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EU-JAPAN AGREEMENTS: CONTENT, CONTEXT AND IMPLICATIONS

Andżelika Kuźnar, Jerzy Menkes***

ABSTRACT

The article analyses the agreements concluded by the EU with Japan: Economic Partnership Agreement, Strategic Partnership Agreement and the negotiated agreement: Investment Protection Agreement. EPA liberalizes trade in goods and services. By setting the legal framework for a strategic partnership, SPA facilitates cooperation against common challenges. IPA will regulate standards for investment protection and disputes resolution.

The analysis consists: – the content of the Agreements; – socio-economic and political potential of the parties; – EU's legal powers to negotiate and conclude agreements, and its competence, whether exclusive or shared, to enter into these Agreements; – the importance of Agreements for their parties and for other international actors as well as for regional, trans-regional and global relations.

The thesis of the study is the statement that in a world where instability is increasing and security is reduced, the parties are fulfilling their, as real great powers, obligation to bear special responsibility for the implementation of the values represented. The Agreements confirm the community of values on which they are embedded and create conditions for strengthening these values.

The study consists of five parts. First we analyse the subject matter of the Agreements, then their actors, and the reasons of concluding them and why. In part IV we explain the importance of the Agreements for the contracting parties and for

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the international community, and in part V we concentrate on the Agreements as seen from the external perspective.

The conclusions state that the Agreements institutionalise security community where the security and defence policy component is still relatively weak, but is also being developed. The agreements making closer political and economic ties between the UE and Japan open the way to creation of the EU's security community with "democratic diamonds" in the Asia–Pacific region.

Key words: EU, Japan, EPA, SPA, IPA

1. INTRODUCTION

In this document we analyze the following agreements between the EU and Japan which were signed: *Economic Partnership Agreement* (EPA), *Strategic Partnership Agreement* (SPA) and one that is negotiated: *Investment Protection Agreement* (IPA). EPA liberalizes trade in goods and services. By setting the legal framework for a strategic partnership, SPA facilitates cooperation against common challenges. IPA will regulate standards for investment protection and disputes resolution.

The subject scope of the analysis consists of: – the content of the EU-Japan Agreements; – socio-economic and political potential of the Parties; – EU's legal powers to negotiate and conclude agreements with Japan, and its competence, whether exclusive or shared, to enter into these Agreements; – the importance of Agreements for their Parties and for other international actors as well as for regional, trans-regional and global relations.

The thesis of the study is the statement that in a world where instability is increasing and security is reduced, the Parties are fulfilling their, as real great powers, obligation to bear special responsibility for the implementation of the values represented. We claim, that the Agreements confirm the community of values on which they are embedded and create conditions for strengthening these values.

It is a comprehensive study: multidisciplinary (legal, economic) and interdisciplinary (law & economy). The economic study uses quantitative and qualitative analysis methods, while the legal study uses the New Haven Law School's approach and the Rational choice approach is used in the in-

terdisciplinary study[1]. When deciding to create Agreements, the Parties were guided by the assessment of their overall effect, which we also assess.

The study consists of five parts. First we analyse the subject matter of the Agreements (part I: What?), then their actors (part II: Who?), and the reasons of concluding them (part III: How (modus operandi) and why (like that)?). In part IV (Weight of the Agreements) we explain the importance of the Agreements for the contracting Parties and for the international community, and finally in part V (Agreements in the light of of pluri- and multilateral relations) we concentrate on the Agreements as seen from the external perspective.

2. WHAT?

On February 1, 2019 EPA entered into force – the largest free trade zone in the world[2] started operation on that day. Also on that day, as a result of provisional application of SPA, the largest area of free and safe personal data flows was created in the world[3]. The Parties, with the package of newly created agreements, generate a legal framework of "enhanced political and sectoral cooperation and joint actions on issues of common interest, including on regional and global challenges"[4].

Both EPA and SPA are an expression of the Parties' support – for the institutionalization of plurilateral cooperation, and against interna-

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[1] See: Robert Keohane, "Rational Choice and International Law" Journal of Legal Studies 1 (2002), 307-319, December 1, 2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=355020.

[2] Total trade between Japan and the EU is about 175 billion euro. In 2016 EU exports of goods and services to Japan reached 89 billion euro. Japanese exports to EU valued at 85 billion euro. The expected outcome of EPA is increase of EU exports to Japan by 14 billion euro, and from Japan to EU by 22 billion euro. See: The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA). An analysis prepared by the European Commission's Directorate-General for Trade, European Commission 2018. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157116.pdf (access date: 15.05.2019).

[3] EPA and SPA were signed on July 17, 2018.

[4] EU-Japan trade agreement enters into force, European Commission, 2019, January 31. Retrieved from: http://europa.eu/rapid/press-release_IP-19-785_en.htm (access date: 15.05.2019).

tional relations in the form of single and one-dimensional transactions and the pursuit of immediate profits; – for free and fair trade, and against protectionism; – for the commitment and will to implement the values and principles[5] common to both societies in all spheres – alongside the economy – security, sustainable development, climate protection, consumer protection, labour standards, etc., etc.

The agreements have created an economic and socio-political framework for EU-Japan relations. They have different legal status: – EPA[6] is in force; – SPA[7] is provisionally applied and awaits ratification[8]; – IPA is being negotiated[9]. EPA – for the most part – has liberalized trade in goods and services. SPA sets the legal framework for strategic partnership, confirms the community of values and facilitates cooperation against common challenges (Article 1). IPA will regulate legal standards for investment protection and (above all) dispute resolution (in form of ISDS, but also SSDS). EPA and IPA are „new generation" EU agreements[10].

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[5] These include democracy, the rule of law, human rights, good governance and market-based economy.

[6] Annex to the Proposal for a Council Decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan, European Commission, 2018, April 18. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0192#document2 (access date:19.02.2019).

[7] Council Decision (EU) 2018/1197 of 26 June 2018 on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part, OJ L 216/1, Retrieved from: https://eur-lex.europa.eu/eli/dec/2018/1197/oj (access date: 15.05.2019).

[8] The SPA entered into force on February 1, 2019. The ratification process has been completed within the envisaged deadline. The first Joint Committee under the Japan-EU Strategic Partnership Agreement was held on March 25, 2019 in Tokyo. The first Joint Committee of the Japan-EU Strategic Partnership Agreement (SPA), MOFA, 25.03.2019. Retrieved from: https://www.mofa.go.jp/press/release/press4e_002392.html (access date: 10.04.2019).

[9] The lack of declarations on the state of progress on IPA indicates only that the Parties keep it in a tightly closed room, in which, however, a consensus was created. The ratification of SPA and IPA will also require a positive decision from the parliaments of the Member States.

[10] That is a comprehensive trade agreement regulating not only trade in goods but also services and providing for not only elimination of customs duties but gradual abolition of all restrictions in international trade (Consolidated versions of the Treaty on Europe-

EPA is a bilateral agreement connecting the EU with Japan. The EU has exclusive competence in areas covered by the agreement, therefore EPA entered into force on the basis decision of the Council and consent of the European Parliament[11]. It results from the decision to include in the agreement only the domains falling within the exclusive competence of the EU and not to include, *by contrario*, the issues going beyond this scope, consisting of provisions regarding the broadly understood investment issues. These issues will form the IPA, which will include, inter alia: regulation of investments other than direct investments, investment protection, material and procedural issues of investor-state dispute resolution. EU, remembering difficulties and controversies accompanying the conclusion and ratification of CETA, decided at all costs to avoid the conclusion of one large mixed agreement with Japan. The Court of Justice in its Opinion 2/15 of 16 May 2017 on the European Union's Free Trade Agreement with Singapore[12] helped to stratify provisions falling under the exclusive competence of the EU and shared competence between the EU and the Member States. The Court of Justice has clearly indicated that agreements serving the implementation of the disposition of Article 216 of the Treaty on the Functioning of the European Union belong to the matter covered by shared competences, while the matter of Article 207 of the Treaty belongs to the sphere of exclusive competence. In this situation, the Commission, as part of the division of EU treaty relations with Japan into economic and political, has separated economic relations into trade and investment ones. This procedure has made – as it seems – easier to create regulations, at the same time giving away the threat of a political dispute and difficulties

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an Union and the Treaty on the Functioning of the European Union, OJ C 202/1, Volume 59, 7 June 2016, Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN (access date: 1.04.2019), title: Common commercial policy, 139) within the Strategy „Trade for All" (Trade for All – New EU Trade and Investment Strategy, European Commission, 04.04.2016. Retrieved from: http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/index_en.htm (1.04.2019).

