 2015, 5; Aafke Komter, "Solidarity", In: International Encyclopedia of Civil Society, ed. Helmut. A. Anheier, Stefan Toepler, New York: Springer -Verlag, 2010, 1460-1461.

[40] An „independent" context is also possible, however it shall be omitted as unrelated to the subject matter. Dariusz Dobrzański, „Nowożytna idea solidarności", In: Idea solidarności w kontekstach filozoficzno-historycznych, ed. Dariusz Dobrzański, Andrzej Wawrzynowicz, Poznań: Wydawnictwo Instytutu Filozofii UAM, 2006, 14.

[41] Charles Gide, "Solidarity", In: The New Palgrave Dictionary of Economics, ed. John Eatwell, Murray Milgate, Peter Newman, London: Palgrave Macmillan, 2018, 1.

[42] Compare: Émile Durkheim, De La Division Du Travail Social, Paris: PUF, 2007.

to other categories, such as age where it becomes intergenerational. Irena Lipowicz rightly notices that "Solidarity directs joint actions, teaches how to bear the burdens of others, it helps a person or even nation leave the bounds of their self-centred interests. It is beneficial for the whole nation throughout its continued existence"[43]. Similarly, Ingolf Price described solidarity as the idea of the community itself, a "qualified bond" shared by its members[44]. It then begs a question of whether solidarity creates a community, or the community creates (the need for) solidarity[45]. How should social solidarity be understood?

It may sometimes be difficult to distinguish two similar concepts from each other, as it is in the case of solidarity and charity. In principle, charity exists in vertical relations and is associated with compassion while solidarity, which builds a community, is based on horizontal relations. The scope is also different: for charity it is the "I", while solidarity is motivated by "us."[46] In some views, charity is seen as one which does not require reciprocation, while solidarity may in certain cases be mutual (the exchange of goods, benefits, values)[47]. On the surface, social inclusion should be motivated by charity more than solidarity. Any expectation of some kind of "return" from the one who is being included would be virtual, especially if the return were to comprise similar goods as those utilised in the process of inclusion. However, the realisation of an individual interest (of the excluded) during the legal and legally-based inclusion should always entail a public (community's) interest or even personal (i.e. a specific person's)

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[43] Irena Lipowicz, „Dobro wspólne", Ruch Prawniczy, Ekonomiczny i Socjologiczny 3(2017): 20.

[44] Ingolf Pernice, „Solidarność w Europie. Miejsce w relacjach między obywatelem, państwem i Unią Europejską, part I", Europejski Przegląd Sądowy 10(2013): 5.

[45] The author seems to be a proponent of the latter, as only by the use of the EU instruments may solidarity fully emerge. Ingolf Pernice, „Solidarność w Europie. Miejsce w relacjach między obywatelem, państwem i Unią Europejską", part I, Europejski Przegląd Sądowy 10(2013): 49.

[46] Arto Laitinen, Anne Birgitta Pessi, "Solidarity: Theory And Practice. An Introduction", In: Solidarity. Theory and Practice, ed. Arto Laitinen, Anne Birgitta Pessi, London: Lexington Books 2015, 15.

[47] Arto Laitinen, Anne Birgitta Pessi, "Solidarity: Theory And Practice. An Introduction", In: Solidarity. Theory and Practice, ed. Arto Laitinen, Anne Birgitta Pessi, London: Lexington Books 2015, 12.

achievement. Consequently, even if its transactional nature is to be concerned, solidarity is strictly correlated with social inclusion.

Solidarity helps with enforcing various values while being a value itself. The positive axiological context of solidarity is unsurprising, although one can name certain "deviations", such as an instance of strong solidarity shared by a group which manifests itself as aversion to others. On the other hand, one could wonder if solidarity could be compulsory, yet it is believed that compulsory solidarity is simply not possible. In a prosperous country the duties and actions taken for the sake of others may only be motivated and justified by solidarity[48]. The authors of this paper share the (somewhat subjective) view that solidarity should never be used for "exploitation for exploitation's sake", but a kind of "exploitation" of oneself to serve the others. A person is the only and sufficient source and reason for solidarity.

The Preamble to the Polish Constitution clearly references solidarity by stating that "all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland[49]." It is therefore crucial to address the potential effect of mentioning solidarity in the Constitution, as it is necessary to properly understand the normative context in which this expression is found and its further consequences. Solidarity on its own is an inclusive value, historically legally linked with poverty prevention[50], yet it must also be supported by the analysed contemporary normative data.

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[48] Dariusz Dobrzański, „Nowożytna idea solidarności", In: Idea solidarności w kontekstach filozoficzno-historycznych, ed. Dariusz Dobrzański, Andrzej Wawrzynowicz, Poznań: Wydawnictwo Instytutu Filozofii UAM, 2006, 40.

[49] Such a direct mention of solidarity may also be found in Article 20 of the Constitution, yet it concerns a matter distant from the topic of this paper and thus shall not be investigated. The Article governs the economy and states: „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."

[50] Philipp Dann, "Solidarity and the Law of Development Cooperation", In: Solidarity: A Structural Principe Of International Law, ed. Rudiger Wolfrum, Chie Kojima, Heidelberg, New York: Springer 2010, 56.

The analysis of the Preamble to the Constitution leads to the conclusion that it has at least partial normative nature, assuming that the normative nature of the Preamble implies its direct application – it would entrust the duties and responsibilities of a certain state or self-government (and other) entities to public administration. The Preamble sets "the obligation of solidarity with others", which is grounded in the following position "I do not require charity from anyone (assuming vertical, not horizontal relationship)[51], set in personal compassion or mercy, but a paradigm of a modern democracy – every man is equal." Regardless of the view on the necessity of inclusion of those socially excluded, the Polish Constitution points to the obligation to bear the consequences stemming from solidarity (such as taxes, positive discrimination, etc.). This makes solidarity a normative imperative for the actions of the state and its members, initially motivated by the need of human dignity protection.

The Preamble is proprietary and serves as a reference point for the understanding of the purpose of specific regulations, allows for a better understanding of their *ratio legis*, and helps us better our understanding of the relations between respective regulations within a legal act[52]. Moreover, due to the position of the Constitution within the Polish legal system, the Preamble serves as the point of reference for contextualizing the whole legal system and is invaluable in the process of interpretation of statutory acts[53]. Therefore, by maintaining an axiological uniformity of the Polish law, one must attempt to understand the law from the perspective of the principle of solidarity. Naturally, the interpretation may neither fix bad law nor create a new regulation.

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[51] Philipp Dann, "Solidarity and the Law of Development Cooperation", In: Solidarity: A Structural Principe Of International Law, ed. Rudiger Wolfrum, Chie Kojima, Heidelberg, New York: Springer 2010, 57.

[52] Leszek Leszczyński, „Wykładnia celowościowo-funkcjonalna przepisów prawa administracyjnego", In: Wykładnia w prawie administracyjnym. System Prawa Administracyjnego, ed. Roman Hauser, Andrzej Wróbel, Zygmunt Niewiadomski, Warszawa: C.H. Beck, 2015, 294.

[53] The Supreme Administrative Court of Poland rulings: 30 October 2010, I OSK 2060/14, CBOSA; 23 October 2015, I OSK 456/14.

3. FINAL REMARKS

All the values presented in this paper coexist with one another. It is not possible (nor should it ever be attempted) to artificially separate them – only when they intertwine, complete and enhance one another can the inclusive actions be designed and executed in the most advantageous manner. The values and related principles are connected and, therefore, their interpretation in the context of law application must also be done from the perspective of their coexistence and mutual influence. However, our goal has never been to provide an in-depth analysis of the connections between the discussed values, their coexistence and significance for social inclusion appears to be unquestionable. Each of the discussed values takes part in the establishment of the resources shared by a democratic state and by the internal structures of the civil society existing within this state's bounds. They are the basis and an inherent attribute of modern civilized societies, while remaining complementary for one another. Only by taking them all into consideration can we provide an adequate and comprehensive understanding of inclusivity and achieve its desired model.

All the values presented in this paper justify social inclusion, although solidarity stands out as the one binding them all together. The goal of social inclusion from the perspective of solidarity requires the legal debate to include other values, specifically the ones discussed in this paper. Dignity presents all human beings as worthy of inclusion. Freedom stresses the need for being included, as only by being fully included in a society can one be truly free (exclusion is the denial of freedom). Common welfare lets the inclusion reach beyond the national bounds. Finally, equity, from the perspective of justice, lets the excluded to have access to the welfare as a whole and provides for equal opportunities.

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INSTRUMENTAL OFFENCE IN SPANISH CRIMINAL CODE: PROBLEMS OF LEGITIMACY?

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ABSTRACT

This paper presents a new category of criminal norms that are referred to as "instrumental crimes". It is a from of anticipation through which the Spanish legislator punishes the preparation of crime incriminating evidence or processes to commit a crime in order to prevent new forms of crime. However, this decision is illegitimate because it is incompatible with constitutional principles. In that sense, maintaining those criminal norms in the code will require interpretation that conforms to the basic principles of criminal law.

Key words: Anticipation, constitutional principles, preparation, instrumental crimes, interpretation.

1. PUNISHMENT OF PREPARATION

In most cases, the criminal code conceptualises an offence as the consummation of an act. However, at times preparation of crime is included in this definition depending on the relevance of the legal right and the circumstances that may threaten the object of protection. From the preparation phase[1]. In effect, when legislators normally describe crime, they often

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[1] Cfr. Santiago Mir Puig: Derecho penal. Parte general, 10.ª ed., Barcelona: Reppertor, 2015, 346.

do so referring to its consummate form[2]. This may lead to the presumption that legislators are not thinking of prohibiting the preparation of a criminal offence but rather that the set of rules, namely the code is intended to prevent actions that affect the essential legal interests of the law-society-entity not appreciated in the criminal preparation. With this in mind, although it is commonly understood that it is prohibited to kill, it is less clear to refer to the preparation of homicide or another type of crime. In those cases, doubt may arise regarding the certainty of punishability of crime preparatory acts. The precept contained in Art. 138 of the Penal Code describes a conduct carried out (homicide); it does not refer to acts of disposition that may subsequently cause the death of another[3]. If the Penal Code is reviewed, more precepts will be found to refer to an accomplished fact and not to the preparation of crime[4]. Therefore, it is plausible to state that the majority of precepts describe a perceptible, conflicting aggression. Therefore, the incrimination of the preparation in Spain is reserved for exceptionality[5].

Within the power available to the legislator to establish criminal offences as well as their respective sanctions, is the power to choose the mode of incrimination that deems most convenient, as well as the type of pen-

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[2] Cfr. Claus Roxin: Derecho Penal. Parte General, Tomo 1. Fundamentos: La estructura de la Teoría del Delito, 2.ª ed. (translators: Diego-Manuel. Luzón Peña/Miguel Díaz y García Conlledo/Javier de Vicente Remesal) Madrid: Civitas Ediciones, 1997, § 1, N. 22.

[3] Judgment of the Court of 25 April 2012 (case 2012 RJ 2012\11286 Jorge Barreiro), F.J. 7.

[4] The vast majority of crimes are of this nature; thus, carrying out sexual acts with children under sixteen years of age (Article 183), taking a movable property with others without permission of its owner (Article 234), causing damage to property of others (Article 263), provoking serious imprudence a crime of havoc (Article 347), counterfeit currency (Article 386). The examples of this category in the Penal Code would take pages and pages.

[5] Cfr. Claus Roxin, Derecho Penal. Parte General, Tomo 1, 2.ª ed., 1997, § 7, N. 14. The consummated crime is the point of reference for the legislator that only for special reasons decides, as a manifestation of its power, to incriminate preparatory actions that do not represent any injury in a phenomenal sense. In other words, it dispenses with the concept of unfairness as a valued fact from the perspective of "social damage". However, this power does not end with punishable preparatory acts but can go to other overtaking figures.

alty[6]. In the task of regulating human behaviour, the criminal norm is used and it may present various structures. In this sense, the legislator can describe actions that produce a result or opt for actions that do not require any external modification[7]. Pure omission, from which a rational contribution to the social system is expected, may serve as an example. It is known that the power to incriminate a conduct, elaborating criminal norms by means of various structures, does not find its limit when sanctioning the omission[8]. The legislator also draws precepts where it establishes a sanction for the non-observance of the objective duty of care of its citizens. And, in addition, the Penal Code is known to present other models of incrimination[9].

The set of forms of exceptional criminality includes the so-called "instrumental offences". It is a tutelary technique that incriminates preparatory acts aiming to commit a criminal offence, which brings about relevant consequences[10]. It is a decision that creates legal norms with complex structures because the interpreter will be forced to go to areas

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[6] Cfr. Santiago Mir Puig: Derecho Penal. Parte General, 10.ª ed., Barcelona: Reppertor, 2015, 348.

[7] Cfr. Claus Roxin: Derecho Penal. Parte General, Tomo 1, 2.ª ed., 1997, § 11, N. 119. The legislator is known to be authorised to anticipate the intervention to phases before the consummation. It can be done by means of dependent figures, I think of "the attempt" or "punishable preparatory acts". But it can also present autonomous figures, for example, "abstract danger crimes" or "attempted crimes".

[8] Cfr. Judgment of the Court of 28 April (case 470/2006 de 28 abril. RJ 2006\233 Maza Martín) F.J. 1.

[9] Cfr. Claus Roxin: Derecho Penal. Parte General, Tomo 1, 2.ª ed., 1997, § 2, N. 1, 22.

[10] Preparation in terms of a criminal offence is a complex guardianship technique because it is fraught with contradictions. There are many doubts that arise when reviewing this figure since the questions begin with the concept of preparing in a penal legal sense, going through the determination of the unjust until the moment of determining the relevance of the legally relevant risk from the preparation. The chapters that follow will demonstrate how contradictions arise when drafting those rules and imposing the sanction foreseen in them. Preparation in terms of a criminal offence causes the incrimination to appear in various ways because the legislator is not limited to expressions such as "the one I will prepare" but in the largest number of cases, it turns to other governing verbs. For example, when sanctions tenure, possession, facilitation, manufacture... to commit a crime.

that in the largest number of cases are unknown[11]. For example, there are precepts that incriminate the preparation of crime from the possession of computer programs to obtain a fraud[12] (Article 248.2 b])[13]. They are instruments that are not usually used or dominated by anyone, so in some cases one might think about raising some of those types of crime to the rank of special crimes[14]. It is believed that at the moment of the application of the precepts, the interpreter will run into some contradictions in terms of the content and scope of the rules. There will also be contradictions with respect to other precepts, specifically, those provided for in the General Part of the Penal Code[15]. I put for example, the analysis of figures such as authorship, participation, and attempt, as well as voluntary withdrawal.

2. WHAT ARE INSTRUMENTAL OFFENCES?

Instrumental offences do not refer to an intermediate phase between the consummation of crime and the attempt to commit a criminal offence but before a period prior to the attempted crime that is planned[16]. The penological comparison made by the Spanish legislator in the case of instrumental offences is between the preparation phase and the consummation

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[11] Enrrique Peñaranda Ramos: "La reforma de los delitos de falsedades documentales". In: Julio Díaz-Maroto y Villajero, dir.: Estudios sobre las reformas del Código penal. (operadas por las LO 5/2010, de 22 de junio, y 3/2011, de 28 de enero), Cizur Menor (Navarra): Civitas, 2011, 576-578.

[12] Cfr. Judgment of the Court of 20 November 2001 (case 2002\805 Martínez Arrieta), F.J. 1.

[13] José Antonio Cruz de Pablo: Derecho Penal y nuevas tecnologías. Aspectos sustantivos, Madird: Difusión Juridica, 2006, 45-47; Francisco Muñoz Conde: Derecho Penal. Parte Especial, 20.ª ed., Valencia: Tirant Lo Blanch, 2015, 348-349.

[14] Mirentxu Corcoy Bidasolo: "Límites objetivos y subjetivos a la intervención panal en el control de riesgos". In Santiago Mir Puig/Mirentxu Corcoy Bidasolo, dirs.: Política criminal y reforma penal, Montevideo-Buenos Aires: B de F, 2007, 52.

[15] Francisco Muñoz Conde, Mercedes García Arán: Derecho Penal. Parte General, 9.ª ed., Valencia: Tirant Lo Blanch, 2015, 444-447.

[16] Bernardo Feijoo Sánchez: Retribución y prevención general. Un estudio sobre la teoría de la pena y las funciones del Derecho penal, Montevideo, Buenos Aires: BdF, 2007, 141, 149, 573, 577.

phase and not between the tentative phase and execution[17]. In reviewing the definition that the legislator offers for those norms, instrumental offences do not correspond to any of the following criminal manifestations: attempt or consummation of crime. By mandate of the legislator, instrumental offences are understood to be the preparation of certain offences, by means of certain instruments, is equivalent for punitive purposes to the formal consummation. It is not necessarily any prejudice to the protected legal right but the disposition of some materials or necessary processes to be able to injure it. In that sense, for the legislator, the preparation of the offence to the legal right is the basis to ground the unfair[18]. In effect, instrumental offences are considered to correspond to a specific modality of consummated crime in which the legislator views that the act of preparing a crime must be regarded as a consummation[19]. It is a political decision; however, the instrumental offence has few things in common with the crime. For example, its location in the Special Part of the Penal Code, which gives it a certain autonomy since it is not necessary to resort to a rule of the General Part as occurs with other figures of anticipation to be able to regulate its application.

Instrumental offences share certain qualities with figures of dependent anticipation, for example: punishable preparatory acts. Thus, on the one hand, ways or means of preparation for specific crimes are incriminated and not for any crime that can be committed through instruments; On the other hand, the conduct is punished -in a disproportionate manner- without the offense being prepared. However, despite those similarities, instrumental offences cannot be sustained to correspond structurally with punishable preparatory acts as a form of criminal anticipation[20]. In fact,

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[17] Cfr. Ignacio Flores Prada: Criminlidad Inormática: Aspectos sustantivos y procesales: Tirant Lo Blanch, 2012, 250.

[18] Cfr. Alfonso Serrano Gómez, Alfonso Serrano Maíllo: Curso de Derecho Penal. Parte Especial, 4.ª ed., Madird: Dykinson 2017, 659.

[19] Cfr. Noelia Solari Merlo, en Oscar Morales García (dir.): Código Penal con Jurisprudencia, Madrid: Aranzadi, 2013, 892.

[20] Cfr. José Cerezo Mir: Derecho Penal. Parte General, 2008, Montevideo, Buenos Aires, BdF, 900-906; Soledad Barber Burusco: Los actos preparatorios del delito, Granada: Comares, 2004, 99-155; Juan Carlos Campo Moreno: Los actos preparatorios punibles, Valencia: Tirant lo Blanch, 2000, 31.

it is indisputable that instrumental offences do not sanction the execution phase of the respective offences but acts of preparation. In that order, someone commits an instrumental offence whenever their conduct (possession, possession, facilitation, manufacture of instruments), corresponds to a criminal function regardless of whether the respective crime ends. The phenomenon of instrumentality as a crime must be assimilated as a solid base on which the necessary conditions for attacking a legal good are sustained. Five instrumental offences that are contained in the Spanish Penal Code will be displayed (Articles 248.2 b, 270.6, 371.1, 400 and 570.2)[21].

In the crime of manufacturing, introduction, possession or provision of computer programs specifically intended for the commission of fraud[22] (Article 248.2 b), the instrumental nature is appreciated since the actions incriminated by the legislator are intended to avoid accomplishment of a specific criminal work, that is, defrauding another through the use of tools[23]. For that reason, when incriminating the possession or manufacture of the program the content of unlawfulness is assumed to consist of the anticipation of the injustice of the final crime.

The crime of possession, manufacture, import or circulation of any means designed to check out computer programs or literary works (Article 270.6)[24] also has an instrumental structure since both the device or program - prohibited by the legislator - allows for the commission of a specific crime, or, in other words, facilitates the execution of a specific crime. In that direction, the subject can prepare with the device the consummation of the final crime by the same or by third parties[25].

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[21] Alberto Alonso Rimo: «¿Impunidad general de los actos preparatorios? La expansión de los delitos de preparación», InDret 2017/4, 3-45.

[22] Cfr. Judgment of the Court of 20 November 2001 (case 2002\805 Martínez Arrieta), F.J. 1.

[23] Ignacio Flores Prada: Criminlidad Inormática: Aspectos sustantivos y procesales: Valencia: Tirant Lo Blanch, 2012, 212-214.

[24] Cfr. Judgment of the Court of 27 October 2015 (case 2015\4803 Martínez Arrita) F.J. 1-2.

[25] Ferando Miró Llinares: La protección penal de la propiedad intelectual en la sociedad de la información, Madrid: Dykinson, 2003, 427-433.

In the crime of preparatory acts for the trafficking of precursors (Article 371.1)[26], its instrumental nature is highlighted because when the legislator incriminates the possession, manufacture, transportation of certain substances or objects, it does so to avoid the preparation of another crime[27]. The unlawfulness of this rule represents the anticipation of the unfairness of a final crime and not a simple custody of instruments.

In the crime of fabrication or possession of materials or instruments to commit crimes of falsehood (Article 400)[28], the phenomenon of instrumentality as a crime is also highlighted[29]. The legislator sanctions the preparation of another crime but the subsequent conduct, that is, falsification, could be carried out by the same preparer (for example, the manufacturer of the instrument) or by other subjects (for example, the new holder of the materials[30]). In this line, the unlawfulness of the preparation contains to a certain degree an anticipation of the injustice of the final crime[31].

In the crime of passive indoctrination or self-indoctrination (Article 570.2)[32], a completely new provision in the legal system, its appearance in the penal code has been detected to obey the will of the legislator to counteract terrorism[33]. The instrumental nature of this crime is not only manifested by material objects considered dangerous by the legislator but by behaviour aimed at committing another crime. In this way, in the phe-

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[26] Cfr. Judgment of the Court of 27 September (case 2012\9830 Berdugo y Gómez de la Torre) F.J. 2-3.

[27] Francisco Muñoz Conde: Derecho Penal. Parte Especial, 20. ª ed., Valencia: Tirant Lo Blanch, 2015, 561-562.

[28] Cfr. Judgment of the Court of 28 de april 2016 (case 474 Giménez García), F.J. 2.

[29] Ignacio Flores Prada: Criminlidad Inormática: Aspectos sustantivos y procesales: Valencia: Tirant Lo Blanch, 2012, 160-234.

[30] Cfr. Judgment of the Court of 30 September 2011 (case 2222 Sánchez Melgar), F.J.6.

[31] Franciso Muñoz Conde/Mercedes García Arán, Derecho Penal. Parte General, 9.ª ed., Valencia: Tirant Lo Blanch, 2015, 505.

[32] Cfr. Judgment of the Court of 29 Juini 2015 (case 2015\3889 Ferrer García) F.J. 1-3.

[33] María Nieves Sanz Mulas: Política criminal, 2.ª ed., Salamanca: Ratio Legis, 2017, 277-278; Franisco Muñoz Conde: Derecho Penal. Parte Especial, 20.ª ed., Valencia: Tirant Lo Blanch, 2015, 767.

nomenon of instrumentality as a crime, the instruments that facilitate the performance of a "task" are not only things (that is, devices, machines, devices, programs, plates, etc.), but that is also behaviour or knowledge[34]. The fundamental thing to establish its instrumental nature is then based on the purpose to which the behaviour is ordered.

Reviewing the precepts has recognised the Penal Code to govern a category within the set of preparedness of crime, that is an instrumental offence. Precepts are characterised by a similar structure since they punish preparatory acts to carry out specific crimes, incriminating, among other actions, the possession, manufacture or facilitation of materials, instruments, objects with a specific criminal goal. However, the legislator also incriminates the acquisition of knowledge or processes aimed at a criminal purpose. As it has been mentioned, with these crimes the commission of another crime is prepared (the final crime)[35], either by the same subject, by another or by other subjects[36].

3. INCOMPATIBILITY WITH BASIC PRINCIPLES OF CRIMINAL LAW

In the first part of this investigation it has been demonstrated that instrumental offences are presented in various ways because it is not an advancement of punishment to prevent infractions that can be committed through the computer system or to avoid behaviour that seek to overthrow the government, for example. This phenomenon also reaches other spaces such as the production, manufacture, facilitation, possession or possession of devices or devices to commit a crime of documentary falsi-

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[34] Juan Carlos Campo Moreno: Comentarios a la reforma del Código penal en materia de terrorismo: La L.O. 2/2015, Valencia: Tirant Lo Blanch, 2015, 72; Boldoba Pasamar: "Consecuencias sancionadoras de la radicalización terrorista de los menores de edad y su adecuación al perfil de jóvenes infractores". In Alonso Rimo/Cuerda Arnau/Fernández Hernández (dirs.), Terrorismo, sistema penal y derechos fundamentales, Valencia: Tirant Lo Blanch, 2018, 696-701.

[35] Cfr. Judgment of the Court of 16 January (case RJ 2018\78 Llanera Conde) F.J. 2-3.

[36] Ramón García Albero, in: Gonzalo Quintero Olivares, dir.: Comentarios al Código Penal Español, Tomo 2, 7.ª ed., Cizur Menor (Navarra): Aranzadi, 2016, 1910.

fication (Article 400)[37]. Surprisingly, this phenomenon also incriminates acts of psychic influence to avoid the commission of public disorder (Article 557)[38]. In addition, there are high preparedness of acts to the category of crime by indirect approach with the victim to protect the economic interests of consumers, as it happens in the crime of false allegations in the market[39] (Article 282)[40]. There are, therefore, few legal assets that are protected with this figure of anticipation.

Those rules seek to intensify the protection of various legal rights that are threatened. At the time it has been confirmed, albeit succinctly, that this legislative technique generates several hermeneutical problems and disjunctives. However, the editor of those precepts continues to resort to this instrument, so that the scope of prohibition continues to increase. In this sense, arguments are necessary to justify the appearance of those precepts in the Penal Code. In other words, although including better prevention tools in a complex society to counteract threatening actions, it remains the attitude of the legislator, not that any legislative provision is valid. For this reason, it is worth knowing if the creator of those norms sufficiently justifies the incrimination of those precepts.

While those criminal norms protect both individual and collective legal rights, it is also true that the legislator is especially interested in economic patrimony and other lesser legal assets. In the authors' view, this legal right is important but does not deserve the status of a privileged legal right to typify preparatory acts with a view to protecting economic interests since that legal good does not depend on the configuration of other legal rights.

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[37] Cfr. Judgment of the Court of 28 Juni 2017 (case 2017\3174 Jorge Alberto Gumersindo) F.J. 1.

[38] Cfr. Criminal Court of Pamplona of 27 October 2014 (case 314\2014 Alemán Ezcaray) F.J. 1.

[39] Cfr. José Antonio Cruz de Pablo, in: José Antonio Cruz de Pablo, coord.: Comentarios al Código penal, Vol. 1, Madrid, Difusión Jurdídica, 2008, 1028-1029; Antonio Doval País, Enrique Anarte Borrallo, in: Javier Boix Reig, dir.: Derecho Penal. Parte Especial, Vol. 3, Madrid, Iustel, 2012, 483-493; Carlos Martínez-Buján Pérez: Derecho penal económico, Valencia: Tirant lo Blanch, 2002, 80-90.

[40] Cfr. Judgment of the Court of 25 Juni 2007 (case 2007\7294 García Pérez) F.J. 1-2.

The prediction of those norms in the Penal Code did not occur in a single reform but the legislator, gradually, has been introducing new instrumental offences in numerous titles of the Special Part of the Penal Code. Although it cannot be said that any reform of the code has brought new instrumental offences, it is verifiable that they have been foreseen in several of them. It is plausible to state that those norms are not compatible with the limiting principles of punitive power since this type of intervention goes beyond the traditional or classical model of criminal law[41]. Indeed, criminal law can be understood as a measure or an instrument of social control[42]. In this sense, criminal policy is concerned with studying effective means to fight crime[43]. Thus, the legislator groups or selects the behaviour that it intends to avoid; only those who are able to affect the legal order. But to meet this objective the content described in the standard must be understandable to citizens. However, this does not happen with several precepts that have been analysed in this section[44].

Within the framework provided by the legislator to decide what behaviour should be elevated to the category of crime and opt for one or another legislative technique, is highlighted, as we know, the legal authority to set the penalty deemed appropriate according to criteria of legality. In this way, the normal thing is the one depending on the greater or less seriousness of the fact, as it determines, in the same way, as it is to be expected, the seriousness of the penal sanction. However, the sentence chosen by the legislator in this technique of instrumental offences is incommensurate with the criminal action. In effect, those precepts set a penalty for a stage prior to the beginning of the execution of the offence even for a pre-trial phase. The barrier of criminal protection is advanced punishing preparatory acts aimed at injuring a legal right, in other words, incriminating acts

[41] Claus Roxin: Política criminal y sistema del derecho penal, 2.ª ed., traslator: Francisco Muñoz Conde, Buenos Aires: Hammurabi, 2002, 87-88; Giovanni Fiandaca, Enzo Musco: Diritto Penale. Parte Generale, 4.ª ed., Bolonia: Zanichelli, 2001, 5-31.

[42] From another opinion, Yesid Reyes Alvarado: Imputación objetiva, 3.ª ed., Bogotá: Temis, 2005, 61-62.

[43] From another opinion, Diego-Manuel Luzón Peña: Lecciones de Derecho penal. Parte general, 2.ª ed., Valencia: Tirant lo Blanch 2012, 36.

[44] Francisco Muñoz Conde: Derecho Penal. Parte Especial, 20.ª ed., Valencia: Tirant lo Blanch 2015, 768.

that are too far from producing an injury, resorting to sanctions, in some cases, equal to those provided for the types of result[45].

It is understood that the basic principles of criminal law provide for, among other aspects, certain limits that the legislator must follow when describing the behaviour that are to prohibit since the criminal law is the most violent instrument that the State has[46]. In that sense, the principles that set limits to the punitive power of the State, namely, legality, subsidiarity, proportionality, injury, guilt and presumption of innocence, are not compatible with instrumental offences. In consequence, those precepts must be interpreted with criteria that limit their application, otherwise, they should be expelled from the Penal Code[47].

4. FINAL REMARKS

The Spanish legislator, when punishing acts of preparation, makes criminal policy, as it fights crime but we cannot affirm yet that all the incriminated conducts with this technique are intolerable to deserve such advancement.

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[45] The following has been found. Art. 400 establishes the same sentence indicated for the authors of a crime of falsehood that the subject prepares, obviously, the penalty will depend on the illicit that corresponds to the plan of the author, for example, the penalty will also be six months up to two years if one prepares falsification of a private document to harm another (see Article 395). In the same way it happens with Art. 248.2 b) because it provides a prison sentence of six months up to three years for those who prepare a computer fraud. In a similar sense, the assumption of Art. 270.6 imposes a penalty very close to that provided for the type of result since for the preparation corresponds to a penalty of imprisonment of six to three years in prison; while for the result it is from six to four years (see Article 270). Something similar can be seen in the precept contained in Art. 183 ter, since it is a crime that establishes a custodial sentence of one to three years for anyone who contacts a minor on the Internet and proposes a meeting. While for the result crime, sexual abuse, a prison sentence of two to six years is imposed (see Article 183).

[46] Cfr. Claus Roxin: Política criminal y sistema del derecho penal, 2.ª ed., traslator: Francisco Muñoz Conde, Buenos Aires: Hammurabi, 2002, 39-42.

[47] Miguel Bajo Fernández: Los delitos de estafa en el Código Penal, Madrid: Editorial Universitaria Ramón Areces, 2004, 173.

It has been shown that by means of those criminal rules, an attempt is made to protect a diverse group of legal rights. In this way, the technique cannot be seen as an instrument for a group of privileged legal rights but it can be used with great flexibility. In other words, in the case of instrumental offences, intervention can be anticipated to protect a variety of legal rights.

The increasing number/volume of those criminal norms represent a response to the social demand for greater legal protection agains almost everything that is dangerous. In this sense, Spanish legislators as well as those from other European countries use this legislative technique. Those precepts are foreseen to reach similar objectives both in Spain and in other countries. And some legislative reforms that have foreseen instrumental offences come about because of compliance with international commitments.