[11] It was not subject to ratification by EU Member States.

[12] Opinion of the Court (Full Court) of 16 May 2017 — European Commission, OJ C 363, 3.11.2015. Retrieved from: http://curia.europa.eu/juris/document/document.jsf?docid=193125&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=4517259 (access date: 3.04.2018).

with ratification of the agreement regulating merits of investment matters (*de facto* ISDS matters.)

The investment issues have been partially regulated by EPA, which does not cover investment protection standards and investment protection dispute resolution. They are going to be regulated in IPA, which will regulate the investment issues comprehensively, referring and repeating (partially) the relevant EPA standards and it will comprehensively regulate material, as well as procedural and legal issues in the settlement of investment disputes[13]. The separation of investment protection from EPA, in particular the settlement of investment disputes, makes it a non-standard agreement (this separation is artificial). At the same time, the Parties indicated unequivocally that they treat the domain of investment as inseparable from economic relations, as evidenced by its combined treatment with the remaining regulated matters in the Preamble of the Agreement. Normative statements of the Preamble indicate the fact that the matter of protecting the investment is covered by the *pactum de contrahendo*. This proves the tactical nature of the separation of this domain, used for internal use of the EU – this has facilitated the ratification. Separation is therefore a defence against populism and demagogy, derived from experience. However, this *modus operandi* tactic – creation a policy of *fait accompli*, raises doubts as to whether it does not lead to a circumvention of law-democracy, which in the medium and long term may endanger existing civil societies (in mature democracies[14]) or not favour the development of civil societies (in immature democracies[15]).

EPA and IPA are embedded on a foundation of shared values and principles. There is a two-way action between them and SPA. A set of agreements is intended to implement a strategic partnership[16] between the Parties.

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[13] First of all, the most controversial investor-state disputes but also state-state disputes.

[14] So called „Old Europe" (old EU Members states).

[15] New Europe, the countries that acceded to the EU after the systemic transformation (former communist countries). Terms used by Donald Rumsfeld (US Secretary of State) in January 2003; Secretary Rumsfeld Briefs at the Foreign Press Center. Retrieved from: https://web.archive.org/web/20130606002456/http://video.msnbc.msn.com/msnbc/4017033 (access date: 17.07.2019).

[16] See: Preamble of SPA.

EPA is solely a trade agreement. It belongs to one of the three subsets that make up a set of EU trade agreements, which are[17]: – customs unions[18]; association agreements[19], stabilization agreements[20], (deep and comprehensive) free trade agreements[21], economic partnership agreements[22]; – partnership and cooperation agreements[23]. EPA will promote trade through the elimination of tariffs and the reduction of non-tariff barriers, including the regulatory cooperation or harmonisation of law between the Parties. Through its conclusion, the Parties establish a free trade area.

However, EPA's importance for the overall relationship between the Parties and the global society goes beyond the trade dimension.

On the one hand, EPA will affect the world economy and society, on the other hand it is a response to challenges and opportunities, a proof of awareness of the effects of globalization by the Parties and deepening economic integration (Preamble). This proves the acceptance of the two-way action between the indicated phenomena and processes.

The Parties to the Agreement strongly emphasize the values that unite them, making at the same time – which is politically interesting – a choice of standards that set this system, namely, recalling the values expressed in the United Nations Charter and the Universal Declaration of Human Rights (and not in the human rights pacts). The proof of the community of values of the Parties is also the announcement of cooperation at the UN forum in the creation of new regulations in the field of safety and environmental protection (related, inter alia, to automotive, Annex 2-C).

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[17] The list of treaties and their texts: Treaties Office Database. Retrieved from: http://ec.europa.eu/world/agreements/searchByType.do?id=1 (access date: 10.04.2019).

[18] They abolish duties in trade between the Parties and establish a common customs tariff for third party(ies); a classic example is the agreements with San Marino and Andorra.

[19] For example with Georgia, Israel, Ukraine.

[20] In practice, they also establish associations; e.g. with Albania, Bosnia and Herzegovina, Kosovo.

[21] For example, with South Africa, Mozambique, Namibia, negotiated with Morocco or Tunisia.

[22] Their effect is the reduction or elimination of duties in bilateral exchange; e.g. agreements with Fiji, Papua New Guinea.

[23] They provide a framework for bilateral economic relations, do not regulate the level of tariffs; e.g. with Azerbaijan, Georgia.

This cooperation, however, extended to all international organisations and forums, is also covered by Article 1.B.SPA.

The effect of implementation of EPA is the ongoing liberalization of trade in goods and services. The Agreement is within the standards set for this type of agreements. The standard also includes the provision in Articles 5.2 to 5.9 for safeguard measures and the general rule to protect Parties by means of collective value legal standards (e.g. in relation to services, Article 8.1.2 "For the purposes of this Chapter, the Parties reaffirm their right to introduce in their territory regulatory measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social protection and consumer protection, or the promotion and protection of cultural diversity"). The outcome of negotiations is that both Parties agreed to provide almost free bilateral access to their markets. Japan will eventually (after 15 years of entry of the Agreement into force) fully liberalise 97% of its tariff lines (86% immediately at the entry into force) and 99% of imports, while the EU will liberalise 99% of its tariff lines (96% at the entry into force) and 100% of imports. On the 3% of tariff lines not fully liberalised, Japan has given significant concessions in terms of tariff rate quotas or tariff reductions.

Apart from elimination of tariffs, the non-tariff measures in relation to manufacturing and agricultural goods are reduced or eliminated, and the common rules for determining the origin of goods, technical barriers to trade, sanitary and phytosanitary measures are being introduced.

Particularly important, from the point of view of implementation of EPA, are extensive, detailed dispositions regulating the determination of the "rules of origin"[24]. Issues relating to this matter – disputes in case of the absence of regulation, may in fact prevent any agreement regulating trade in goods or introduce significant non-tariff restrictions, or be a source of continuing controversy. The regulations of Chapter 3 in connection with Annex 3-B of the EPA can be considered adequate to the current and potential needs, and the application regime set out in Article 3.6 (Tolerances) is a rational regime. At the same time, the EPA protects against abuse of derivative rights by refusing to recognise the origin

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[24] Packages of private persons or personal luggage with regard to goods not imported for commercial purposes shall be exempted from the rules of origin requirements.

in the event of insufficient processing or working (Article 3.4). It should not be difficult to apply the regulation in practice, as the procedures (Section B) do not contain any elements hindering the exercise of rights by operators. The Parties have decided to cooperate in the fight against fraud, which will also include administrative cooperation and assistance.

An important element of the institutionalisation of the regulation is the establishment of the Committee on Rules of Origin and Customs–Related Matters, which will be responsible for the implementation and functioning of the relevant EPA regulations (Article 3.28.1).

EPA Parties confirmed both the fact that technical barriers to trade (TBT), in many cases, only serve to protect the market, and do not serve the declared purposes and the will to eliminate the existing TBT and not to introduce the new ones. This is illustrated, with regard to motor vehicles and their components, by the provisions of Article 11.1[25] and Article 12.1[26] Annex 2-C. The Parties also decided to establish institutional and procedural safeguards against breach of agreement in the future (Article 13). The above regulations should not be treated as a special regime. They indicate the objectives and intentions of the Parties and the way of preventing and resolving disputes and avoiding conflicts.