The phenomenon of criminal preparation represented in instrumental offences must face the criticism that has been indicated. In that sense, the criminal norms, that have been analysed, must conform to the principles of presumption of innocence, minimal intervention, proportionality, culpability, injury and legality. Otherwise, an integral function with those norms cannot be confirmed.

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THE DIRECTIVE 2016/97 ON INSURANCE DISTRIBUTION (IDD) AND PRIVATE INTERNATIONAL LAW

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ABSTRACT

Clear normative grounds for the information obligation are visible in the Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (hereinafter: IDD). One of the challenges before insurance law is to answer the question of whether and how one should sanction violations of disclosure obligations resulting in the absence of the desired insurance protection. In this aspect important legal problem is the law applicable to the assessment of liability for violation of disclosure obligations by the insurer.

The second important problem is the law applicable to the assessment of liability for violation of disclosure obligations by third parties vis-a-vis the insurer. Some remarks concerning jurisdiction in matters relating to the loss of chance to become insured have different practical implications.

Key words: IDD, the loss of chance to become insured, information obligations, the law applicable, the third party of insurance

1. INTRODUCTION

The insurance contract is generally qualified as a contract of utmost confidence (*contractus uberrimae fides*) based on the good faith principle. This principle should be understood as a requirement to take into account

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the interests of the counterparty at the stage of concluding and performing the contract[1].

One of the basic manifestations of good faith in the insurance contract is the existence of pre-contractual disclosure obligations[2]. It must be emphasized that such obligations are mutual. On one hand, the party seeking insurance protection is imposed with the obligation to provide the insurer with the information relevant to the assessment of risk[3], on the other one, the insurer is expected to notify the policyholder about the circumstances affecting the decision on the conclusion of the insurance contract[4].

The widely understood information obligation may take three forms, namely the duty to provide guidance, duty to draw attention and duty to give advice[5].

Clear normative grounds for the information obligation are visible in the Directive (EU) 2016/97 of the European Parliament and of the

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[1] See F. Reichert-Facilides, Contract Law: General Aspects In: H. Heiss, M. Lakhan, eds., Principles of European Insurance Contract Law: A Model Optional Instrument, München 2011, p. 144–146.

[2] T. Pfeiffer, New Mechanisms for Concluding Contracts, In: R. Schulze (ed.), New Features in Contract Law, München 2007, 162.

[3] More in M. Fras, In: System Prawa Handlowego. Międzynarodowe Prawo Handlowe, vol. 9, ed. W. Popiołek, Warszawa 2013, 582. The principle of good faith as a source of the obligation of declaring risk is described in B. Kucharski, Naruszenie powinności deklaracji jako podstawa odmowy wypłaty odszkodowania ubezpieczeniowego, Acta Universitatis Lodziensis. Folia Iuridica 2013, No. 72, 25–28.

[4] R. Merkin, Colinvaux's Law of Insurance, London 1997, 125.

[5] More in M. Fras, Odpowiedzialność brokera ubezpieczeniowego za niewykonanie lub nienależyte wykonanie zobowiązania: rozważania na tle orzecznictwa Sądu Najwyższego, PA 2009, No. 3, 3 et seq. The provision of § 6(1) first sentence of the German Act on the insurance contract (Versicherungsvertragsgesetz, BGBl. I, S. 2631) sets out that the insurer is obliged to ask the policyholder about his expectations and needs when this is justified by difficulties in the evaluation of the offered insurance or the character of the policyholder or his situation and, taking into consideration the due proportion between the cost of consultancy and amount of premium, to provide the policyholder with advice and justify that advice. See Art. L 112-2 of the Insurance Code (Code des assurances, Journal Officiel de la République française, 1978, 1088, modifié). The direction in which the principle under that provision was developed by the French Court of Cassation is analyzed in more detail in J. Bigot, La responsabilité civile des sociétés d'assurance à l'égard des assures en droit français, In: Mélanges Roger O. Dalcq, Bruxelles 1994, 25 and the case-law cited therein.

Council of 20 January 2016 on insurance distribution (hereinafter: IDD)[6], which is intended to ensure more transparency on the part of insurance distributors and improvement of the terms of business activities pursued by such distributors. Under the provision of Art. 20 IDD, "[p]rior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obtained from the customer, the demands and the needs of that customer [...] Any contract proposed shall be consistent with the customer's insurance demands and needs." The demands-and-needs test becomes a new pre-contractual obligation imposed on insurance distributors.

In the IDD's preamble, Recital 44 reads that: "In order to avoid cases of mis-selling, the sale of insurance products should always be accompanied by a demands-and-needs test on the basis of information obtained from the customer. Any insurance product proposed to the customer should always be consistent with the customer's demands and needs and be presented in a comprehensible form to allow that customer to make an informed decision." It should be emphasized that the overarching objective of the IDD is to ensure, among others, protection to customers, which in turn has very strong ties to the issue of mis-selling prevention.

Expansion in the content of the disclosure obligation is in line with a general trend to protect persons considered to be the weaker party of an obligational relationship[7].

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[6] OJ EU L 26 of 2 February 2016.

[7] The significance of pre-contractual disclosure obligations in the insurance contract is also accentuated in the case-law of the ECJ. In the judgment of 9 December 2013 in the case C-209/12 *Walter Endress v. Allianz Lebensversicherungs AG*, Monitor Prawniczy 2014, No. 3, 120, the ECJ expressed the opinion that the model assumptions on the sanctions for violation of disclosure obligations at the pre-contractual stage, which were developed for the purpose of protecting consumers who conclude off-premises contracts, match the needs of ensuring protection to policyholders. In justification of that position, it was indicated that "insurance contracts are financial products which are complex from the legal perspective, which may essentially differ depending on the insurer being the offeror and may give rise to significant and potential long-term financial obligations, [and at the same time] the policyholder has a weaker position in relation to the insurer, and his situation is analogous to the one of a consumer concluding an off-premises contract." This conclusion is material inasmuch as it refers to one of most rigorous, from entrepreneurs' perspective, models of consumer protection in the entire *acquis*, which is discussed in more detail in B. Gnela,

One of the key problems in the insurance market is purchase by customers of insurance products that do not match their needs[8]. Inadequacy of an insurance product leads, in particular, to the following consequences: a) absence of insurance protection in respect of specific risks or incomplete (partial) insurance protection in respect of a specific risk; b) excessive (unnecessary) insurance protection.

Moreover, it seems that within the first category it is necessary to distinguish between two situations:

1) the policyholder wrongly assumes that a specific risk known to him is covered by insurance protection on account of the conclusion of a specific contract. Cases falling under this category form a vast majority of factual situations examined in judicial practice[9];
2) the policyholder does not know that there exists insurance protection against a specific risk or does not realize the expedience of concluding particular insurance.

Inadequate (incomplete) insurance protection results in encumbrance of the policyholder's finances because it is the policyholder and not the insurer to incur the financial consequences of an insurance accident.

The second category (excessive insurance protection) refers to another issue: the policyholder incurs the costs of insurance protection against risks to which, generally (in theory or practice), he is not exposed. In other words, the insurer offers to the policyholder an insurance product that does not match his needs. Although situations falling under this category do not expose insurance customers to an acute (unexpected) necessity to incur financial consequences of an insurance accident (loss) from their own funds, they result in economically unjustified investments in needless insurance protection.

Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym, Warszawa 2013, 210 et seq.

[8] Cf. G. McMeel, The FSA's insurance conduct of business regime: a revolution in (consumer) insurance law?, Lloyd's Maritime and Commercial Law Quarterly 2005, No. 2, 186, 187.

[9] P. Tereszkiewicz, Obowiązki informacyjne w umowach o usługi finansowe, Warszawa 2015, 346.

2. THE CONCEPT AND ESSENCE OF LOSS OF CHANCE TO BECOME INSURED

One of the challenges before insurance law is to answer the question of whether and how one should sanction violations of disclosure obligations resulting in the absence of the desired insurance protection.

Depending on the position taken in this matter by the law designated as applicable, inadequacy of insurance protection caused by a violation of one of the three forms of disclosure obligation may lead to the policyholder being given the right to terminate the unfavorable contract[10], the insurer being deprived of the possibility to rely on the contractual clauses responsible for the inadequacy of insurance protection[11] or the insurer's compensatory liability for a so-called loss of chance to become insured.

Especially extensive investigations on the loss of chance to become insured (*perte de chance de s'assurer, perte de chance de souscrire une assurance*) were conducted in French case-law in the context of group insurance. It is indicated that violation of disclosure obligations may result in compensatory liability when the party seeking insurance protection, despite sensible evaluation of the situation, cannot enjoy a benefit of the insurance contract which he could have expected in case of materialization of the risk against which that party such sought to insure himself[12].

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[10] P. Tereszkiewicz, Obowiązki informacyjne ……, 346.

[11] D. Krajeski, In: Droit de la responsabilité et des contrats, ed. P. Le Tourneau, Paris 2012, 985.

[12] See the judgment of the Court of Cassation of 31 January 2012, Cass. com., 31 janvier 2012, n° 11-11700; the judgment of the Court of Cassation of 15 December 2011, Civ.2e, 15 décembre 2011, n° 10-23889. The conception of the loss of chance to become insured (perte de chance de s'assurer) was commented on by the Court of Cassation also in another context in the judgment of 25 January 2012, Cass. soc., 25 janvier 2012, n°11-11.374. In that case, the Court of Cassation found that an employer, by omitting to notify an employee that it does not pay premium for retirement insurance and by omitting to present to the employee a full picture of his retirement situation, deprived the employee of a chance of insurance since the employer precluded him from making a reasonable decision on the voluntary payment of premium in the social security system.

In common law countries, analogous claims are asserted against insurance brokers in connection with the loss of chance to obtain insurance protection (*the chance of being covered by insurance*)[13].

However, the status of the so-called loss of chance in the regime of compensatory liability is highly arguable. Results of comparative law research allow to draw the conclusion that certain legal systems approve of that conception (Belgium, Spain, France, Greece, Ireland, Italy, Luxemburg, Holland, United Kingdom)[14], whereas others to a lesser (Austria, Denmark, Finland, Sweden) or greater extent (Germany, Portugal) question its admissibility[15]. It should be added that a part of them analyze the compensation for a lost chance in terms of causal link, while others associate it with the concept of damage[16], and even in such legal systems there are doubts as to the specification of the amount of the financial benefit payable to the injured party[17].

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[13] A. Kramer, The Law of Contract Damages, Oxford 2014, 280–281.

[14] In the legal systems which are supportive of this conception, it is assumed, in principle, that a "loss of chance" may amount to a damage when as a result of specific acts or omissions a probability is nullified of the occurrence of an event favorable to the injured party even though the materialization of chance is never certain. Apart from the classical preconditions to compensatory liability, namely fault and causal link, it is required that the damage manifest in the loss of chance be real and serious. More in J.L. Fagnart, La perte d'une chance ou la valeur de l'incertain, In: C. Devoet, J.L. Fagnart, C. Paris eds., La réparation du dommage. Question particulières, Louvain-la-Neuve 2006, s. 77–80; see S. Martens, R. Zimmermann, In: Digest of European Tort Law. Volume 2: Essential Cases on Damage, eds. B. Winiger, H. Koziol, B.A. Koch, R. Zimmermann, Berlin 2011, 1075 at seq. and the case-law analyzed therein.

[15] J.M. Binon, La réparation de la perte d'une chance dans la jurisprudence européenne: une question de chance?, In: Liber Amicorum Jean-Luc Fagnart, Bruxelles 2008, 380–381.

[16] E. Bagińska, Odpowiedzialność deliktowa w razie niepewności związku przyczynowego. Studium prawnoporównawcze, Warszawa 2013, 278 i n. It should be noted that discrepancies in this regard can also be found within a specific legal system. More in the context of insurance in J. Bigot, La responsabilité..., 32 and the literature cited therein.

[17] One may distinguish between two principal models. The former consists in adjudication ex aequo et bono. The other, referred to as the method of proportional compensation, boils down to the calculation of compensation taking into account the loss of chance as expressed in percentage, J.M. Binon, La réparation..., 381.

It seems that according to the position taken in this regard by Polish law, “loss of chance to become insured” may be analyzed in terms of a damage manifest in the loss of profits (*lucrum cessans*)[18], which differs from the legally irrelevant potential loss of profit by a high degree of probability[19]. It may be considered in the violation of disclosure obligations, as a special instance of *culpa in contrahendo*, is not remediable only within the scope of negative contractual interest.

The situation is complicated in the insurance context by the fact that such services are, in principle, “standardized.” This problem can be analyzed both in terms of the existence of a causal link and at the stage of determining the size of the damage. It may not be excluded that on the insurance market no services are to be found which would correspond to the expectations of the party seeking insurance protection. The insurance adjusted to the needs of the policyholder may also involve the necessity to pay a higher premium which the policyholder would not decide (or would not be able) to pay[20]. However, if the absence of protection derives from the insurer’s reliance on a contractual clause limiting the insurer’s scope of liability, the amount of compensation should be decreased by the amount of the premium which the injured party would have had to pay to obtain the desired insurance protection[21].

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[18] See E. Bagińska, Odpowiedzialność…, 239 et seq..; otherwise in the judgment of the Supreme Court of 31 January 2002, IV CKN 642/00, Legalis No. 278037, in whose justification an opinion was expressed that „«loss of chance» may imply both an actual damage and loss of profits (lucrum cessans)”.

[19] See M. Nesterowicz, Utrata szansy wyleczenia lub przeżycia w prawie francuskim, PiP 2010, No. 3, 42.

[20] In the judgment of 31 May 2011, the Court of Cassation shared the opinion of the Court of II Instance which dismissed the compensatory claim for a loss of chance to become insured because the claimant did not prove that if she had been duly notified of the terms of insurance, she would have concluded an insurance contract with a wider scope of protection, which would imply a need to pay higher insurance premium, Cass. com., 31 mai 2011, n° 10-20043.

[21] J. Bigot, *La responsabilité…*, 33.

3. LAW APPLICABLE TO THE ASSESSMENT OF LIABILITY FOR VIOLATION OF DISCLOSURE OBLIGATIONS BY THE INSURER

The free movement of insurance services and their dematerialized nature are conducive to the conclusion of insurance contracts in circumstances where specific elements of a life situation are relatively dispersed and it is impossible to speak of their concentration within one legal area[22]. As the cross-border insurance market expands[23], one should also expect a growth in the number of disputes arising from the undue performance of precontractual obligations resulting in the failure to obtain the desired insurance protection. Because of the aforementioned dissimilarities between particular legal systems, it is a question of considerable practical importance to search for the law applicable to the assessment of liability for a loss of chance to become insured attributable to a violation of disclosure obligations.

The discussed issue almost intuitively calls to mind liability for *culpa in contrahendo*. This concept is not understood uniformly in individual legal systems[24]. The catalogue of actions amounting to instances of *culpa in contrahendo* includes, however, the omission to provide information which is essential for the decision about concluding the contract or provision of untrue information, and actions resulting in the reduction in the value of the subject of future contractual performance[25].

The EU legislator devoted to the discussed issue a separate conflict of laws rules under Regulation 864/2007 on the law applicable to non-con-

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[22] See E. Kowalewski, Problematyka kolizyjnego prawa ubezpieczeniowego, PiP 2005, vol. 2, 21, 23–24; F. Seatzu, Insurance in Private International Law. A European Perspective, Oxford–Portland 2003, 43.

[23] The term "cross border insurance," as proposed by E. Kowalewski, has become widespread in Polish legal literature and is used to denote insurance contracts which show a connection with more than one legal area. See E. Kowalewski, Prawo ubezpieczeń gospodarczych. Ewolucja i kierunki przemian, Bydgoszcz 1992, 113–119.

[24] V. Monsalve-Caballero, The Legal and Historical Panorama of Culpa in Contrahendo at Contractual Negotiations. An Approach from European and Latin American Law, Revista de Derecho 2013, no. 39, 132–145.