In the case of liberalization in trade in services, the scope of the agreement is very broad. An important element of EPA – from the point of view of public debate – is the way the "public services" were regulated. During the preparation for the conclusion of CETA[27] and TTIP, the representatives of extreme positions in public opinion stimulated fears of the alleged

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[25] „The Parties shall refrain from amending existing domestic technical regulations in a manner that renders them more trade-restrictive than necessary to fulfil a legitimate objective for the importation and the putting into service on their domestic market of products for which type approvals have been granted pursuant to UN Regulations".

[26] „The Parties shall refrain from introducing any new domestic technical regulations or conformity assessment procedures which have the effect of preventing or increasing the burden for the importation and the putting into service on their domestic market of products for which type approvals have been granted under UN Regulations applied by both Parties, for the areas covered by those UN Regulations unless such domestic technical regulations or conformity assessment procedures are explicitly provided for by those UN Regulations".

[27] More on CETA analysed from the perspective of the "agreement [that] represents the archetype for new trade regimes" in: Kurt Hubner, Tugce Balik, Anne-Sophie Deman, "CETA: the Making of the Comprehensive Economic and Trade Agreement Between Can-

forced privatization of public services as a result of concluding agreements. Apart from the rationality of fears (their awakening was an element of the political game of people and Parties building social support for fears), they threatened the Agreements. Therefore, it is important that EPA includes a negative regulation explicitly stating what the agreement does not require[28]. Of course, the source of obligations is the Agreement, so the legislative logic, which regulates what is not regulated, is questionable, but the Agreement will function not only between the Parties and in real life, but also in the political game, so the applied method of regulation makes it easier to be bound by the Agreement.

EPA significantly liberalizes movement of people, which is important from the point of view of the EU. Lifting existing restrictions will allow European entities (both natural and legal persons) to operate directly on the Japanese market. The relevant regulations are contained in Chapter 8, Section D (and Annexes III, IV, 8-C). Already in the "general provisions" it is made clear that the provisions in question reflect the strengthening of trade relations and the desire to remove obstacles to the entry and temporary stay of natural persons. The regulations of Section D – according to Article 8.20.2 – are applicable to "measures by a Party affecting the entry into that Party by natural persons of the other Party, who are business visitors for establishment purposes, intra-corporate transferees, investors, contractual service suppliers, independent professionals and short-term business visitors, and to measures affecting their business activities during their temporary stay in the former Party".

SPA embeds cooperation of Parties in the context of the paradigm they represent. A broad catalogue of values and views constituting this

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ada and the EU", Notes de l'Ifri, April (2016), 7-34, December 1 https://www.ifri.org/sites/default/files/atoms/files/notes_ifri_ceta.pdf.

[28] „On the question of public services, the EU-Japan Free Trade Agreement, like all other EU free trade agreement, maintains the right of Member States' authorities to keep public services public and it will not require governments to privatize or deregulate any public service at national or local level. Member States' authorities retain the right to bring in to the public sector any privately provided services. Europeans will continue to decide for themselves how they want, for example, their healthcare, education and water delivered"; EU-Japan – The Agreement in Principle, 6 July 2017. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155693.doc.pdf (access date: 15.04.2018).

paradigm has been articulated in the Preamble. The statements contained in the Preamble have a clear normative content which determines the binding force of Preamble. The catalogue of challenges indicated in the Preamble is controversial[29], despite the declaration that it is not exhaustive. "Proliferation of weapons of mass destruction, terrorism, climate change, poverty and infectious diseases, and threats of common interest in the maritime domain, cyberspace and outer space; ... most serious crimes ..." were indicated, while for example aggression and annexation of territories were not.

On the one hand, SPA cannot be underestimated, on the other hand, its dogmatic and functional analysis speaks in favour of recognising that it is more of a dialogue with US politics – Trump's statements – than a closed, comprehensive declaration. The Parties use the SPA as a tool to complement the policy of the West and to maintain its components negated by the United States. What is new – but known from the EPA – is the appreciation of the Universal Declaration of Human Rights at the expense of concealed pacts. The reasoning of SPA leads to questioning the legal quality of the Agreement when the Parties once (classically) indicate that disputes should be settled in accordance with international law (Article 3), and earlier (Article 1.1(c)) complemented this basis – revolutionary – with the necessity of the settlement of disputes in conformity with the principles of justice – giving it additional priority of application. The SPA also contains numerous regulations concerning economic relations. Articles 13 to 31 are common to the EPA and IPA regulations. Articles 32 and 33 regulate judicial cooperation in the domain of home affairs (combating corruption and organised crime). Generally, the SPA confirms and deepens the conviction that the separation of EU-Japan relations between EPA, IPA and SPA is possible and rational, only from a procedural perspective.

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[29] It omits (which is hardly surprising), e.g. the challenges to the world order resulting from President Trump's policy; see the statement by Franck-Walter Steinmeier (President of Germany): "And our closest ally, the United States of America, under the present administration, rejects the idea of an international community." Munich Security Conference 2020, https://securityconference.org/en/medialibrary/collection/munich-security-conference-2020/ (access date: 20.12.2019)

1. EPA and IPA as RTAs. EPA and IPA are considered to be (mutual, preferential) trade liberalizing agreements, known as Regional Trade Agreements – RTA[30]. They belong to the "third wave[31]" of regionalism[32]. This terminology is WTO-compatible but in the WTO language the term RTA is ambiguous. The term RTA is used to refer to both:

– agreements creating preferences in relations between the Parties irrespective of their geographical distance;
– the conditions under which a WTO member may become a party to the RTA without prejudice to its obligations as a WTO member.

The process of regional institutionalisation is not uniform and does not proceed linearly. The start of the "first wave" was marked by the signature of the GATT and the creation of Benelux. A significant increase in the number of RTAs occurred only at the turn of the 1950s and 1960s. The ECSC, EEC, Euratom, Euratom and EFTA were set up and GATT was institutionalised (for which the GATT *acquis* was used)[33]. A parallel process was initiated in Central and South America[34] and Africa[35]. The source of these differences can be found in history and cultural differences. The Parties to the RTAs were – above all – countries belonging to one geographical (or more precisely geopolitical) region. The agreements con-

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[30] RTAs can be the basis for various agreements, namely: Partial Scope Agreement (duties on selected goods are abolished), Free Trade Agreement (duties and quantitative restrictions in trade are abolished and a free trade area is created), Custom Union (the free trade area is supplemented by a common (external) customs tariff and trade policy) and Economic Integration Agreement (introduces free trade in services).

[31] Regionalism is treated as one cycle, in which three sub-cycles, called "waves", are distinguished. See: Edward D. Mansfield, Helen V. Milner, "The New Wave of Regionalism", International Organizations, Vol. 53, 3(1999), 589-627; Yohanes E. Riyanto, Jung Hur, "On the Explanation of Regionalism Waves", 제42집 3호, December 22, 2019, https://pdfs.semanticscholar.org/e9d8/413ff16d0db90bdda4bda7e07a5ab8ed49f5.pdf.

[32] Economic regionalism is defined as an institutionalised process of cooperation that includes the economy. For an overview of definitions see: Edward D. Mansfield, Etel Solingen, "Regionalism", Annual Review of Political Science, 13(2010), 145-163.

[33] At the time of so called Dillon's and Kennedy's Rounds.

[34] The 1951 agreement between El Salvador and Nicaragua established the Central American Free Trade Area.

[35] In 1959, Benin, Burkina Faso, Mali, Mauritania, Niger, Senegal and Côte d'Ivoire established the Union douanière economique des Etats de l'Afrique de l'ouest; (economic customs union of West African states); delay was due to colonialism.

cluded provided for preferences to be granted to the Parties. Such agreements could be either equal (reciprocal preferences) or unequal (unilateral preferences). Asia differs from this "model", as the process of institutionalization of cooperation began much later, is slower and the processes are less advanced (than in other continents)[36].

The "second wave" of regionalism that began in the 1980s was to a large extent a response to the crisis of the 1970s, characterised by a combination of inflation and stagnation. In this wave, the WTO was established. During this wave, the economic mechanisms were used[37]. The number of RTAs grew exponentially. The countries focused on regional cooperation as a tool to limit the negative effects of the Uruguay Round. The "second wave" of regionalism was strongly influenced by politics, which both marked the initial caesium and determined its course by the end of the "Cold War" and the socio-economic transformation of the Eastern Bloc member states.

The factors determining the distinction of "second wave" are Parties of the agreements and regulated matters. From the first point of view, the US involvement was crucial[38]. By concluding the RTA, the USA became a precursor to the change in the geographical characteristics of the agreements – they set the azimuth for the "third wave", because the first American agreement was interregional (and not regional). The USA initially concluded agreements that did not lead to institutionalisation in the form of an integration organisation, but in the last decade of the 20th century this process entered into the ranks determined by European cooperation (in the form of North American Free Trade Agreement). Argentina, Brazil, Paraguay and Uruguay have created the Mercado Común del Sur, which abolishes tariffs and non-tariff barriers. In Africa, Economic Community of West African States (ECOWAS) and Common Market for Eastern and South-

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[36] ASEAN primarily institutionalises political cooperation, while trade liberalisation under the Australia New Zealand Closer Economic Relations Trade Agreement excludes sensitive goods. In this case, "backwardness" is balanced by the advancement of cooperation by introducing a uniform regime for determining the origin of goods.

[37] Thus, the tried and tested recovery from the crisis without state interventionism was continued, with the model of action rejecting – or at least limiting – Keynesianism.

[38] The first US RTA was only concluded in 1985, it was an FTA. On its basis, a free trade area was established between the USA and Israel.

ern Africa (COMESA) were created. Meanwhile EU members, without creating new institutions, have deepened and broadened European integration (this process is considered to be a symbol of the "second wave")[39]. In the regulated matters, this "wave" was determined by the inclusion of liberalisation of services.

The beginning of the "third wave" is dated to 1995 and is associated with the conclusion of the Uruguay Round and the creation of the WTO. This "wave" includes the EPA, which introduces reciprocal trade preferences[40].

Conclusion of EPA was actually – an unexpected – consequence of the Uruguay Round[41]. As a result of the "third wave", each WTO member is now also a party to a RTA[42]. The EPA confirms the long-term trend according to which subsequent states or (regional) economic integration organizations[43] conclude RTAs recognizing that they can achieve more by creating a special regime by means of bilateral regimes than under the WTO multilateral regime. In addition, the EPA, also in the manner typical for RTAs of "third wave", covers in its scope of regulation some of the subject areas in relation to which it was not possible to reach agreement in negotiations at the WTO forum.

One of the key characteristics of "third wave" is that RTAs often include bilateral agreements between Parties located in different continents. When analyzing EPA through the prism of entities participating in it, it is simply a classic case of finding partners geographically distant. This is de-

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[39] These organisations are customs unions, but in their functioning, apart from undoubted successes, e.g. the advancement of the rules of origin regime (in COMESA), difficulties in achieving the assumed objectives (e.g. the problem of non-tariff barriers in ECOWAS) are also revealed.

[40] It is therefore different from PTAs that introduce unilateral preferences. Under the PTAs, developed countries introduced tariff reductions on goods imported from developing countries (mainly in the Generalized System of Preferences – GSP).

[41] Of course, this was not the aim of the Uruguay Round, indeed it seems that this effect of the Round surprised the WTO Member States.

[42] This process culminated in a RTA between Japan and Mongolia (June 2016). According to the data as of June 2019, there are 294 RTAs notified to WTO and in force. Regional trade agreements, WTO. Retrieved from: https://www.wto.org/english/tratop_e/region_e/regfac_e.htm (access date: 27.07.2019).

[43] For explanation see: Jerzy Menkes, Andrzej Wasilkowski, Organizacje międzynarodowe. Prawo instytucjonalne, Warszawa: PWN, 2017, 172-174.

termined by a number of factors, among which it is evident that the stock of partners in the neighbourhood is depleted. An important factor that facilitates the conclusion of RTAs outside the geographical region is the ability to use a model of such agreements which results from the big number of such agreements. RTAs of the "third wave" have *de facto* created a framework agreement, only modified to individual needs, which speeds up the conclusion of an agreement and reduces costs. RTAs of the "third wave" as bilateral agreements become a serial product in the creation of which the Parties use the "common platform", reducing the costs of creation or use of knowledge.

Another fact proving that EPA can be regarded as an example of the "third wave" of regionalism is that the Parties represent a comparable level of development and economic potential.

One more key feature of "third wave" RTAs is that they cover areas other than only trade in goods. When characterizing the EPA through the scope of regulation, it should be noted that it belongs to the PTA (Preferential Trade Agreement) category, classified as WTO+ (after the transitional period customs duties will be eliminated, i.e. the level of cooperation will be increased – in relation to multilateral obligations – under the current WTO mandate) and WTOx (covering new areas, i.e. going beyond the WTO mandate)[44]. The EPA provides rules in areas such as sustainable development with an emphasis on environmental protection, corporate social responsibility, labour standards, facilitations for small and medium enterprises, consumer protection as well as regulatory cooperation or harmonisation of law in areas covered by the Agreement.

In spite of the fact that EPA goes beyond the liberalization of trade in goods and services (which is typical for the agreements of "third wave"), it does it unusually, because the broadening of the scope of normative regulation is significantly greater than in the case of comparable agreements. EPA upgrades the typical RTA model – it is the first RTA to form a relationship with the Paris Climate Agreement (PCA), by including obligations of the Par-

[44] Shailja Singh, WTO Plus Commitments in RTAs, Centre for WTO Studies, New Delhi, 2014: March 31, 2019, http://wtocentre.iift.ac.in/CBP/WTO%20Plus%20Commitments_Shailja.pdf.

ties to cooperate – in various forums – in implementation of the PCA. This hard and sharp commitment is important from the perspective of the PCA itself, as it proves that important (and perhaps the main) potential actors of cooperation have decided to sustain and develop it, rejecting the arguments of the opponents and not taking the opportunity to bury it, which was given by the US decision to withdraw from the PCA. It is also important for other international actors (including states), as it is a signal of the expectations of the superpowers (not just economic ones, which are the EU and Japan).

At the same time, the EPA is not a typical RTAs of the "third wave" because it only slightly enlarges and deepens the economic dimension of EU-Japan legal ties. Contrary to other RTAs of this wave, the EPA (without the issues regulated by IPA) does not cover the full scope of regulations regarding investments.

To sum up, the "third wave" RTAs are characterised by: – the geographical distance of the partners; – bilateralism[45], which can be set against the practice of creating regional organisations[46]; – and the broadening of the scope of the RTAs to include further dimensions of economic cooperation in addition to liberalisation of trade in goods.

2. RTAs and GATT. The new international economic order after the Second World War was founded on a standard prohibiting discriminatory treatment (Articles: I GATT, II GATS and IV TRIPS). The aim was to achieve equal treatment by implementing the prohibition of discrimination. The implementation tool was the application of clauses equalling all partners (countries) or all entities (both domestic and foreign) participating in trade. In the first regime, any privilege granted to one partner was automatically applied to the other beneficiaries under the Most Favoured Nation (MFN) clause. Under the second regime, whose legal framework was determined by the National Treatment clause (NT), domestic and foreign goods, services, trademarks, copyrights and patents had the right to be equally treated on the market of a Party bound by the NT.

GATT, and then the WTO, law therefore aimed to establish a universal regime. The RTAs establishing a preferential regime between the Par-

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[45] EU RTAs are, in most cases, mixed agreements.