[25] M.A. Zachariasiewicz, In: System Prawa Handlowego. Międzynarodowe Prawo Handlowe, vol. 9, ed. W. Popiołek, Warszawa 2013.

tractual obligations (hereinafter Rome II)[26]. Under Art. 12 of the Rome II Regulation, the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, is, in principle, the law that applies to the contract or that would have been applicable to it had it been entered into [law applicable to the contract designated under the norms of the Regulation 593/2008 on the law applicable to contractual obligations[27] (Rome I)]. Only where on that basis the relevant law cannot be found, one should apply conflict of laws rules based on connectors characteristic of tortious obligations (Art. 12(2)).

According to the conception of autonomous interpretation, the term *culpa in contrahendo* should be read in isolation from the meaning attached to it in the laws of individual Member States[28]. Interpretative guidance in this regard is provided by the wording of Recital 30 of the Rome II Regulation. Although in the Polish language version of the Regulation it is indicated that the concept of *culpa in contrahendo* should cover "violations of the secrecy obligation", the English (*duty of disclosure*), German (*die Verletzung der Offenlegungspflicht*) and French (*la violation du devoir d'informer*) language versions of the Regulation point to a positively rendered obligation to provide information.

Only seemingly did the legislator put an end to the disputes about the tortious or contractual qualification of the liability for damage inflicted in consequence of violating pre-contractual obligations. The scope of application of the Rome I Regulation does not cover obligations arising out of dealings prior to the conclusion of a contract (Art. 1(2) letter i)[29], however, the provision of Art. 12 of the Rome II Regulation covers only such "non-contractual obligations" arising out of dealings prior to the conclusion of a contract, which, anyhow, follows from the generally specified scope

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[26] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ EU L 199 of 31.07.2007, 40).

[27] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ EU L 177 of 04.07.2008, 6, as amended).

[28] See Recital 30 of the Rome II Regulation.

[29] See also Recital 10 of the Rome I Regulation.

of application of the Regulation as an instrument on the law applicable to non-contractual obligations (Art. 1(1)). By juxtaposing the normative contents of those provisions, certain authors argue that the liability for violating pre-contractual obligations is either non-contractual of contractual[30].

Confirmation of such distinction on the conflict of laws level is sought in the well-established judicial opinion, developed for the purpose of applying rules of jurisdiction[31]. In the ECJ judgment in the *Tacconi* case, it was emphasized that the jurisdiction to examine disputes relating to the liability for damage caused at a stage prior to the conclusion of a contract should be established under the norms covering claims arising out of non-contractual obligations when the damage does not follow from violation of a freely incurred obligation[32]. In the same way, the Court, at least indirectly, expressed the view that liability for damage prior to the conclusion of a contract does not constitute a uniform category[33].

In light of the rules outlined above, the insurer's liability for violation of disclosure[34] and advisory duties[35] imposed on the insurer at the stage

[30] N. Hage-Chahine, Culpa in Contrahendo in European Private International Law, Northwestern Journal of International Law & Business 2012, vol. 32, 466 et seq.; I. Kull, M. Torga, Fitting the Estonian Notions of Contractual and Non-contractual Obligations under the European Private International Law Instruments, Juridica International 2013, vol. 20, 67.

[31] N. Hage-Chahine, Culpa…, p. 466 et seq.; I. Kull, M. Torga, Fitting…, 67.

[32] Judgment of the ECJ of 17 September 2002 in the case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH*, ECR 2002, p. I-7357, items 22–23.

[33] The contractual qualification of the relationship is decided by whether a violation refers to an obligation freely incurred by one party vis-a-vis another at the stage preceding the conclusion of a contract. This category includes an obligation under the agreement organizing the negotiation procedure and other pre-contractual arrangements as well as obligations under a promise made prior to the conclusion of a contract. P. Grzegorczyk, Jurysdykcja krajowa w sprawach z zakresu prawa własności przemysłowej, Warszawa 2007, 559–560.

[34] See Ł. Żarnowiec, Prawo właściwe dla odpowiedzialności z tytułu culpa in contrahendo na podstawie przepisów rozporządzenia Parlamentu Europejskiej i Rady (WE) – Rzym II, Europejski Przegląd Sądowy 2010, vol. 2, p. 24 and the German literature cited therein; R. Jafferali, Rome II ou la loi applicable aux obligations non contractuelles, Revue générale des assurances et de la responsabilité 2008, p. 14399(6).

[35] See H. Heiss, Insurance Contracts in Rome I: Another Recent Failure of the European Legislature, Yearbook for Private International Law 2008, vol. 10, 264; A. Staudinger, In: Rome I Regulation. Pocket Commentary, ed. F. Ferrari, Munich 2015, 286.

preceding the conclusion of an insurance contract is assessed in accordance with the law found under the norm of Art. 12 of the Rome II Regulation[36]. At the stage of violating disclosure obligations, there is still no freely incurred obligation between the parties[37].

Commentators generally agree that the law applicable to *culpae in contrahendo* as found under Art. 12 of the Rome II Regulation decides about the compensatory liability for violations of pre-contractual disclosure obligations[38], including the basis and scope of liability (Art. 15 letter a of the Rome II Regulation), and about the existence, nature, and assessment of damage or the remedy claimed (letter c).

While delimiting the scope of the law applicable to *culpa in contrahendo*, one should, however, answer the question of whether the law designated under Art. 12 of the Rome II Regulation is relevant to the assessment of the scope and content of disclosure obligations.

Certain authors answer that question in the affirmative[39], whereas others indicate that it is the law directly designated by the norms of the Rome I Regulation that decides about the content of disclosure obligations at the pre-contractual stage[40].

This question is of limited practical significance in the context of violating insurance disclosure obligations. The law applicable to *culpae*

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[36] Ibid, p. 284.

[37] Ł. Żarnowiec, In: System Prawa Prywatnego. Prawo Prywatne Międzynarodowe, ed. M. Pazdan, vol. 20B, 853.

[38] A. Bauknecht, Culpa in contrahendo wobec unifikacji prawa prywatnego w Europie, Berlin 2014, 190; M.A. Zachariasiewicz, Kwalifikacja „culpa in contrahendo" w prawie prywatnym międzynarodowym, Problemy Prawa Prywatnego Międzynarodowego 2008, vol. 3, 37–53.

[39] This comment refers also to such information which will allow the counterparty to prevent the conclusion of an agreement under circumstances in which it would be invalid, I. Bach, In: Rome II Regulation: Pocket Commentary, ed. P. Huber, Munich 2011, 314; see, in reference to precontractual obligations in Belgian law, P. Demolin, L'information précontractuelle et la Commission d'arbitrage. Commentaires de la loi du 2 avril 2014 portant insertion du Titre 2 du Livre X du Code de droit économique, Bruxelles 2014, 125; see also, in the context of contracts of sale with a cross-border element, G. Dannemann, In: The Common European Sales Law in Context: Interactions with English and German Law, eds. G. Dannemann, S. Vogenauer, Oxford 2013, 37.

[40] M.A. Zachariasiewicz, Kwalifikacja…, 58.

in contrahendo generally corresponds to the law applicable to the insurance contract[41].

These two can be discordant, on an exceptional basis, when the parties make a partial choice of law for an insurance contract or a choice of law applicable to *culpa in contrahendo* under Art. 14 of the Rome II Regulation, which at the stage preceding occurrence of the event giving rise to a damage (*sc.* violation of disclosure obligations) is possible only in relations between entrepreneurs and under a freely negotiated agreement[42].

As opposed to the unlimited choice of law under Art. 14 of the Rome II Regulation, the choice of law applicable to an insurance contract, apart from insurance contracts covering so-called large risks, is limited in nature[43]. If the scope and content of disclosure obligations is specified by the relevant law found under the Rome II Regulation, a situation is possible when the resolution in respect of such obligations must be made under a law that could not have been chosen by the parties for the insurance contract. It may be considered if the adoption of such solution is legitimate since, seemingly, it implies violation to the integrity of the law applicable to the insurance contract, which – because of the tendency to protect the weaker party of the insurance contract – is generally designated by inflexible connectors of an objective nature.

It seems that this doubt may be removed by a qualification demarcating the spheres of application of the conflict of laws rules under Art. 7 of the Rome I Regulation and Art. 12 of the Rome II Regulation. The former provision refers to the performance of obligations arising from a contract[44], the latter one – to the terms on which the parties reach the stage when such obligations are incurred. However, one may defend the position that the law applicable to contractual obligations covers the process of reaching

[41] See Art. 12(1) and (2) of the Rome II Regulation.

[42] Under the Rome II Regulation, choice of law is admissible after the event giving rise to the damage (Art. 14(1) letter a). Choice of law prior to the occurrence of an event giving rise to the damage is admissible only "where all the parties are pursuing a commercial activity" (Art. 14(1) letter b).

[43] Art. 7(3) of the Rome I Regulation. More in M. Fras, In: System…, 589.

[44] See Art. 12(1) letter b and letter c of the Rome I Regulation, which refer to performance of contractual obligations.

consensus from the very beginning[45], that is also at the time of mutual explanation of the shape of the planned contract by its parties.

The first position is supported by the urge to preserve uniformity of the applicable law within the regime of compensation for *culpae in contrahendo.* There is a functional connection between the triggering event and its consequences. Evaluation of the cause (*sc.* what the content of the disclosure obligations was and whether they have been violated) in isolation from its consequences, using norms deriving from different legal orders, involves many complications[46].

As has been mentioned above, violation of disclosure obligations may lead to the policyholder being granted the rights to influence the content of the contract by way of adjusting such content to the policyholder's expectations or termination of the contract or may allow questioning the contract's existence or validity.

Focusing, in the first place, on the last group of situations, one must point out that the law applicable to contractual obligations covers the existence and validity of the contract[47], including the right to avoid the consequences of a declaration of intent made in error when the error was caused by violation of the disclosure obligations at the pre-contractual stage[48]. The preconditions to the validity of a legal act, especially ones relating to vices of consent, should be assessed under the provisions of the law

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45 M.A. Zachariasiewicz, Kwalifikacja…, 58.

46 In the context of partial choice of law under the Rome II Regulation, cf. R. Vander Elst, L'autonomie de la volonté en droit international privé français et belge, In: Liber Amicorum Baron Louis Fredericq, vol. II, Gent 1996, p. 991. It must be noted that solutions from outside the law applicable to culpa in contrahendo may apply under Art. 17, under which "[in] assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability."

47 More on the scope of the law applicable to contractual obligations in respect of insurance contracts in M. Fras, K. Pacuła, Umowa ubezpieczenia obowiązkowego w prawie prywatnym międzynarodowym, In: E. Kowalewski, W. Mogilski eds., System prawny ubezpieczeń obowiązkowych. Przesłanki i kierunki reform, Toruń 2014, 178.

48 R.A. Garcia, La regulación de la responsabilidad precontractual en el Reglamento Roma II, InDret. Revista para el Análisis del Derecho 2008, no. 4, 13; P. Rogerson, J. Collier, Collier's Conflict of Laws, Cambridge 2013, 346.

applicable to the contract[49]. This solution, according to a well-established tradition of private international law, was also adopted within the framework of the Rome I Regulation[50]. Besides, it would be difficult to neglect the position taken in this regard by the law applicable to contractual obligations, which provides for specific consequences of vices in the process of reaching consensus by the parties[51]. From the perspective of *lex causae,* the fact that they are consequences of untrue information or omission to provide information is of secondary importance in relation to the principal question about the future of the planned contract[52]. It must be pointed out that this may give rise to a situation in which the contract is found invalid pursuant to the provisions of the law applicable to contractual obligations and, at the same time, the policyholder obtains compensation under the law applicable to *culpae in contrahendo*[53].

As regards other consequences of violating pre–contractual disclosure obligations, certain authors are prone to narrow down the scope of the norm under Art. 12 of the Rome II Regulation only to compensatory liability. It is indicated, for example, that a party's right to terminate the contract for violation of disclosure obligations should be evaluated according to the law applicable to contractual obligations[54].

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[49] M. Pazdan, Prawo prywatne międzynarodowe, Warszawa 2012, 127.

[50] Art. 10(1) of the Rome I Regulation provides that the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid. Moreover, the question of the return of what had been performed between the parties to a contract which was eliminated from the legal practice is also subject to the law applicable to contractual obligations. Under Art. 12(1) letter e of the Rome I Regulation, the law applicable to the contract is relevant, in particular, to the consequences of the contract's invalidity.

[51] In this spirit, M.A. Zachariasiewicz, In: Tort Law in Poland, Germany and Europe, eds. B. Heiderhoff, G. Żmij, Munich 2009, 149.

[52] These circumstances, however, will be taken into consideration as reasons for a contract's (relative or absolute) invalidity.

[53] It does not seem that in this case one may expect the intervention of mandatory overriding provisions or the public policy clause since certain legal systems allow to challenge the contract's legal existence and simultaneous pursuit of compensatory claims.

[54] In justification of that position, the scope of the law applicable to contractual obligations is invoked, as specified in Art. 12(1) of the Rome I Regulation, which relates to the consequences of full or partial non-performance of an obligation (letter c) and different types of extinction of obligations (letter d); I. Bach, In: Rome II…, 314.

While generally agreeing with that position, one should note that in the Rome II Regulation the concept of loss covers "all consequences arising out of *culpa in contrahendo*" (Art. 2(1)) and the applicable law found on its basis decides about the existence, nature, and assessment of damage or the remedy claimed in relation to such damage (Art. 15 letter c)[55]. If the remedy concerning the so understood damage is the right exercised in relation to the subsequently concluded contract, one should apply in this regard provisions of the law relevant to events referred to as *culpa in contrahendo*. If that law sets out, for example, that a consequence of the disclosure obligations being violated by the insurer at the pre-contractual stage is the right to claim the contract's adjustment[56], and this is not afforded by the law applicable to contractual obligations, it would not be desirable to deprive the policyholder on that basis of the protection deriving from the law applicable to *culpae in contrahendo*. Disharmony between norms belonging to different legal systems may be removed by way of adjustment (*l'adaptation*)[57].

4. LAW APPLICABLE TO THE ASSESSMENT OF LIABILITY FOR VIOLATION OF DISCLOSURE OBLIGATIONS BY THIRD PARTIES VIS-A-VIS THE INSURER

It must be noted that in a significant number of cases, insurance contracts are concluded through a third party: broker, agent or organizer in group insurance contracts.

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[55] In this spirit, B. Schinkels, In: Rome Regulations. Commentary on the European Rules of the Conflict of Laws, ed. G.P. Calliess, Alphen aan den Rijn 2011, 524.

[56] Citing opinions found in German literature, P. Tereszkiewicz indicates that situations of violating the advisory obligation may authorize the policyholder to terminate the contract for an important reason. See P. Tereszkiewicz, Obowiązki…, 324.

[57] Adjustment may, among others, "consist in the creation of a sui generis synthesis of the norms found in different legal systems as though they originated from one legislator," and when this proves impossible, "such norms must be replaced by substantial a norm of private international law formulated by the judge for the purpose of a specific case". M. Pazdan, Prawo…, 85.

An insurance broker is tied by a legal relationship to a person seeking insurance protection with the broker's involvement or through the broker. The provision of adequate information is, besides the duty of competence, the most important obligation imposed on every professional, including insurance brokers[58]. As a result, brokers are obliged to precisely analyze the insurance risk relating to the customer (so-called risk assessment) and have the functionally related advisory duty regarding the adequacy of the insurance protection. The disclosure and advisory duty of an insurance broker are aimed at recommending to the customer the possibly most favorable insurance contract, considering the current status of that customer's insurance protection and his actual needs. Apart from situations in which the principal seeks the source of the broker's liability in a tort, it is the applicable law found under the Rome I Regulation to resolve in respect of the scope and content of the disclosure obligation as well as liability for its violation.

On the other hand, there is no contract between an insurance agent and a person applying for insurance protection. An agent acts on behalf of the insurer to whom, as a rule, he is tied by an agency relationship.

When delimiting the scope of application of the norm under Art. 12 of the Rome II Regulation, one should resolve whether that norm covers the liability of third parties for acts and omissions at the stage preceding the conclusion of a contract by the parties. In the doctrine of private international law, no uniform position has, thus far, been established[59].

Certain authors are of the opinion that liability for *culpa in contrahendo* may be incurred only by the parties to the contract to whose conclusion the acts made at the pre-contractual stage directly lead[60]. On the other hand, the liability of third parties is decided by the law found under

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[58] See M. Fras, Odpowiedzialność…, 3 et seq.