[46] This does not mean that such organisations are not created as part of the "third wave", but only that the dynamics of their creation have decreased.

ties had the character of a specific regime, based either on a bilateral or plurilateral agreement establishing derogations from a certain universal regime as a legal basis. However, the RTAs were not contrary to the universal obligations. The granting of preferences was authorised by the provisions of Article XXIV GATT, the Agreement on the interpretation of Article XXIV GATT 1994, the Enabling Clause and Article V GATS. Article XXIV of the GATT 1947 regulates the establishment of free trade areas and customs unions. The tool to bring preferential RTAs into line with the non-discrimination requirement was GATT Article XXIV, under which the parties to GATT cannot raise barriers to trade of other parties, and a commitment to final liberalisation of trade – including "substantially all the trade" (however, the term used is vague in this case).

3. RTA - PTA (Preferential Trade Arrangement). PTAs differ from RTAs in relation to the obligations assumed by WTO members and in their characteristics.

The legal basis for RTAs under the WTO regime is the dispositions of Article XXIV.5 GATT[47] and Article V GATS[48]. RTAs standards, in principle, fall within the WSTO framework set of standards. However, many RTAs go beyond this framework both by liberalising trade above the maximum level agreed in the WTO and by regulating matters not regulated by WTO law[49].

In the case of PTAs, we are dealing with relations that go beyond the scope of WTO obligations. The relationship of these agreements to WTO obligations is reflected in terminology, which is confirmed by

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[47] This provision protects third countries from a direct deterioration of their situation as a consequence of the conclusion of the RTA. Customs duties in relations with third countries – members of free trade areas or customs unions may not be higher than those in force before the establishment of the free trade area or customs union under the regime of Article XXIV. In general, RTAs must not discriminate against third countries.

[48] The disposition of this article determines the designation of the term "economic integration". Article V, which allows the free movement of services, requires the presence of the service provider at the place of supply and the free movement of service providers and customers, requires a deepening of cooperation, lowering the barriers to cooperation to the level necessary for free trade in goods.

[49] These may include: environment, labour, investment, competition issues, deepening of cooperation regulated by TRIPs, etc.

the WTO language[50]. At the same time, within the PTAs set, stratification takes place. There are distinguished: – multilateral agreements that create commitments going beyond what is agreed in multilateral fora, e.g. with regard to further tariff reductions, defined as WTO-plus (WTO+); – agreements in which the parties have regulated issues outside the scope of the WTO mandate, such as, for example, the setting of labour standards. These agreements are labelled as WTO-extra (WTOx)[51].

In the case of WTO+ PTAs, the parties to the agreements do not merely commit themselves to liberalising trade by lowering custom duties, but, taking advantage of the transition periods, completely eliminate them. In these agreements, the parties manage to agree, for example, on the issue of certificates of origin and the implantation of these arrangements by the customs administration[52]. The strength of the PTAs is that they regulate matters on which there is no consensus in the WTO multilateral forum; for example, no agreement was reached in the Uruguay Round on certificates of origin. WTO+ agreements have also established a prohibition of export duties, which are not prohibited by the WTO law.

WTOx PTAs often contain non-mandatory standards that are declarations of intent and forward-looking. Such a legal state constitutes the use of the term "shall" in the text of the agreement – the dispositions of such a norm are not only not self-executable, but also questionable. In the case of a standard whose instruction includes a statement "... the parties *shall* cooperate...", it is not possible to assess the behaviour of the Parties in terms of the performance of contractual obligations (because it is not possible to state neither the fact of cooperation between the Parties nor the fact that there is no such cooperation). Such provisions – common in PTAs – change their character from *traités-contrat* or descriptive *traités-loi*

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[50] See: Shailja Singh, WTO Plus Commitments in RTAs, Centre for WTO Studies, New Delhi, 2014, March 31, 2019, http://wtocentre.iift.ac.in/CBP/WTO%20Plus%20Commitments_Shailja.pdf.

[51] See: Herik Horn, Petros C. Mavroidis, André Sapir, Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements, Vol. VII, Brussels: Bruegel Blueprint Series, 2009.

[52] In this case, in the WTO+ PTAs the EU establishes a joint body to determine the rules of origin, while in the WTO regime, in the absence of institutional cooperation mechanisms, EU members implement the regulations individually – they are only obliged not to discriminate.

to prescriptive *traités-loi* (forming a program). The indicated provisions do not set out the rights and obligations of the Parties, but political and moral obligations. Beyond the scope of the substantive legal framework defining the WTO regime, there are, for example, obligations to coordinate the social systems or social development of the Parties.

The above distinction of RTAs to WTO+ and WTOx PTAs is model-based and not all the elements mentioned are always present in a single agreement, nor can they occur in different combinations.

The EPA is a "third wave" RTAs standard. It contains the standards that characterise both WTO+ and WTOx. This is determined by the fact that its regulations cover, inter alia, sustainable development and environmental protection (with emphasis on environmental protection), labour standards and employee rights, facilitations for small and medium enterprises and consumer protection, as well as approximation or harmonisation of the law in the areas covered by the Agreement. EPA encourages not only sustainable development but also the implementation of values such as corporate social responsibility. The EPA (it can be assumed that IPAs as well) – typically for this "wave" of agreements – goes beyond the scope of liberalisation agreements on trade in goods and services, and do so atypically, as the extension of the scope of normative regulation of EPA is significantly greater than for comparable agreements[53]. The EPA contains commitments by the Parties to cooperate – in various fora – with regard to the implementation of the Paris Climate Agreement. This firm commitment is important from the perspective of the Paris Agreement itself, as it shows that important (and perhaps the main) actors of potential cooperation have decided to maintain and develop this cooperation, rejecting the arguments of the opponents and not taking the opportunity to bury it as a result of the US decision to withdraw from the Agreement. This is also important for other international actors, as it is a signal of the expectations of the powers (not only the economic ones, which are the EU and Japan). However, contrary to the declaration, there remains the lack of any real commitment from Japan to implement the Paris Climate Agreement[54].

[53] Such as UE-Viet Nam FTA, EU-Singapore FTA&IPA.

[54] In practice, Japan's policy (consisting, among other things, in a return to coal in the energy sector and a move away from nuclear power) is still closer to American than

The socio-economic potential of the new market is 637 million people (8,5% of world total) and 27 trillion USD of GDP (based on purchasing power parity, PPP), which is 21% of the world's GDP. In market prices, Japan and the EU together account for around a third of the world economy. In terms of GDP and population the EU is about four times larger than Japan (see table 1). At the same time, Japan is the 3rd richest economy in the world (by GDP) after USA and China[55].

Table 1. The economic size of EU-28 and Japan, 2018

	EU-28	**Japan**
GDP, current prices, billion USD	18768	4971
GDP, PPP (current international USD, billions)	22447	5415
GDP per capita (current USD)	36570	39290
GDP per capita, PPP (current international USD)	43738	42797
GDP, current prices, share of world total (in %)	21,8	5,8
GDP based on PPP, share of world total (in %)	16,5	4,0
Population, mln persons	513	127

Source: World Development Indicators, World Bank, https://databank.worldbank.org/ (23.02.2020)

Both the EU and Japan are developed, industrialised democracies, sharing common values like the rule of law, with strong economic and

European policy; see: Valerie Volcovici, "At climate talks, Japan's Koizumi confronts critics over coal", Reuters. December 9, 2019 https://www.reuters.com/article/us-climate-change-accord-japan/at-climate-talks-japans-koizumi-confronts-critics-over-coal-idUSKBN1YF2KG; Eric Johnston, "At Madrid climate talks, Japan's Shinjiro Koizumi confronts critics over coal", The Japan Times. December 12, 2019, https://www.japantimes.co.jp/news/2019/12/12/national/science-health/madrid-climate-talks-japans-shinjiro-koizumi-confronts-critics-coal/#.XlFWrC16OWg.

[55] Germany and United Kingdom are the fourth and fifth. Gross domestic product 2018. Retrieved from: https://databank.worldbank.org/data/download/GDP.pdf (access date: 10.03.2019).

political links, and closely cooperating with one another in international and multilateral fora such as the UN, the WTO, the G7 and G20[56]. Japan is one of the EU's closest partners and a strategic partner in the Asia-Pacific region.

Table 2. EU-28 main trade partners, 2018 (USD billion and %)

	Exports/goods	**Value in billion USD**	**Share of total**		**Imports/goods**	**Value in billion USD**	**Share of total**
	World	6468	100		World	6411	100
1	United States	480	7,4	1	China	465	7,3
2	China	247	3,8	2	United States	317	4,9
3	Switzerland	186	2,9	3	Russian Federation	198	3,1
4	Russian Federation	101	1,6	4	Switzerland	130	2,0
5	Turkey	92	1,4	5	Norway	99	1,5
6	**Japan**	**76**	**1,2**	6	Turkey	90	1,4
7	Norway	64	1,0	**7**	**Japan**	**83**	**1,3**
8	Rep. of Korea	59	0,9	8	Rep. of Korea	60	0,9
9	India	54	0,8	9	India	54	0,8
10	Canada	49	0,8	10	Vietnam	45	0,7

Source: Direction of Trade Statistics (DoTS), International Monetary Fund

Japan is the EU's 2nd biggest trading partner in Asia after China[57]. However, it is the EU's only 7th most important trading partner worldwide (6th in extra-EU exports and 7th extra-EU imports, see table 2), while

[56] The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA). An analysis prepared by the European Commission's Directorate-General for Trade, European Commission 2018. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157116.pdf (access date: 15.05.2019).

[57] The increased importance of cooperation with Japan compared to the higher potential of cooperation with China results from the analysis of the overall relations with Japan as compared to relations with China. The effects of trade, and more broadly economic cooperation of the EU (as well as the USA) with China, vary. On the one hand, trade serves the economic development of the parties, on the other hand, in a situation where China

the EU is Japan's 3rd trading partner (3rd in exports and 2nd in imports – see table 3).

Table 3. Japan's main trade partners, 2018 (USD billion and %)

	Exports/goods	Value in billion USD	Share of total		Imports/goods	Value in billion USD	Share of total
	World	738	100		World	776	100
1	China	144	19,5	1	China	174	22,4
2	United States	141	19,1	**2**	**EU**	**88**	**11,3**
3	**EU**	**84**	**11,3**	3	United States	84	10,8
4	Rep. of Korea	52	7,1	4	Australia	46	5,9
5	Taiwan	42	5,7	5	Saudi Arabia	34	4,4
6	Hong Kong	35	4,7	6	Rep. of Korea	32	4,1
7	Thailand	32	4,4	7	Taiwan	28	3,6
8	Singapore	23	3,2	8	UAE	28	3,6
9	Australia	17	2,3	9	Thailand	25	3,2
10	Vietnam	16	2,2	10	Indonesia	22	2,8

Source: Direction of Trade Statistics (DoTS), International Monetary Fund

So there is an untapped potential in EU-Japan trade relations which was at the core of the decision to launch negotiations for a bilateral trade agreement. EPA, by abolishing tariff and non-tariff barriers to EU's and Japan's markets, opens up new opportunities resulting from expanding markets. The importance of EPA for Parties is affected by the share of trade in their GDP. In case of the EU trade accounts for almost 85%, while the world average is 56% (see figure 1). For Japan the corresponding number is much less – 31%[58].

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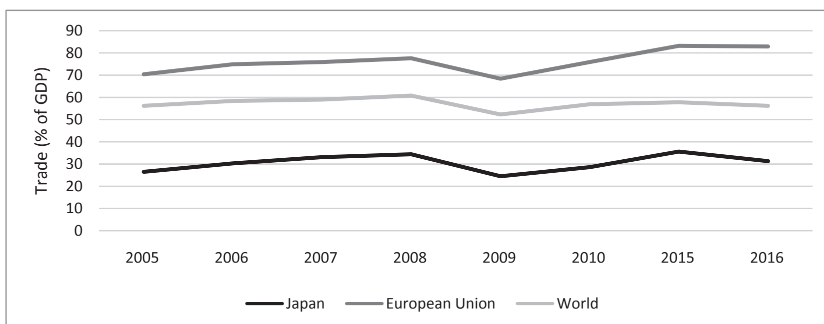
does not fully respect free trade rules (WTO obligations), trade with China is a source of threats for the EU, the US and Japan.

[58] This low share in case of Japan is due to the collapse of the Japanese exports after 2008. It was a combined effect of the global downturn in 2008 and a natural disaster – earthquakes in the pacific coast of the Tōhoku region (11/03/2011) and the nuclear power plant disaster in Fukushima.

Figure 1. Trade openness of Japan, EU-28 and world, 2005-2016



Source: own work based on World Development Indicators, World Bank

Fast growth of trade and GDP of both partners can be forecasted as a result of implementing EPA. In 2012, the Commission forecasted that the cumulative economic effect of all (then) negotiated FTAs would exceed 250 billion euro, increasing the EU's GDP by 2% (equivalent to the GDP of Austria or Denmark)[59]. The prognosis is supported both by the use of widely recognised quantitative methods in economic research and by the EU's experience in implementing similar agreements. Customs duties account for approximately 2% of EU exports to Japan. A reduction in customs protection may translate into increased employment in companies manufacturing goods and services exported to Japan. This is important in a context where 0.6 million jobs are already derived from trade with Japan and where, of the 74 000 or so companies exporting to the Japanese market, 78% are small businesses, for which the cost of entry is of particular importance.

The common tool used in empirical studies for assessing the economic impact of liberalisation of trade (elimination or reduction of customs duties) is GTAP (Global Trade Analysis Project) model. The standard GTAP Model is a multiregion, multisector, Computable General Equilibrium

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[59] Karel De Gucht, *Why we should open free trade negotiations with Japan.* Retrieved from: http://europa.eu/rapid/press-release_SPEECH-12-562_en.htm?locale=en (access date: 10.03.2019).

model, assuming perfect competition, constant returns to scale,product differentiation by countries of origin – the so-called Armington assumption.

The idea of general equilibrium dates back to Leon Walras (1834-1910). It takes into account the fact that markets interact with each other, and therefore markets and its components are interdependent. For example, demand for any one good depends on the prices of all other goods and on income, which in turn depends on wages, profits and rent, etc. The CGE (Computable General Equilibrium) approach allows for taking into account the complexity of the markets (contrary to other approaches which require many simplifications). However, this can be done by the expense of simplification of the characterization of economic behaviour. CGE models express all economic relationships in mathematical terms and allow to predict changes of different variables resulting from a change in economic policies[60]. The models analyse the effects of trade policy taking into account the main links between sectors as well as between the domestic and international production of goods and services. The efficiency gains from trade liberalisation can be captured, as the reallocation of the factors of production (capital, labour and land) across sectors and between countries (domestic-foreign) is tracked. The way the models are constructed allows to compare the impact of hypothetical changes in trade policy on costs, prices or income to a certain "baseline" (i.e. the scenario with no policy changes). One should be aware however, that the results should be treated only as indications of the magnitude of expected impact of trade agreements. The CGE models do not capture the potential expansion of trade in new products and services or any welfare gains from access to a greater variety of final products. They also do not take into account the long-term effects, such as greater incentives to innovate[61].

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[60] *GTAP* Models: Computable General Equilibrium Modeling and GTAP. Retrieved from: https://www.gtap.agecon.purdue.edu/models/current.asp (access date: 20.07.2019).

[61] The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA). An analysis prepared by the European Commission's Directorate-General for Trade, European Commission 2018. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157116.pdf (access date: 15.05.2019).