[59] B. Schinkels, In: Rome…, 527–529. Differences in this regard are also observable in substantive law. In Polish law, the conception of culpa in contrahendo covers also faulty conduct of third parties as long as they are connected with the contractual parties. M.A. Zachariasiewicz, In: Tort Law…, 147. Similar opinion in the context of German law is discussed in B.S. Markesinis, H. Unberath, A. Johnston, The German Law of Contract: A Comparative Treatise, Oxford 2006, 93.

[60] P. Rogerson, J. Collier, Collier's…, 346.

Art. 4 of the Rome II Regulation[61]. In the doctrine, one may also find an opposite opinion, according to which the scope of the norm under Art. 12 of the Rome II Regulation covers as well the question of liability of persons engaged in the contracting process[62].

While adopting the latter position, one should emphasize that the norm under Art. 12 refers to obligations "directly relating" to dealings prior to the conclusion of a contract[63]. This relation should be understood as a functional connection between the pre-contractual obligations and the contract to the conclusion of which the parties are heading[64]. This feature may refer to acts of third parties who are directly involved in the process of reaching consensus between the parties. The proposed solution promotes also legal certainty. An active participant of the negotiation procedure is capable of anticipating what law is going to be designated as applicable to the contract to be concluded by the parties[65]. In this way, also the interests of the injured party are protected. The same applicable law is relevant to the assessment of liability of the counterparty to the negotiation procedure and its representatives[66].

Moreover, delimitation of the scope of Art. 12 of the Rome II Regulation by the criterion of functional relation between pre-contractual obligations and the planned contract means that the law found under that norm is relevant to the assessment of interests of the insured party who has not obtained insurance protection due to violation of a disclosure obligation in the relation between the insurer and the policyholder[67].

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[61] A. Dickinson, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations, Oxford 2008, 528; A. Dutta, Das Statut der Haftung aus Vertrag mit Schutzwirkung für Dritte, Praxis des Internationalen Privat- und Verfahrensrechts 2009, vol. 4, 293 et seq.

[62] I. Bach (win:) Rome II…, 216.

[63] See Recital 30 of the Rome II Regulation.

[64] B. Volders, Culpa in Contrahendo in the Rome II Regulation, Yearbook of Private International Law 2007, vol. 9, 131.

[65] I. Bach (in:) Rome II…, 217.

[66] It must be noted that the law found under the norms of the Rome II Regulation resolves whether the insurer is jointly and severally liable for an agent's acts or omissions (Art. 15 letter g).

[67] B. Schinkels, In: Rome…, 528.

A peculiarity of group insurance contracts, deriving from the specific position of the group organizer as a person seeking to ensure insurance protection to the group members (insured parties), is that the organizer is imposed, to a narrower or wider[68] extent, with disclosure obligations. A consequence of their violation may be a loss of chance to become insured on the part of a group member.

Search for a conflict of laws rule relevant to the evaluation of a question arising against the backdrop of the relation between a group member and its organizer should be preceded by a number of comments on the very construction of group insurance.

As a rule, group members are tied to the organizer by an extra-insurance internal relationship which justifies the conclusion of the group insurance contract. Its establishment predates the formation of the insurance relationship. Therefore, the opinion of the Supreme Court has not become outdated according to which the disclosure obligation in group insurance may follow from an extra-insurance relationship between the group organizer and a person seeking insurance protection or from the provisions of a contract for the group insurance concluded between the organizer and the insurer[69].

Disclosure obligations under the internal relations are an example of a freely incurred obligation towards a group member, which predetermines their contractual nature. This internal relationship is characterized by the conflict of law's independence. At the same time, it is an extra-insurance relationship. In consequence, it is not covered by the scope of Art. 7 of the Rome I Regulation.

There are more doubts relating to pre-contractual disclosure obligations whose source is outside the internal relationship.

It is indicated in the literature that the conclusion of a group insurance contract results in the establishment – through the policyholder – of a legal relationship between the insurer and the insured party. In the

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[68] Under Art. L 141-4 of the Insurance Code, the group organizer delivers to the insured party a document prepared by the insurer which contains, among others, information on the scope of protection under the insurance contract. The scope of that duty is strongly shaped by case-law, with a clear tendency for its extension. D. Krajeski, In: Droit…, 1429.

[69] Resolution of the Court Supreme of 8 November 1977, I PZP 48/77, Legalis No. 20483.

author's opinion, this observation is universal although "[in] certain legal systems [group insurance] is treated as a multitude of individual insurance relationships between the same policyholder and the insurance company. Others classify the group insurance contract as a framework agreement between the policyholder and the insurance company, relating to individual insurance relationships emerging between the insurance company and the insured parties."[70]

In the context of French law, a distinction is made, already within the framework of one substantive law regime, between group insurance with compulsory accession (*assurance de groupe à l'adhésion obligatoire*), in which the insurance protection is established automatically upon obtaining the status of a group member and follows from a contract concluded between the group organizer (policyholder) and the insurer, and group insurance with elective accession (*assurance de groupe à l'adhésion facultative*), which forms a peculiar legal construction, a combination of individual insurance with a special type of framework agreement between the insurer and the group organizer. The framework agreement is not an insurance contract. On the other hand, an individual insurance contract holds between each of the group members (insured parties) and the insurer[71]. It is generally concluded, with the effect of the establishment of insurance protection, as a result of a declaration of accession being made.

Similarly, in German literature, authors distinguish between the so-called proper group insurance contract (*echte Gruppenversicherung*), in which the group organizer is at the same time the policyholder, and the so-called improper group insurance contract (*unechte Gruppenversicherung*), which is based on the abovementioned construction of a framework agreement between the organizer and the insurer[72].

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[70] M. Kropka, Prawo właściwe dla umowy ubezpieczenia następstw nieszczęśliwych wypadków. Glosa do wyroku Sądu Najwyższego z dnia 3 lutego 2006 r., II PK 152/05, Problemy Prawa Prywatnego Międzynarodowego 2007, vol. 2, 201–202 and the literature cited therein.

[71] J. Bigot, In: Traité de Droit des assurances. Tome 3. Le contrat d'assurance, ed. J. Bigot, Paris 2002, 132 et seq.; L. Mayaux , In: Traité de Droit des assurances. Tome 4. Les assurances de personnes, ed. J. Bigot, Paris 2007, 666 et seq.

[72] More in F. Herdter, Der Gruppenversicherungsvertrag – Grundlagen und ausgewählte Problemfelder, Karlsruhe 2010, 14 et seq.; This terminology was coined by

This solution was also adopted by the authors of the model instrument governing insurance contracts, the Principles of European Insurance Contract Law (PEICL)[73], which is developed with the use of results of comparative law research. Researchers from the Restatement Group decided to introduce a distinction between group insurance with compulsory (*accessory group insurance*) and elective (*elective group insurance*) accession[74].

It would be difficult to speak of a violation of disclosure obligations with the effect of a lost chance to become insured in case of group insurance with compulsory accession. In this case, protection emerges automatically. It is a consequence of adherence to the group. If the group organizer (policyholder) concludes for the benefit of the group's member (insured party) a group insurance contract which does not ensure to the member the desired level of protection, the assessment of liability for such a situation should be referred to the internal relationship. It is the internal relationship that may give rise to the obligation to ensure specific protection in the form of insurance to the group member.

How to find the law applicable to the assessment of liability of a group organizer for violation of disclosure obligations in a group insurance contract with elective accession if such obligations arise from the agreement between the organizer and the insurer?

A group member is not a party to that agreement. This seems to decide about the non-contractual character of the organizer's liability for damage caused to a group member at the stage prior to his accession to the insurance[75]. In the doctrine of private international law, it is nevertheless

H. Millauer, Rechtsgrundsätze der Gruppenversicherung, Karlsruhe 1954, 107 et seq.

[73] M. Lakhan, H. Heiss, An Optional Instrument for European Insurance Contract Law, Utrecht Journal of International and European Law 2010, vol. 26, 1–11.

[74] D. Fuchs, Ubezpieczenia grupowe w europejskiej umowie ubezpieczenia, O potrzebie uregulowania ubezpieczeń grupowych, conference materials, Warsaw 15 November 2013 r.; A. Daszewski, A. Dąbrowska, O potrzebie zmiany przepisów kodeksu cywilnego o umowie ubezpieczenia w kontekście uregulowania ubezpieczeń grupowych, In: M. Serwach ed., Rynek ubezpieczeniowy – nadregulacja czy niedoregulowanie, Łódź 2014, 187.

[75] The situation of a group member in relation to the group's organizer is quite different from the situation of an insured party in relation to the insurer obliged to provide him with insurance protection. The law applicable to the insurance contract is relevant to the assessment of rights of a third party for whose benefit specific performance was stipulated

assumed that the question of personal liability of an agent for the damage caused as a consequence of the undue performance of disclosure obligations is decided by the law found under Art. 12 of the Rome II Regulation[76]. This observation refers to all situations in which a party decides to enter into the contract acting in reliance on the information provided by a third party[77], even if such third party is tied to the counterparty by a contractual relationship.

5. JURISDICTION IN MATTERS RELATING TO THE LOSS OF CHANCE TO BECOME INSURED

Under the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[78] (hereinafter Brussels I bis Regulation), jurisdiction in matters relating to insurance is asymmetrical. The rules of jurisdiction are different depending on whether the "weaker party" of an insurance relationship takes the role of claimant or defendant. The policyholder, insured party, beneficiary or injured party having a claim under the insurance relationship is

by the parties. See A. Bělohlávek, Rozporządzenie Rzym I. Konwencja rzymska. Komentarz, vol. 2, Warszawa 2010, 185. However, one should not equate this formula with a construction of a contract with a protective consequence for a third party (Vertrag mit Schutzwirkung für Dritte), by which certain German authors explain the scope of obligations of the group organizer towards the group's members. It assumes that a debtor is obliged to exercise, while performing, special care not only vis-a-vis the creditor but also certain third parties (e.g. in the context of disclosure obligations). B. Hesse, Interessenkonflikte bei der Lebensversicherung zugunsten Dritter, Karlsruhe 1981, 150. This obligation, however, is accessory to the main performance stipulated for the creditor's benefit. A third party may not demand such performance for the third party's benefit, which is why this construction is denied contractual nature by P. Mankowski, In: Brussels I Regulation, eds. U. Magnus, P. Mankowski, München 2007, 121.

[76] I. Bach (in:) Rome II…, 217.

[77] B. Schinkels, In: Rome…, 528.

[78] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ EU L 351 of 20.12.2012, 1, as amended).

allowed to sue the insurer before a forum expedient to such weaker party, determined according to the residence of the claimant, whereas the insurer may generally sue exclusively before the courts of the country of residence of the defendant.

Special rules of jurisdiction apply to "matters relating to insurance" (Art. 10). Therefore, it seems that by delimiting the scope of their application, one should limit oneself to matters pertaining to contractual claims. However, in light of the provision of Art. 12 of the Rome II Regulation and its Recital 30, it is unlikely that such qualification of claims for the violation of pre-contractual disclosure obligations is going to be adopted in case-law.

Whereas the ECJ, in the *Tacconi* case, drew attention to the fact that pre-contractual obligations may assume a contractual or non-contractual form, after the entry into force of the Rome II Regulation, the lawmaker clearly leans towards the non-contractual qualification of claims for violation of pre-contractual disclosure obligations. Bearing in mind the postulate of coherence between the Rome Regulations and the Regulation on jurisdiction, the introduction of a special conflict of laws rule for non-contractual obligations arising out of dealings will not be without significance for the application of jurisdiction rules[79]. Such direction in the delimitation of the scope of jurisdiction norms, consistent with the non-contractual qualification of *culpa in contrahendo* under the Rome II Regulation, was anticipated in the literature even prior to its entry into force[80].

Disputes for the payment of compensation for a lost chance to become insured will probably be considered by the courts of the Member

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[79] This does not mean, however, that it is the only acceptable way of thinking. It may be also accepted that claims for violation of precontractual disclosure obligations are of contractual nature in the jurisdictional context, which is not consistent with their qualification in the conflict of laws context. This point of view is amply discussed in N. Hage-Chahine, Culpa…, 468–470.

[80] P. Mankowski, In: Brussels…, 117; See also J. Gołaczyński, Jurysdykcja, uznawanie orzeczeń sądowych oraz ich wykonywanie w sprawach cywilnych i handlowych. Rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 1215/2012. Komentarz, Warszawa 2015, 34 et seq, where the author suggests that the non-contractual qualification of claims relating to a strike, as dictated by the scope of the norm under Art. 9 of the Rome II Regulation, predetermines also their qualification in the area of jurisdiction.

State in which the sued insurer is domiciled (Art. 4(1) of the Brussels I bis Regulation) or the courts of the place where the harmful event occurred (Art. 7 item 2). The same terms will apply in case of claims asserted against an agent.

If, however, the damage was caused by an act of an agent for whom the insurer is responsible, a suit against the insurance company may also be brought before the court of the place where the agency is situated (Art. 7 item 5). The provision of Art. 7 item 5 allows to base jurisdiction on the place where the agent is situated in matters involving disputes arising out of such agent's activities. The scope of that norm includes as well non-contractual disputes[81].

One may speak of existence of a "branch, agency or establishment" of the main entrepreneur if a given entity has a management structure and property structure of such type that a third party may negotiate contracts with such entity without a need of direct involvement of that entrepreneur although, eventually, the legal relationship will be established between such entrepreneur and the third party[82]. The absence of control over the activities of a given entity and absence of the duty to follow the main entrepreneur's orders preclude the conclusion that a given entity is a branch, agency or establishment[83]. Analysis of the ties between a branch and the main entrepreneur may not be limited exclusively to the examination of formal organizational and legal ties. Even in the absence of such ties, the admissibility to recognize a given entity as a branch is decided by the objective relations between such entities from the perspective of third parties[84].

Most legal literature in which an attempt is made to transpose those patterns to insurance relationships concentrates on the juxtaposition of an insurance broker and an insurance agent, and uses the term "branch,

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[81] Judgment of the ECJ of 22 November 1978 in the case 33/78 Somafer SA v. Saar-Fergnas AG, ECR 1978, 2183, item 13.

[82] Ibid, item 12.

[83] Judgment of the ECJ of 6 October 1976 in the case 14/76 A. De Bloos, SPRL v. Société en commandite par actions Bouyer, ECR 1977, p. 149, item 20–21.

[84] Judgment of the ECJ of 9 December 1987 in the case 218/86 SAR Schotte GmbH v. Parfums Rothschild SARL, ECR 1987, p. 4905, item 14–17.

establishment or agency" only in reference to the latter[85]. This distinction is based on the conviction that a broker has an autonomous position vis-a-vis the insurer, whereas an agent acts in correlation with the insurer[86]. In consequence, an entity that pursues its activities independently and is not obliged to follow the instructions it is given may not be considered to be a branch of the agency[87].

A broker infringing a disclosure obligation unduly performs the contract with the principal. Such principal may bring a claim for a loss of chance of insuring before the courts of the country of the broker's domicile (Art. 4 item 1 of the Brussels I bis Regulation) or before the court of the country in which, under the contract, brokerage services were provided or should have been provided (Art. 7 item1 letter b). However, the connector under Art. 7 item 1 letter b of the Regulation may sometimes be a source of trouble. The place of provision of the service should be established, in the first place, according to the intention of the parties as expressed in the content of the contract. Only secondarily, "where the provisions of the contract do not permit determination of the place of the main rendition of services," one should alternatively consider the place where the service provider acted if such determination is not contrary to "the parties' intention as expressed in the provisions of the agreement."[88] Following that rule, the Polish Supreme Court expressed an opinion that the place of provision of legal consultancy services is the seat of the service provider, where draft agreements and opinions are drawn up, and not the place where such documents are used by their recipients[89]. Applying these remarks to the le-

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[85] See K.F. Tsang, Forum Shopping in European Insurance Litigation: What We Have Learned from New Hampshire Insurance Co. v. Strabag Bau, Loyola of Los Angeles International and Comparative Law Review 2010, vol. 32, 246, footnote 39.

[86] H. Heiss, In: Brussels I Regulation, eds. U. Magnus, P. Mankowski, München 2007, 281–282.