The theoretical framework of the GTAP model was presented by Hertel[62], and updated later on by Corong et al.[63] Dynamic version of the model incorporates international capital mobility and capital accumulation. GTAP modelling is widely used for bilateral tariff reduction analysis. E.g. Tongzon[64] assessed the trade implications of China's WTO membership for developing ASEAN countries, Siriwardana and Yang[65] analysed the effects of the proposed Australia – China Free Trade Agreement. There are also several studies of the EPA impact using GTAP model[66]. The advantage of the most recent one, prepared by the European Commission's Directorate-General for Trade and published in 2018[67], is that it includes provisions actually negotiated by the EU and Japan in the EPA.

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[62] Thomas W. Hertel (ed.), Global Trade Analysis: Modeling and Applications, New York: Cambridge University Press, 1997.

[63] Erwin L. Corong, Thomas W. Hertel, Robert McDougall, Marinos E. Tsigas, Dominique van der Mensbrugghe, "The Standard GTAP Model, Version 7", Journal of Global Economic Analysis, Vol. 2, 1(2017), 1–119.

[64] Jose L. Tongzon, "China's Membership in the World Trade Organization (WTO) and the Exports of the Developing Economies of East Asia: A Computable General Equilibrium Approach", Applied Economics, Vol. 33, 15(2001), 1943–1959.

[65] Mahinda Siriwardana, Jinmei Yang, "GTAP Model Analysis of the Economic Effects of an Australia-China FTA: Welfare and Sectoral Aspects", Global Economic Review, Vol. 37, 3(2008), 341–362.

[66] For example: Eva R. Sunesen, Josef F. Francois, Martin H. Thelle, Assessment of barriers to trade and investment between the EU and Japan. Final report, Copenhagen: Economics, 2010; Trade Sustainability Impact Assessment of the Free Trade Agreement between the European Union and Japan. Final Report, European Commission, Directorate-General for Trade 2016; Gabriel Felbermayr, Fukunari Kimura, Toshihiro Okubo, Martina Steininger, Erdal Yalcin, On the Economics of an EU-Japan Free Trade Agreement, Study of the Ifo Institute on behalf of the Bertelsmann Foundation, Final Report on March 3, 2017; Eliza Przeździecka, Rumiana Górska, Andżelika Kuźnar, Jerzy Menkes, The effects of EU-Japan economic partnership agreement for Poland's economy, "Ekonomista" 6(2019), 701-733; The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA). An analysis prepared by the European Commission's Directorate-General for Trade, European Commission 2018. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157116.pdf (access date: 15.05.2019).

[67] The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA). An analysis prepared by the European Commission's Directorate-General for Trade, European Commission 2018. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157116.pdf (access date: 15.05.2019).

According to the simulations, by 2035 (when EPA is fully implemented) EU's GDP will increase by almost 34 billion euro more (or extra 0.14%) and Japanese economy will grow by 29 billion euro more (or 0.6%) when compared to the situation with no agreement. This is also accompanied by an increase of EU exports to Japan by about 13 billion euro (13%) and of Japanese exports to the EU by about 23 billion euro (23%)[68]. The relative positive impact is larger for Japan which may be attributed to the smaller size of this economy and the fact that Japan is a relatively smaller trade partner for the EU (see Table 2 and Table 3).

The results are sector-specific. Table 4 presents the economic impact of EPA in terms of output in various sectors, while table 5 illustrates the impact for bilateral trade in the same sectors. According to the results presented in table 4, the EU's sector that would benefit the most from the implementation of EPA are business services (13 billion euro by 2035). Some other services sectors are also among the top beneficiaries. The reason for that is that many services are intermediate inputs used in other sectors, which exports may increase due to the Agreement. Therefore, even if exports of business services is not expected to increase by large extent, there are still possible gains in this sector of the European economy. The sector that is expected to grow the most (by 2%) are the textiles, apparel and leather. In this sector tariffs that EU companies were facing in Japanese market were relatively high (over 21% on average). However, Japan eliminated duties on textiles and clothing immediately upon entry of the Agreement into force. It has also (in March 2015), adopted an international textiles labelling system similar to the one used in the EU. Therefore the costs of entry to Japan's market for European exporters will decrease. There are two sectors that lose from the agreement: cereals (marginally) and motor vehicles. The latter one may be negatively affected by increased imports from Japan. However, it is expected that vehicle sector exports to Japan will increase thanks to the reductions in non-tariff measures (see table 5). Not surprisingly, the very same sector is going to gain most in Japan (in terms of output).

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[68] Ibidem.

Table 4. The economic impact of the EU-Japan EPA in 2035,
by sector output (% and million €)

	EU		**Japan**	
	%	**Absolute change (million €)**	**%**	**Absolute change (million €)**
Rice	0.0	2	-0.0	-3
Cereal grains	-0.0	-6	-0.4	-2
Other Primary	0.0	78	-0.1	-61
Livestock	0.2	278	-0.6	-119
Meat	0.2	725	-0.5	-162
Fishery	0.0	5	-0.0	-5
Dairy	0.3	1054	-1.5	-505
Beverages and Tobacco	0.2	535	0.2	196
Processed Food	0.2	1841	-0.2	-493
Textile, Apparel and Leather	1.9	7096	-2.2	-1327
Wood	0.2	2187	0.4	841
Chemicals	0.1	1975	1.2	6235
Motor Vehicles	-0.0	-139	2.5	13861
Transport Equipment	0.0	30	2.4	1221
Electronic Equipment	0.1	328	0.6	2093
Metal Products	0.1	805	1.1	2424
Machinery and equipment	0.1	1307	1.0	5362
Ferrous Metal products	0.1	272	0.9	3113
Other Manufacture	0.2	949	0.9	676
Minerals and glass	0.1	3103	0.8	5565
Other Transp. and travel agencies	0.1	2400	0.5	2819
Air Transport	0.1	307	0.3	187
Water Transport	0.1	601	0.3	524
Business services	0.2	12844	0.8	11174
Communication	0.1	1123	0.4	1154
Trade	0.1	6943	0.7	10436
Finance and Insurance	0.1	2831	0.6	3355
Construction	0.3	9423	1.5	9150
Other Services	0.1	6150	0.1	4614

Source: *The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA). An analysis prepared by the European Commission's Directorate-General for Trade,* European Commission 2018, p. 50. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157116.pdf (access date: 15.05.2019).

The EPA will cause the largest increase in the EU absolute exports to Japan in textiles…, chemicals, motor vehicles, processed food and dairy. For Japan, the sectors that will increase their exports to the EU the most include: motor vehicles, machinery and equipment, chemicals, minerals and glass and metal products. That means that for Japan the main gains are in manufacturing industrial goods while in the EU the benefits are more diversified and located in many sectors that often do not benefit the most from trade policy, e.g. agriculture, beverage, textile, apparel and leather products[69].

Table 5. Impact of EPA in 2035 on EU-Japan bilateral trade, by sectors (% and million €)

	EU		**Japan**	
	%	**Absolute change (million €)**	**%**	**Absolute change (million €)**
Rice	-0.1	0	0.1	0
Cereal grains	1.5	0	22.1	0
Other Primary	27.6	55	22.1	21
Livestock	9.0	7	2.0	0
Meat	73.4	337	22.5	14
Fishery	6.9	2	4.3	2
Dairy	215.0	729	170.0	5
Beverages and Tobacco	10.2	260	7.1	2
Processed Food	51.8	1095	38.2	67
Textile, Apparel and Leather	220.0	5213	63.2	337
Wood	21.8	635	20.1	69
Chemicals	6.9	1606	30.0	3306
Motor Vehicles	11.5	1222	51.3	8174
Transport Equipment	0.9	15	30.3	991
Electronic Equipment	1.3	25	6.9	437

[69] The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA). An analysis prepared by the European Commission's Directorate-General for Trade, European Commission 2018, 52. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157116.pdf (access date: 15.05.2019).