[87] See, in the context of the Lugano Convention, R. Stefanicki, Jurysdykcja w sprawach ubezpieczeniowych według Konwencji Lugańskiej, WU 1999, vol. 9–10, 38.

[88] Judgment of the ECJ of 11 March 2010 in the case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA*, ECR 2010, p. I-02121, items 38, 40 – hereinafter, the ECJ judgment in the *Wood Floor* case.

[89] Decision of the Supreme Court of 22 January 2015, I CSK 668/13, Legalis No. 1200707.

gal position of a broker, one may assume that – unless the parties agreed otherwise – the place of performance of a service consisting in preparation of an insurance program is the broker's seat, even if the broker carries out, under the concluded contract, a number of additional (auxiliary) activities out of his seat. In case of a multitude of places of providing services in different Member States, the goal should be to indicate one court competent for all claims arising out of the contract. This will be decided by the place of the main performance[90], which, however, does not have to correspond to the broker's domicile[91]. On a side note, it must be indicated that the injured party may also base the broker's liability on a tort (Art. 7 item 5). However, the court competent on that basis has no jurisdiction to resolve a case for compensation brought on contractual grounds[92].

As far as the liability of an organizer in group insurance is concerned, the starting point is an analysis of the ties between such an organizer and a group member.

If the disclosure duty follows from an obligation freely incurred as a part of an extra-insurance internal relationship, cases for compensation based on its violation are contractual. For example, in employee group insurance contracts, special norms on employment contracts will apply (Art. 20 and following of the Brussels I bis Regulation).

It seems that is if the disclosure obligation follows from a framework agreement organizing the insurance, jurisdiction should be established under the non-contractual qualification of a claim. A member of the group is not a party to that agreement although it is concluded in such member's interest.

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[90] ECJ decision in the Wood Floor case, items 27 and 33.

[91] Determination of the place of main performance may imply complications when the service provider, in a contract similar to insurance intermediation or legal consultancy, undertakes primarily to act in the name and on behalf of the client vis-a-vis third parties. Cf. K. Pacuła, Forum shopping i kolizyjnoprawne obejście prawa w działalności ubezpieczeniowych kancelarii odszkodowawczych, In: E. Kowalewski ed., Doradztwo odszkodowawcze w Polsce. Potrzeba regulacji prawnej, Toruń 2015, 177 et seq.

[92] In this regard, the opinion of M. Pazdan has not become outdated, as expressed in M. Pazdan, Zbieg odpowiedzialności cywilnej ex contractu i ex delicto w prawie prywatnym międzynarodowym, In: J. Błeszyński, J. Rajski eds., Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego, Warszawa 1985, 294.

6. CONCLUSION

Despite the specific conflict of laws rule for the liability for *culpa in contrahendo* in the Rome II Regulation, the law applicable to the assessment of the liability for a loss of chance to become insured is, in principle, the law relevant to the insurance contract itself. Under Art. 12(1) of the Rome II Regulation, the law applicable in this case is basically *lex contractus in negotio.*

More doubts are raised by the assessment of the same issue on the level of jurisdiction. One may consider if, in the case of disputes concerning the liability for violation of insurance disclosure obligations, the claimant should not take advantage of the special rules of the jurisdiction from Chapter II Section 3 of the Brussels I bis Regulation. This is supported also by the need to protect the policyholders and the insured parties. If one is to apply the comments made in the context of the insurer's pre-contractual obligations to analogous obligations in respect of the declaration of risk, which are imposed on the weaker party of the insurance contract, it will turn out that in a dispute arising from their violation such person, acting as the defendant, will not enjoy the protection under the rules of jurisdiction contained in Chapter II Section 3 of the Regulation.

An inducement in this regard is offered by Art. 10 of the Brussels I bis Regulation, which delimits the scope of application of special jurisdiction rules "in matters relating to insurance." Its wording differs from the two remaining provisions of similar nature, which provide respectively for the application of special jurisdiction rules if the subject of the proceedings is an employment contract or claims under an employment contract (Art. 20(1)) or a contract or claim under a contract concluded by a consumer (Art. 17). In the provisions of Art. 10 and following of the Brussels I bis Regulation, it is not clearly indicated that the claim should arise from "an insurance contract," which may open the way for the coverage by these provisions of disputes with non-contractual qualification[93].

[93] It does not seem that this point of view is precluded by the assumption that the discussed norms are exceptions to a general rule and, as such, may not be interpreted extensively. The argument based on the exceptiones non sunt extendendae principle may not result in rendering invalid those provisions which are protective in nature. See the opinion

The case-law points as well to the possibility to widen the scope of application of those norms to disputes conducted on the initiative of the injured parties[94], their legal successors[95], and disputes conducted against the injured parties themselves[96] or against persons merely related to the insurance relationship[97]. These persons are not the parties to the insurance contract. However, they take advantage of special protection in the area of jurisdiction on account of the endeavor to implement the postulate of protecting the "weaker party." As a consequence, a conclusion may be drawn that, under the provisions of Chapter II Section 3, the relation between the dispute and the insurance contract should not be understood narrowly if this could stand in opposition with the purpose of special jurisdiction rules.

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of Advocate General Francis G. Jacobs of 13 December 2001 in the case C-96/00 Rudolf Gabriel v. Schlank & Schick GmbH, ECLI:EU:C:2001:690, item 47.

[94] Judgment of the ECJ of 13 December 2007, C-463/06, in the FBTO Schadeverzekeringen N.V. v. Jack Odenbreit case, ECR 2007, p. I-11321.

[95] Judgment of the ECJ of 17 September 2009 in the case C-347/08, Vorarlberger Gebietskrankenkasse v. WGV Schwäbische Allgemeine Versicherungs AG, ECR 2009, p. I-08661.

[96] The French Court of Cassation concluded that the rules of jurisdiction relating to insurance (currently Art. 14(1) of the Brussels I bis Regulation) apply to actions brought against the injured party, regardless of whether the insurer takes the role of the claimant independently. Cass. civ., 27 février 2013, n° 11-23.228.

[97] Judgment of the House of Lords in the case Baltic Insurance Group v. Jordan Grand Prix Ltd [1999] 2 AC 127, against whose background such opinion is formulated in P. Stone, EU Private International Law, Cheltenham 2010, 128.

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MORTGAGE IN INTERNATIONAL PRIVATE LAW

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ABSTRACT

The article discusses the law applicable to the determination of a property-secured right – i.e. a mortgage. Major reflections are preceded by the legal analysis of a mortgage, the concept of the Eurohypothec and the European Land Information Service – EULIS. What follows is a short review of mortgage regulations in selected legal systems (e.g. the French and German systems). The core of the article focuses on the rules for the search of the law applicable to a mortgage and related scope. The change of law governing mortgages (property), e.g. as a result of the change of borders, including a hostile incorporation (annexation), is also discussed.

Key words: a mortgage, conflict of law, conflict of law principles, Rome I regulation, connection of the laws of different countries

1. INTRODUCTION

This article discusses the issue of the cross-border determination of *in rem* rights and the law applicable to the establishment of a mortgage within conflict of law principles. It is a continuation of reflections on the determination of the law applicable to a pledge as a collateral security action[1].

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[1] As regards the concept itself, the catalogue of collateral security actions and the qualification of rights as *in rem* rights, see J. Widło, Zastaw rejestrowy na prawach, Warszawa: Lexis|Nexis, 2008, 160-162.

The analysis focuses on a mortgage in the sense of a pledge right – securing a claim on property or any component of property which does not require the subject of collateral security to be released. It is based on a limited *in rem* right or a similar construct. As part of it, there arises the right to satisfaction with priority over other entities – derived from the subject of collateral security. As a rule, the right applies to property or rights related to property, including those secured earlier with a mortgage (*subintabulat*). This right is effective with regard to other creditors, both unsecured and secured with a lower priority. It is effective with regard to third parties as well as the buyer of the encumbered item and ensures certain privileges in enforcement and bankruptcy proceedings.

The problem that arises is the application of the law applicable to the legal relationship and the rights arising from a cross-border mortgage, i.e. the one including an element of the legal relationship which goes beyond the legal system of one state (because the subject of *in rem* rights is located abroad, the state where the mortgage was established was different from the state where the ruling court is based, the parties are citizens of different states or the law applicable to the mortgage is different from the law applicable to the debt secured with it or the two are based in different countries).

2. REMARKS ON MORTGAGE QUALIFICATION

Private law of respective states usually has a territorial scope of application. Securing rights include in rem rights or obligation rights2. This division is also reflected in the Polish Act of 4 February 2011, Private International Law (PIL)[3]. If a given registered right is qualified as an *in rem* right, there are grounds for the application of the Law of Goods[4] (Art. 41 of PIL) as the proper law to evaluate this right. If a securing right is an ob-

[2] E. Drozd, Kompetencja statutów rzeczowego i obligacyjnego w zakresie praw podmiotowych, Studia cywilistyczne 30 (1979): 127.

[3] Act of 4 February 2011, Polish Private International Law (Journal of Laws from 2015, item 1792), hereinafter referred to as PIL.

[4] In this article the Law of Goods means lex rei sitae (law applicable to property and a mortgage in private international law).

ligation, the Law of Obligations (law applicable to contractual obligations) should be applied.

The question that arises is the one concerning a clear distinction between the scope of application of the Obligations and the Law of Obligations (law applicable to contractual obligations) as well as the premises for the qualification of a given registered right as an in rem right, which creates the foundation for the application of the Law of Goods (in the light of private international law provisions. In this respect, the reflections on a registered pledge should be consulted)5.

It should be repeated here that the concept of in rem rights used for defining the scope of the conflict of law principle in Article 41 of PIL is subject to the process of legal qualification6, which may be carried out according to a variety of criteria[7].

It should be reiterated that the majority of Polish researchers favour the view that the qualification method applied should be based on an autonomous theory, i.e. the concepts of in rem rights in various legal systems must be defined using the method of legal comparison in order to capture the common characteristics of in rem rights in the aforementioned systems (not just the Polish concept of in rem rights). This is done in separation from any specific system of rights8. Some followers of the doctrine also indicate that the qualification method of *lex rei sitae*[9] may be applied. In this method, the qualification of the *in rem* right concept precedes the indica-

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[5] See J. Widło, Zastaw rejestrowy na prawach, Warszawa: Lexis|Nexis, 2008, 556.

[6] The concept of qualification in the light of PIL denotes the interpretation of terms defining the scope of the conflict of law norm in order to determine the premises for the application of this norm, see Maksymilian Pazdan, Prawo prywatne międzynarodowe, Warszawa: LexisNexis 2002, edition 7, Warszawa 2003, edition 8, Warszawa 2011, 53.

[7] As regards the theory of qualification in PIL, see M. Pazdan, Prawo prywatne... , 54 and 55, which mentions: 1) the qualification according to the law in force at the seat of the ruling court, 2) the qualification according to legis causae, 3) the concept of autonomous qualification, 4) the qualification according to legis fori.

[8] Fryderyk Zoll Junior, Międzynarodowe prawo prywatne, Kraków 1947, 50 and the following, Kazimierz Przybyłowski, Prawo prywatne międzynarodowe. Część ogólna 1935,104, E. Drozd, Kompetencja statutów..., 127, M. Pazdan, Prawo prywatne... , 54 and the following.

[9] See a review of opinions in E. Drozd, Kompetencja statutów, 133, M. Pazdan, Prawo prywatne, 186.

tion of the applicable law. It is carried out according to the interpretation of the Law of Goods, i.e. the PIL provisions of the state where the property is situated [10] (and not the seat of the ruling court). The Law of Goods is the one that is effective *erga omnes* and offers privileges to the secured creditor (including enforcement privileges).

In Poland, it is accepted (E. Drozd[11]) that a limited *in rem* right involves what is defined as such by an act of law. A. Wąsiewicz holds a different opinion. According to this author, it should be accepted that the *numerus clausus* rule makes it possible to include among (limited) *in rem* rights the rights listed in the Civil Code, Book II (…) or those that may not be denied such characteristics on the basis of the analysis carried out even though they are regulated in another book of the Civil Code or another act of law.[12] I. Ignatowicz[13] and S. Grzybowski[14] are also inclined to endorse this view.

According to the foreign doctrine, the constitutive quality of *in rem* rights is their absolute nature – effectiveness *erga omnes*[15]. The problem that arises is whether *in rem* rights should only be those that are characterised by multi-directional effectiveness as regards third parties (such as legal protection, protection against a breach, protection against the loss of a right and against the acquisition of a right by an unauthorised person), effectiveness as regards the purchaser and effectiveness in enforcement and bankruptcy proceedings or whether it is sufficient that those rights are characterised only by one-directional extended effectiveness[16].

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[10] The problem will arise for in rem rights on rights. The questions that need to be addressed here is the 'location' of the private law. Cf further deliberations.

[11] E. Drozd, Kompetencja statutów rzeczowego i obligacyjnego…, 128.

[12] Andrzej Wąsiewicz Prawo w*łasności i inne prawa rzeczowe*. In: System Prawa Cywilnego, ed. J. Ignatowicz. Vol. II . Wrocław 1977, 598.

[13] Jerzy Ignatowicz, Komentarz do kodeksu cywilnego, t.1, ed. Jerzy Ignatowicz, Krzysztof Pietrzykowski, Warszawa 1972, 669.

[14] Stefan Grzybowski, Zarys prawa rzeczowego, Warszawa: PWN 1976, 41.

[15] E. Drozd, Kompetencja statutów*,* 129, but the effectiveness of the law with regard to third parties may be analysed on many platforms. Detailed reflections may be found in *ibidem*, 130.

[16] E. Drozd, Kompetencja statutów..., 130 –131.

For the purpose of further deliberations, it needs to be indicated that considering the existing doubts, some rights are treated as irrefutable in rem rights in all legal systems, e.g. the right of ownership or a mortgage[17]. Pledge rights are also treated as typical *in rem* rights[18]. The reflections on the concept and legal nature of a mortgage in the Polish law will be disregarded here as the subject has been comprehensively discussed in the extensive literature on the subject which is part of the civil law canon[19].

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[17] E. Drozd, Kompetencja statutów... 132, J. Górecki, Hipoteka – aspekty kolizyjnoprawne, In: Rozprawy z prawa prywatnego. Księga pamiątkowo dedykowana profesorowi Aleksandrowi Oleszce, ed. Jerzy Jacyszyn, Anna Dańko-Roesler, Mksymilian Pazdan, Wojciech Popiołek, Warszawa: Stowarzyszenie Notariuszy Polskich, 2012, 144 and the German literature quoted herein which qualifies a mortgage in the same way in the light of Article 43 (1) of EGBGB.

[18] E. Drozd, Kompetencja statutów... , 153.

[19] There are many publications about a mortgage, including in particular those introducing its capped model to the amended Polish law, such as Pisuliński Jerzy, Hipoteka, In: System Prawa Prywatnego, vol. 4, ed. Edward Gniewek, Warszawa: CH Beck 2007, Pisuliński Jerzy, Hipoteka bankowa, In: Encyklopedia prawa bankowego, ed. W. Pyzioł, Warszawa: CH Beck 2001; Pisuliński Jerzy, Hipoteka kaucyjna, Kraków: Zakamycze 2002; Pisuliński Jerzy, Hipoteka na nieruchomości zabudowanej domem mieszkalnym. Uwagi de lege lata i de lege ferenda, In: Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego. Księga pamiątkowa dla Romualda Sztyka, ed. Edward. Drozd, Aleksander Oleszko, Maksymilian Pazdan, Kluczbork: Stowarzyszenie Notariuszy RP 2007; Pisuliński Jerzy, Hipoteka na udziale we współwłasności nieruchomości, KPP 1 (2002), Pisuliński Jerzy, O planowanej nowelizacji ustawy o księgach wieczystych i hipotece i wprowadzeniu długu gruntowego, KPP 3 (2005), Pisuliński Jerzy, Przedmiot i treś*ć hipoteki. Zagadnienia wybrane*, Rejent 9 (1992), Pisuliński Jerzy, Verfügung *über* frei gewordene Hypothekenstellen, In: Ius est ars boni et aequi. Festschrift für Stanisława Kalus, ed. Magdalena Habdas, A. Wudarski, Frankfurt am Main 2010; Pisuliński Jerzy, Zasada szczegółowości i akcesoryjności hipoteki po nowelizacji, In: Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci prof. E. Gniewka, ed. J. Gołaczyński, P. Machnikowski, Warszawa: CH Beck 2010; Pisuliński Jerzy, Hipotek, In: Hipoteka po nowelizacji, ed. J. Pisuliński, Warszawa: Lexisnexis 2011; Swaczyna Bartłomiej, Hipoteka *łączna* po nowelizacji - zagadnienia wybrane, Wrocławskie Studia Sądowe 2 (2012), Swaczyna Bartłomiej, Hipoteka umowna na nieruchomości, Kraków: Zakamycze 1999; Swaczyna Bartłomiej, Hipoteka umowna, Warszawa-Kraków: WoltersKluwer 2007; Swaczyna Bartłomiej, Rozporządzanie opróżnionym miejscem hipotecznym i hipoteka właściciela (uwagi na tle projektu Komisji Kodyfikacyjnej Prawa Cywilnego, KPP 1 (2003), Swaczyna Bartłomiej, W kwestii ustanowienia zabezpieczenia hipotecznego przy umowie ramowej, Prawo Bankowe 5 (2008),

1.1. The Eurohypothec

It needs to be noted that there has been an attempt to unify the rights secured on property as part of the Eurohypothec.

There was a proposal to introduce a common mortgage for Europe, shaped as a relatively flexible right secured on property with an aim to strengthen integration with regard to mortgage lending (the freedom of movement of loans and collaterals) in the European Union.

The Eurohypothec was to become a general European non-accessory security instrument, an alternative to pledge rights on property governed by internal legal systems of respective Member States.

'Basic Guidelines for a Eurohypothec'[20], which were developed, made a comprehensive document defining rules, the legal nature and the way of creation, transfer and expiration of the Eurohypothec and, in particular, the application of that collateral security measure – related to the entry into a register as well as enforcement and bankruptcy proceedings[21].

Rudnicki Stanislaw, Rudnicki Grzegorz, Komentarz do kodeksu cywilnego. Księga druga. Własność i inne prawa, Warszawa: LexisNexis 2011; Maria Kaczorowska, Koncepcja Eurohipoteki na tle praw zastawniczych na nieruchomościach w Europie, Wrocław: Wydawnictwo Opole 2016, Paulina Armada-Rudnik, Prawo hipoteczne po nowelizacji z 26.6.2009 r., Monitor Prawniczy 1 (2010), 7-15; Edward Gniewek, Współczesny model hipoteki – zasadnicze zręby konstrukcji, Monitor Prawnczy 4 (2011), 181-188; Zaradkiewicz Kamil, Nowa regulacja prawa hipotecznego, Przegląd Prawa Handlowego 1 (2011), (supplement), Izabela Heropolitańska, A. Tułodziecka, Zagadnienia z praktyki bankowej i sądowej na tle znowelizowanego prawa hipotecznego – wnioski po X Ogólnopolskiej Konferencji Wieczystoksięgowej, part 1, Monitor Prawa Bankowego 9 (2012), 96-104; part 2, 10 (2012), 90-100; Barbara Jelonek-Jarco, Julita Zawadzka, Praktyczne problemy nowelizacji ustawy o księgach wieczystych i hipotece, Rejent 9 (2010), 33-56.

[20] Basic Guidelines for a Eurohypotec, Warsaw (2005).

[21] Maria Kaczorowska, Koncepcja Eurohipoteki na tle praw zastawniczych na nieruchomościach w Europie, Wrocław: Wydawnictwo Opole 2016, 77- 87 and the following, Wudarski Arkadiusz, W poszukiwaniu konstrukcji, KPP 1 (2009), 209, 233 and the following.

According to the definitions provided in Clause 2.1 of 'Basic Guidelines' hereinafter referred to as BG, the Eurohypothec is a non-accessory pledge right on property under which its holder may demand the payment of a specific account receivable secured on the property. As a rule, the Eurohypothec is applied in combination with a collateral security agreement[22].

The adopted concept of the Eurohypothec has three fundamental qualities determining the legal characteristics of the future common pledge law on a property:

– the collateral security-based function,
– flexibility,
– the European range[23].

The Eurohypothec may only be established by a property owner. The property owner does not need to be the creditor's personal debtor at the same time. The national law may introduce the requirement of concluding a contract between the owner and the future holder of the right to the Eurohypothec as a pre-condition for the establishment of the Eurohypothec (Clause 3.1 of Basic Guidelines).

According to Clause 3.2 of BG, the Eurohypothec should be entered into the relevant property register (land and mortgage register), following the national law regulation. Registration determines the effectiveness of the Eurohypothec as regards third parties[24]. Pursuant to Clause 3.3 of BG, there are two types of the Eurohypothec that may be governed by the national law: the Eurohypothec in the form of a letter right and the Eurohypothec in the form of a non-certified right (non-letter right). The Eurohypothec should guarantee the authorised party full satisfaction, also in the event of the owner's bankruptcy. It is inadmissible to change the priority of satisfaction to the detriment of the person authorised in the Eurohypothec with the exception of the expenses related to the bankruptcy proceedings (Clause 9.1 of BG).

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[22] M. Kaczorowska, , Koncepcja Eurohipoteki …, 108, Wudarski A., W poszukiwaniu konstrukcji…, 233.

[23] M. Kaczorowska, , Koncepcja Eurohipoteki … ,106 and the following;

[24] M. Kaczorowska, , Koncepcja Eurohipoteki …, 108.

Moreover, if the Eurohypothec is to be traded, a common European property register is required. The European Land Information Service (EULIS)[25], which is being currently developed, plays an important role here.

Work on EULIS was inaugurated in 2002 as part of the eContent programme of the EU Directorate General for the Information Society. A portal offering access to the property registers of the countries that had joined the project was launched on 2006. Currently, the EULIS system includes Austria, Spain, the Netherlands, Ireland, Lithuania, Scotland, England and Wales, and Sweden[26] as the registers of those countries have been entirely included in the EULIS network[27]. EULIS is an initial platform, but if other EU Member States were to join it, there needs to be a uniform mechanism for obtaining information on encumbrance and a mechanism for a mortgage entry, e.g. into a European database. This would result in making this right public in a way accepted in a given state or - if there is no unified property registration – within the above mentioned platforms of law creation and information provision. An extremely important detail needs to be mentioned here, i.e. uniform property marking methodology and a uniform data catalogue which enables queries about property (e.g. numbers assigned to property, not land and mortgage registers). This would create a need for a property register including additional registration of property titles and their uniform marking.

3.2. Mortgage In Selected Legal Systems

Securing rights on property should be briefly mentioned here.

3.2.1. The French law. The Hypothec

In the French law a mortgage (hypothèque) is classified as collateral security, accessory security or as a securing in rem right of the second degree (sûretés réelles, droits réels accessoires, de garantie, du second degré). A securing in rem right of the second degree is one of the categories of in rem

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[25] M. Kaczorowska, , Koncepcja Eurohipoteki … , 120.

[26] EULIS in total 21 countries, see www.eulis.eu [date of access: 12.08.2019].

[27] M. Kaczorowska, , Koncepcja Eurohipoteki …, 108.

rights, next to independent in rem rights or in rem rights of the first degree (droits réels principaux, du premier degré)[28]. Unlike independent *in rem* rights which apply to the substance of things, collateral security refers to the value expressed in financial terms and is not independent of the claim it secures. A mortgage is defined in Article 2393 of the French Civil Code from 1804 as an *in rem* right to a property for the purpose of paying off the financial liability.

A contractual mortgage (hypothèque conventionnelle) is governed in Articles 2413-2424 of the French Civil Code. A contractual mortgage is created as a result of the conclusion of a mortgage contract. A notary deed is required to declare the establishment of a mortgage, the creditor's declaration may be submitted in an ordinary written form. The entry of a mortgage into a property register is just a pre-condition for the effectiveness of the pledge right with regard to third parties[29].

3.2.2. The German Law. A mortgage, Land Charge And AnnuityFee

The rights of pledge in the German law include a mortgage and a land charge with the subcategory of an annuity. They are governed by § 1113-1203 of the German Civil Code (BGB from 1900). In trade, the land charge as a non-accessory right is of primary importance. Pursuant to § 1192 of the German Civil Code, mortgage regulations apply to a land charge[30].

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[28] The category of independent *in rem* rights includes ownership and *in rem* rights separated from ownership. See Ograniczone prawa rzeczowe w prawie francuskim, SPP 4 (2008), 20.

[29] Stéphane Glock, Real Property Law and Procedure in the European Union. France Report, http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/France, [date of access: 4.07.2019], A. Kaczorowska, Koncepcja Eurohipoteki, 156, see: Report Consumer Market Study On The Functioning Of Real Estate Services For Consumers In The European Union. https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/ZERP/TENLAW/FollowUp/real_estate_services_final_report_EU_october_2018.pdf , [date of access: 12.12.2019].

[30] Christian Hertel, Real Property Law and Procedure in the European Union. National Report. Germany, http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Germany.

Pursuant to § 1113 (1) of the German Civil Code, a mortgage is a right under which a creditor may demand the payment of a specified amount secured on the encumbered property to satisfy a claim. A mortgage may exist as an accounting right – entered into the land and mortgage register, or a letter of mortgage – defined in a separate document, a peculiar bearer's option of collateral security issued to the holder by a land and mortgage office (§ 1116 of the German Civil Code)[31]. Apart from an ordinary mortgage (traded), the German law includes a security mortgage (*Sicherungshypothek*), which has an accessory nature[32].

A land charge governed by § 1191-1198 of the German Civil Code is a stand-alone collateral security and may be traded independently. The right of pledge and a secured claim are linked by means of the so-called collateral security agreement. Pursuant to § 1191 (1) of the German Civil Code, a land charge is the right which encumbers property in such a way that the person for the benefit of whom the encumbrance has been established may demand the payment of a specified amount secured on the property[33]. It is of a non-accessory nature as it has been predicted to become entirely independent of the existence of the claim secured by it. The land charge is the so-called isolated or stand-alone land charge (*isolierte Grundschuld*, also referred to as *Primärgrundschuld*)[34]. In practice,

PDF (2.09. 2019), A. Kaczorowska, Koncepcja Eurohipoteki … , 170, Report Consumer Market Study On The Functioning Of Real Estate Services For Consumers In The European Union. https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/ZERP/TENLAW/FollowUp/real_estate_services_final_report_EU_october_2018.pdf, [date of access: 12.12.2019].

[31] A. Kaczorowska, Koncepcja Eurohipoteki, 170.

[32] Jerzy Pisuliński, Hipoteka kaucyjna, Kraków: Zakamycze 2002, 23-24; Jerzy Pisuliński, O długu na nieruchomości, Transformcje Prawa Prywatnego 1 (2001), 15. Jerzy Pisuliński, Rys prawnoporównawczy. Hipoteka w zagranicznych systemach prawnych. Eurohipoteka, In: Hipoteka po nowelizacji. Komentarz, ed. J. Pisuliński, Warszawa: LexisNexis 2011, 51 and the following.

[33] Adam Bieranowski, Dług gruntowy (uwagi na tle projektowanej regulacji), Rejent 10 (2004), 76 and the following, Arkadiusz Wudarski, Umowa zabezpieczająca jako surogat akcesoryjności długu gruntowego, Kwartalnik Prawa Prywatnego 2 (2010), 435 and the following; A. Kaczorowska, Koncepcja Eurohipoteki…, 170.

[34] A. Kaczorowska, Koncepcja Eurohipoteki…, 173-174, Pisuliński J., Rys prawnoporównawczy. Hipoteka w zagranicznych systemach prawnych. Eurohipoteka,…, 51 and the following.

the right of pledge which is under consideration, takes the form of the so-called securing land charge (*Sicherungsgrundschuld*) used for securing the existing or future claims. The regulation of a securing land charge as a statutory subtype of the land charge was envisaged in the amendment to the German Civil Code of 2008 which introduced the legal definition of a securing land claim in § 1192 (1a) ('a land charge established to secure a claim')[35].

The establishment of a securing land charge is accompanied by the conclusion of a collateral security agreement by the parties defining the purpose of the security, which links the right of pledge and the secured claim.

3.2.3. The English and Scottish law. Mortgage

The regulations of the property law, including a property-based collateral security, in force in the United Kingdom of Great Britain and Northern Ireland are different. There are differences, in particular, between the English law and the Scottish legal system[36]. The right that corresponds to the mortgage in England and Wales is a *mortgage,* while in Scotland[37] it is a *standard security* (*right in security*). In its content and purpose, a mortgage initially corresponded to the transfer of ownership as a debt collateral security[38].

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[35] A. Wudarski, Umowa zabezpieczająca, 436-437.

[36] Paweł Blajer, Historyczny rozwój angielskiego modelu rejestrowania praw do nieruchomości, In: Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi, ed. Marlena Pecyna, Jerzy Pisuliński, Małgorzata Podrecka, Warszawa: Lexisnexis 2013, 275; M. Kaczorowska, Koncepcja Eurohipoteki… , 193.

[37] Along with fixed security, the English and Scottish law distinguishes the so-called floating security or floating charge, which is a kind of a general pledge encumbering the components of the assets of an active company. See Jacek Gołaczyński, Zastaw na rzeczach ruchomych, Warszawa: CH Beck 2002,110 T. Stawecki, Zastaw , In: Ustawa o zastawie rejestrowym. Warszawa 1998 , 193 and the following, Report Consumer Market Study On The Functioning Of Real Estate Services For Consumers In The European Union. https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/ZERP/TENLAW/FollowUp/real_estate_services_final_report_EU_october_2018.pdf, [date of access: 12.12.2019] .

[38] T. Stawecki, In: T. Stawecki, M. Tomaszewski, F. Zedler, Ustawa o zastawie, 194 and the following

The English mortgage is governed by the act on *in rem* rights of 1925 (*Law of Property Act*) and may take two forms: *a legal mortgage* and *an equitable mortgage.* Historically, the *legal mortgage* provided for an automatic transfer of the right to the property upon the creditor, which could subsequently be transferred back upon the debtor after the expiry of the secured claim, hence its nature was close to the transfer of ownership as a debt collateral security. The debtor was unable to establish another mortgage for the benefit of another creditor. Because of the limitations following from the regulation of a *legal mortgage*, an alternative security measure was introduced – an *equitable mortgage*. Under the English *in rem* right there was a change in the legal mortgage regulation which excluded the transfer of the right to property upon the creditor and admitted the possibility of establishing many mortgages by a debtor[39].

A special form of a *deed*[40] is reserved for the contract which establishes a mortgage in the form of a *legal mortgage*. The mortgage thus established, which encumbers a property entered into a property register, is subject to registration, which makes the mortgage effective with regard to third parties. In the case of a freehold, property ownership unlimited by time, the first mortgage is established for 3000 years and each next one for the period longer by one day. The mortgage encumbers the property together with its components and attachments[41]. The mortgage has a strictly accessory nature. It may secure claims of a defined value and credits on a current account[42].

3.2.4. Mortgage In the American Law

Regardless of what is secured, securing rights in the US are called *security interests*. What they share is the function – the security of a claim – and the content according to which priority is given to the satisfied

[39] M. Kaczorowska, Koncepcja Eurohipoteki…, 193., J. Pisuliński, Rys prawnoporównawczy…, 50.

[40] M. Kaczorowska, Koncepcja Eurohipoteki… ,194.

[41] J. Pisuliński, Rys prawnoporównawczy, p. 51.

[42] J. Pisuliński, Rys prawnoporównawczy... , 51.

creditor in the event of security performance and in simplified satisfaction procedures.

Each state has its own legislation governing property encumbrance.

There are two kinds of contractual mortgages in the US: a *mortgage* and a *deed of trust*. Moreover, the American law also provides for an *equitable mortgage*[43]. State legislatures admit the existence of statutory mortgages (e.g. for the benefit of the seller – a *vendor's lien*). The difference between a *mortgage* and a *deed of trusty* boils down to the fact that a *deed of trust* is a contract concluded by three parties: a property owner, creditor and a trustee [44]. Under the contract, the trustee becomes the property owner and the transfer of ownership occurs in order to secure a claim. If the secured claim is not paid off, the trustee has to sell the property. If the obligation has been fulfilled, the trustee has to transfer the ownership back to the person who established the security.

An entry into a property register (*county recorder*) is not required to create a mortgage. The entry is important for the priority of rights encumbering the property and the effectiveness of the mortgage as regards third parties[45].

In the American law, a mortgage is of accessory nature. It is also admissible to secure a claim which is to arise in the future (an *open-end mortgage* is established).

4. CONFLICT OF LAW PRINCIPLES APPLICABLE TO MORTGAGE

Article 41 of the Polish Private International Law of 4 February 2011, currently in force, which regulates the law applicable to a mortgage applies

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[43] J. Pisuliński, Rys prawnoporównawczy.., 52 and the literature quoted herein.

[44] J. Pisuliński, Rys prawnoporównawczy... , 52.

[45] As regards the scope of encumbrance, a mortgage may encumber a property (*fee simple*) together with its fixtures but it may also encumber some rights to a property (e.g. perpetual usufruct). In most states, a mortgage is executed by the public sale of the encumbered property (*foreclosure by sale*) and the payment of the secured debt (*strict foreclosure*), J. Pisuliński, Rys prawnoporównawczy... , 53.

a general territorial jurisdiction rule to the location of an *in rem* right, including a mortgage[46].

Pursuant to Article 41 (1) of the Private International Law, ownership and other *in rem* rights are subject to the law of the country in which the item they apply to is located. (2) The purchase and loss of property as well as the purchase, loss and change of the content or priority of other *in rem* rights are subject to the law of the country in which the subject of those laws was located at the moment when the event entailing the legal consequences occurred.

In general, the rules for establishing a mortgage are identical regardless of the subject to mortgage, i.e. whether it involves immovables or rights (Article 41 (1) of the Private International Law). In such a situation the *lex rei sitae* of the subject to mortgage location is usually applied. What must be considered is the so-called *situs naturalis*, i.e. the real location of the subject to mortgage. It refers to the physical location of the property, property titles such as perpetual usufruct or rights (a mortgage on a claim secured by a mortgage). It should be accepted that the Law of Goods of the *subintabulate* - i.e. a mortgage on a claim encumbered by a mortgage – will be the location of the property that secures the claim secured by a mortgage. Such a solution makes it possible to take into account both the application of the *subintabulate* in general and the mechanism of its establishment or the system of transfer for such a claim (e.g. the system of mutual legal dependence between the claim and the mortgage securing it). It is relatively easy to determine in which country the property is located because of national borders and the external marking of the territory of each

[46] There are relatively few remarks on the law applicable to a mortgage, see Jacek Górecki, Hipoteka –aspekty kolizyjnoprawne…, 143, and the following, Jacek Górecki, Prawo rzeczowe, In: System Prawa Prywatnego. Prawo Prywatne Międzynarodowe, T 20B, ed. Maksymilian Pazdan, Warszawa: CH Beck 2015, 933 and the following. Jacek Górecki, Umowy dotyczące nieruchomości w prawie kolizyjnym, In: Z zagadnień prawa rolnego, cywilnego i samorządu terytorialnego. Księga pamiątkowa profesora Stanisława Prutisa, ed. J. Bieluk, Białystok 2012, M. Kaczorowska, Koncepcja Eurohipoteki… , 79, 87, and the following, Arkadiusz Wudarski A., W poszukiwaniu konstrukcji , KPP 1 (2009), 209, 233 and the following.

state. Additionally, a land register system makes it possible to identify the property using a land and mortgage register, land register, cadastre, etc.[47]

The selection of the law applicable to a mortgage is not admissible as an *in rem* right[48]. A problem arises when a right is mortgaged. It should be assumed that in such a situation it is necessary to seek the location of the right[49].

The Law of Goods must change when the law applicable to the mortgage subject changes.

In theory, there may be two reasons for it. The first is a change in the relevant conflict of law principles and the second - a change of the national borders of the state where the property is located.

The first situation will not occur in the case of property because according to the universal rule applied across the world, the law applicable to property is determined on the basis of *lex rei sitae*.

The second may arise when there is a change of national borders.

In general, the change of national borders falls into one of the two categories: 1. A voluntary arrangement between states, and 2. a result of annexation, in particular aggression. In the second category, it is important that the change of borders is recognised by respective states and in terms of the international relations.

Paradoxically, the first situation did arise in Poland's recent history, which was one of the most extensive border corrections in contemporary rope. It was performed under the agreement on the change of borders of 15 February 1951[50] (the area was similar in size to the city of Warsaw). The agreement was published in the Journal of Laws from 1951, no 11, item 63 (hereinafter referred to as the agreement on BC).

It applied to the area of 480 km² exchanged between Poland and the USSR (Article 1 of the agreement on BC). The USSR transferred immov-

[47] As regards property registration systems see M. Kaczorowska, Eurohipoteka… , 138 and the following, *passim*.

[48] J. Górecki, Hipoteka –aspekty kolizyjnoprawne.., 144, footnote 7.

[49] As regards detailed rules for the search of the location of the law applicable to a pledge which will be applied here see J. Widło, Zastaw… , 556 and the following.

[50] International agreement between Poland and the Soviet Union on the exchange of borders of 15 February 1951, was published in the Official Journal of 1951, no 11, item 63

ables to Poland within the-then Oblast of Drohobych, a part of the USSR, which at present includes the town of Ustrzyki Dolne (*Устрики Долішні*) and the villages of Czarna (*Чорна*), Lutowiska, Krościenko, Bandrów Narodowy, Bystre and Liskowate together with the adjacent land. Poland transferred the following immovables to the USSR – a part of the Lublin Province with the town and villages of Bełz (currently *Белз*), Uhnów (*Угнів*), Krystynopol (*Червоноград*), Waręż (*Варяж*), Chorobrów (*Хоробрів*) and the left-bank part of Sokal – Żwirka (*Жвирка*) together with the railway line between Rawa Ruska and Krystynopol. Currently, those towns and villages are located within the region of Sokal in the Oblast of Lviv (*Сокальський район, Львівська область*). Out of the seven municipalities, the borders of which were corrected (Bełz, Chorobrów, Dołhobyczów, Krystynopol, Uhnów, Tarnoszyn and Waręż), only the municipality of Krystynopol was transferred to the USSR in its entirety.

Pursuant to the international agreement, the entire movable assets (buildings, kolkhozes, infrastructure, railway lines) were transferred, together with the territory, to the new owner. This is why the transferring state could not demand any compensation for it. The transferring state retained its right to the movable assets (agricultural equipment, rolling stock, livestock) on the condition that they would be transported from the other state. This entailed the displacement of the population and the transfer of movable assets within the period of 6 months[51].

It is unfortunate that the second situation also arose in the history of contemporary Europe as an unlawful invasion and annexation of the Crimean Peninsula, a part of Ukraine, by the Russian Federation.

It should be assumed that if the change of borders occurs and is recognised internationally or, at least, by the state of *legis fori*, a new law of goods should be applied. Problems arise when a part of the territory of a foreign state is unlawfully annexed, which is not recognised in terms of international relations.

The situation when one property is located within the territories of two states should be excluded. In principle, each state shapes the terri-

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[51] As a result of this 'contractual' change of borders Poland lost populated and developed areas rich in coal deposits which extended all the way to the coal mine of Bogdanka near Lublin.

torial boundaries of property exclusively within its own borders. It has the necessary powers, the land and mortgage register system or the cadastre within its own territory[52]. Problems may arise when a part of the property encumbered with a mortgage prior to the change of borders becomes, as a result of it, transferred to another state. In general, in individual legal systems property may be encumbered with the equivalent of a mortgage in terms of its content or purpose.

5. THE SCOPE OF THE LAW OF GOODS APPLICABLE TO MORTGAGE

As regards the scope of the Law of Goods applicable to the mortgage – i.e. the circumstances in which the applicable law is applied, it involves:
1. The determination of the claim that may be secured with a mortgage.

It must be determined whether it is an existing claim or a future claim; whether the claim is exclusively monetary or non-monetary; whether it is one claim or a set of claims; whether the claim is an amount in a nominal value or the highest security amount. The currency of the mortgage and the securing claim needs to be indicated, too[53].
2. The subject of a mortgage and its definition (identification).

The relevant "lex rei sitae" defines whether the subject of a mortgage is property or something that may be treated as property, e.g. a dwelling or an air column above the property, a separate physical part of the property, a share in a property right, a mortgage on a mortgage claim or, possibly, other items of this non-possessory right. It also defines to what extent the related rights and appurtenances are encumbered with the mortgage[54].
3. The way of creating a mortgage and the kinds of mortgage.

The relevant "lex rei sitae" defines the way of creating a mortgage, in particular whether it is exclusively a contract, whether a unilateral declaration of the property owner is sufficient and whether an entry into a land

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[52] As regards the possibility of the creation of a collective mortgage on a property located in the territory of more than one state see J. Górecki, Hipoteka –aspekty kolizyjne…, 145.

[53] J. Górecki, Prawo rzeczowe, In: System Prawa Prywatnego. Prawo Prywatne Międzynarodowe, T 20B, Warszawa 2015, 967 and the following.

[54] J. Górecki, Hipoteka –aspekty kolizyjne…, 146.

and mortgage register is required. Moreover, it defines whether it is possible to create a statutory or compulsory mortgage. It also specifies whether it is possible to create an aggregate mortgage or a general mortgage, just like in the French law, and whether it is necessary to obtain an approval of a national body to create a mortgage[55].

4. The content of a mortgage.

The scope of a mortgage. The relevant "lex rei sitae" indicates the mortgage content, whether other ways of satisfaction than enforcement are admissible, whether a mortgage includes limitations with regard to the disposal of the encumbered property, the priority of mortgages and the admissibility of disposing of an emptied mortgage entry. It specifies whether the mortgage secures the principal amount or accessory liabilities, accessory claims and the costs of satisfaction. It also defines the way of satisfaction for the encumbered property[56].

5. The accessory nature of a mortgage.

The law of goods makes it possible to determine whether a mortgage is an accessory one with regard to three aspects: the creation of a claim, its further existence, including the transfer of the secured claim and the claim expiry. It makes it possible to determine whether a mortgage may exist without a claim[57].

6. THE LEGAL NATURE AND CONSEQUENCES OF AN ENTRY INTO A LAND AND MORTGAGE REGISTER (PROPERTY REGISTER).

The relevant "lex rei sitae" defines the nature of a mortgage entry into a land and mortgage register. This issue is related to the premises of mortgage creation in the situation when a mortgage entry is a premise of its creation and has a constitutive nature[58]. The entry is made by the court (body) with jurisdiction over the property location. Those issues

[55] J Górecki, Prawo rzeczowe…, 968.

[56] J Górecki, Prawo rzeczowe…, 968.

[57] M. Pazdan, Prawo Prywatne…, 268, J Górecki, Prawo rzeczowe…, 969.

[58] As regards some exemplary property registers, see the reflections above and M. Kaczorowska, Eurohipoteka… [The Eurohypothec…], 138 and the following, passim.

are governed by the public law provisions (*lex forii – loci processus* with regard to the grounds for an entry, the form and contents of documents, fees, etc.)[59].

Article 25 of the Private International Law, which provides that the form of a legal transaction is subject to the law applicable to this transaction, governs mortgage forms. As an exception from this rule – the requirements concerning the form of a legal transaction are satisfied if they were fulfilled pursuant to the law of the state where the transaction was executed. It is assumed that this exception does not apply to the regulations concerning properties, which includes mortgages[60]. For a mortgage, it is assumed that the form of its establishment is determined by the law applicable to the act of its establishment, i.e. the relevant "lex rei sitae" for the property location (Article 41 of the Private International Law)[61]. Separate conflict of law aspects should be examined in order to determine the law applicable to the contracts creating an obligation of establishing a mortgage. They include the application of Rome I from 2008[62], which provides for the possibility of the choice of law (Article 3 of Rome I), or, in the absence of the choice of law, the law of the state where the property is located (Article 4 (1) (c) of Rome I).

The form of the contract imposing an obligation to establish a mortgage will be evaluated according to Article 11 (5) of Rome I (which had its equivalent in the Rome convention) [63].

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[59] J. Górecki, Hipoteka –aspekty kolizyjne…, 147.

[60] J. Górecki, Hipoteka –aspekty kolizyjne … , 147 and the literature quoted herein in footnote 13.

[61] J. Górecki, Hipoteka –aspekty kolizyjne… , 148.

[62] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations,. O. J. EU L 177, hereinafter referred to as regulation Rome I or Rome I.

[63] J. Górecki, Hipoteka – aspekty kolizyjne… 148, Jacek Górecki, Umowy obligacyjne dotyczące nieruchomości w konwencji rzymskiej, Europejski Przegląd Sądowy 4 (2009), 5 and the following.

The determination of the law applicable to the transfer of a claim secured by a mortgage deserves a separate explanation.

As a rule, a claim secured by a mortgage is subject to another law than the one applicable to the securing act – a mortgage. It may be a separate legal system. The mortgage is established pursuant to the Law of Goods of the state of the property location and it may secure a monetary claim that is subject to the law of another state.

The law applicable to the transfer of claims was governed as part of Rome I. It was defined in Article 14 of Rome I. It should be assumed that it also applies to the claim secured by a mortgage. Pursuant to Article 14 of Rome I, the law applicable to the transfer of the claim secured by a mortgage should be determined separately from the law applicable to a mortgage, which is governed by Article 41 of the Private International Law. The law applicable to a mortgage may also require that special mortgage disposal mechanisms be applied and determine the premises for the disposal of a mortgage claim. It means that the provisions of the law applicable to the claim secured by a mortgage and to a mortgage should be applied jointly as the absence of their joint application and the failure to fulfil the requirements of both laws may result not only in the failure to transfer a mortgage but also in the failure to transfer the claim secured by it (Article 79 of the Act on Land and Mortgage Registers and on Mortgage[64] in its previous wording established the principle of strict mutual dependence between a mortgage and the claim secured by it). A mortgage alone without the claim secured by it will not be transferred in the systems that recognise its accessory nature. The systems that envisage a non-accessory security (e.g. a land charge which is equivalent to the Eurohypothec in its contents) govern the possibility of trading in an autonomous way, by means of securing rights.

Pursuant to Article 79 (1), in the event of a mortgage claim transfer the mortgage is also transferred upon the purchaser unless the law provides for otherwise. An entry into a land a mortgage register is necessary

[64] The Act on Land and Mortgage Registers and on Mortgage of 6 July 1982 published in the Journal of Laws from 2019, No 2204.

to transfer a mortgage claim. According to (2), a mortgage may not be transferred without the claim it secures. Article 79, amended on 20 February 2011, provides that a mortgage claim transfer results in the automatic transfer of a mortgage upon the assignee. The legal effect of a mortgage claim transfer is the transfer of a mortgage on a new mortgage creditor. There is no legal requirement of entering into a separate contract with an *in rem* effect, which was mandatory prior to 20 February 2011, but the constitutive nature of the entry of a mortgage claim transfer has remained valid. Along with the conclusion of a transfer contract, the Law of Goods defines an additional prerequisite for the effectiveness of a transfer which is the constitutive entry of the claim purchaser into a land and mortgage register[65].

7. CONCLUSIONS

Concluding, it should be indicated that pursuant to Rome I (Article 14), the law applicable to a secured claim should be determined separately from the law applicable to a mortgage, which is governed by the rule of Lex rei sitae. A mortgage should be treated as an in rem right (Germany, France, England). The selection of the law applicable to a mortgage is inadmissible. Those are the rules commonly applied across the world. It should be remembered that the Eurohypothec could become a common cross-border mortgage in Europe. Its regulation would be the same in all the EU Member States. The Eurohypothec should be based on the concept of a German land charge entered into the European property register according to uniform rules. Currently, it should be postulated that uniform rules for the registration of property and mortgages in national property registers be adopted as this will strengthen the principle of the transparency of property rights and facilitate the creation of the European property register in the future by transferring data from national registers to one European register.

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[65] The sentence of the Court of Appeal in Białystok of 16 June 2016, I ACa 159/16, LEX no 2080322: 'an entry into a land and mortgage register with a constitutive effect is required to transfer a claim secured by a mortgage'.

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