	EU		Japan	
	%	Absolute change (million €)	%	Absolute change (million €)
Metal Products	16.4	443	31.9	1321
Machinery and equipment	2.0	237	13.6	3576
Ferrous Metal products	2.7	13	0.8	8
Other Manufacture	23.7	261	20.1	184
Minerals and Glass	26.7	725	83.0	3018
Other Transp. and travel agencies	1.7	14	2.9	20
Air Transport	0.2	5	0.4	9
Water Transport	1.4	77	2.8	39
Business services	2.2	264	3.0	150
Communication	3.6	22	2.4	4
Trade	1.9	85	3.4	171
Finance and Insurance	3.3	107	5.3	96
Construction	2.4	79	6.2	191
Other Services	0.5	8	0.2	2

Source: *The Economic Impact of the EU – Japan Economic Partnership Agreement (EPA). An analysis prepared by the European Commission's Directorate-General for Trade,* European Commission 2018, p. 51. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157116.pdf (15.05.2019).

However, the entry into force of EPAs is not only a tool for obtaining economic benefits[70].

4. HOW (*MODUS OPERANDI*) AND WHY (LIKE THAT)?

The EU and Japan are continuing the two-way process of creation of a legal framework for mutual relations and implementation of legal and

[70] Although it is worth to remember that EU exports are subject to €1 trillion duty and this revenue to Japan's budget will disappear. The context of the agreement, i.e. the links to TPP, TTIP and to Brexit is analysed by Hitoshi Suzuki, *The new politics of trade: EU-Japan,* "Journal of European Integration", 2017, 39 (7), 875-889http://eprints.lse.ac.uk/87318/1/Suzuki_New%20Politics%20of%20Trade%20EU-Japan.pdf (access date: 22.12.2019).

political standards covered by existing commitments. It is a long-lasting process with variable dynamics. This process encountered many different barriers, among which EU's public opinion pays particular attention to the triangle (US-EU-Japan[71]) of interests and interactions as well as potential economic challenges, not always recognizing the importance of cultural differences in the sphere of functioning of both individuals and society. Awareness of the difficulties associated with cultural differences[72], however, was not perceived by the EU and Japan as an insurmountable obstacle but as a challenge that can be faced together. This has been demonstrated by the proposals of deregulation[73] of the Japanese economy presented by the Commission[74], as a way to refloat the economy suffering from the Asian financial crisis. The European response to the Japan's economic problem was not *schadenfreude* when the economic rival suffered the troubles (in politics, Japan was – even informally – a strategic ally of the EU as part of the "western hemisphere"). We consider these particular European propos-

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[71] The tops of this triangle are strategic allies, being at the same time extremely different. The US is (still) the only – perhaps China will achieve this rank – hyperpower in the strategic dimension, remaining a national state (see more: Parag Khanna, The End of the Nation-State, The New York Times, October 14, 2013, https://www.nytimes.com/2013/10/13/opinion/sunday/the-end-of-the-nation-state.html; Rana Dasgupta, The demise of the nation state, "The Guardian", 05.04.2018). The EU and Japan are – at best – the superpowers-the beneficiaries of American security guarantees. At the same time, when the world returns to the Hobbesian culture of rivalry, the USA, using the instruments of unilateralism, confronts with more and more new players of the "axis of evil", while the EU and Japan, adhering to Wilsonian values and methods, follow the path of multilateralism (see also: Robert Kagan, Of Paradise and Power. America and Europe in the New World Order, New York: Alfred A. Knopf, 2003; Robert Kagan, "America's Crisis of Legitimacy", Foreign Affairs, Vol. 83, 2(2004), 65-87).

[72] On fundamental values see: César de Prado, "Towards a Substantial EU-Japan Partnership", European Foreign Affairs Review, 22(4)(2017), 446-452. In this area, the abolition of the death penalty (p. 451) was a difficult issue, but it was closely linked to the waiting for the death penalty to be carried out on 7 perpetrators of the terrorist sarin attack in the Tokyo subway in 1995. 12 people were murdered in the attack (5,000 were injured).

[73] The deregulation dialogue between the EU and Japan has developed since its official establishment in 1994 and is continued.

[74] List of EU Deregulation Proposals for Japan, Commission of the European Communities. 12.10.1998. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_111837.pdf (access date: 20.06.2018).

als as the starting point in the calendar of works on the subject-matter of the agreements researched in this paper. The essence of the proposal was the willingness to help Japan in carrying out the institutional transformation, which was to lead to get out of the crisis and to initiate the economic growth thanks to – among others – restoring confidence in the economy. Apart from the content of the proposal, it was important that the Parties have mutual confidence in each other and are capable of dialogue in matters falling within the internal sphere of the state[75] (demonstrated by the proposal and positive reaction to it). In bilateral contacts, the Parties searched for what is common or for what brings them closer to each other, not what differentiates them[76]. This way – with the use of official, semi-official and unofficial contacts – the EU and Japan led to the entry into force (January 1, 2002) of the Mutual Recognition Agreement[77]. The agreement, by limiting non-tariff barriers, facilitated trade in goods. The Parties analysed the effects of the implementation of the MRA and the possibilities of cooperation in relation to trade and investment[78] and launched public consultations devoted to deepening of ties[79].

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[75] The document contained not only proposals, but also assessments of Japanese actions and their results.

[76] See Commissioner Lamy's speech of 9.03.2000: "As I have said before, our societies spring from similar roots. We have a shared vision of the kind of national and international society that we want. We share a common attachment to freedom, democracy, the rule of law and human rights - and it comes from a shared culture." Retrieved from: http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_120146.pdf (access date: 11.01.2003).

[77] Agreement on Mutual Recognition Between Japan and The European Community), MOFA, 04.04.2001. Retrieved from: https://www.mofa.go.jp/region/europe/eu/agreement.pdf (access date: 15.03.2019).

[78] Joseph Francois, Miriam Manchin, Hanna Norberg, Economic impact assessment of an FTA between the EU and Japan. February 2011. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155782.pdf (access date: 15.03.2019). In the analysis, the authors used the CGE (Computable General Equilibrium) model of general equilibrium, taking into account not only "shocks" related to the elimination of customs duties (tariff barriers), but also estimated effects of the elimination of non-tariff barriers. The co-author, Prof. Francois, is one of the most outstanding European economists specializing in research on world trade

[79] See: Summaries of contributions to the Public Consultation on: The future of EU Japan trade and economic relations. 17.02.2011. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc_147586.pdf (access date: 18.03.2019).

The political impulse for the EPA negotiations were the arrangements made during the 20th EU-Japan Meeting (May 2011). It took a year to agree on the agenda (until May 2012), and the subsequent months passed on the EU internal procedures[80]. However, initially the objectives of the Parties were different; the EU assumed the conclusion of a FTA, Japan pursued an EPA[81]. The official start of negotiations was on 25.03.2013[82], and the first round of negotiations took place in Brussels on 15-19.04.2013. Although the Parties declared "toughness"[83] in the negotiations, and even readiness to withdraw from them, the talks were conducted quickly and the will to reach the agreement was evident. Works on the agreement were carried out in the "4 steps" formula (Preparing, Negotiating, Finalising, Signing[84]), i.e.: 1) the EC submitted to the Council an application for the negotiating directives; 2) the Council adopted negotiating directives, and indicated the Commissions to conduct negotiations; 3) negotiations;

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[80] The Negotiating Directive was adopted on 29 November 2012.

[81] The decision was influenced by external political factors. Japan was the only Asian country to join the US and EU sanctions against Russia after the annexation of Crimea (of course, this is also connected with the Japan-Russia dispute over the so-called "Northern Territories"). More: Kazuto Suzuki, "Perspectives on an Uncertain World: Japan-EU Views on the United States and Russia", Instituto Affari Internationali Commentaries, 18, 21.03.2018. Retrieved from: https://www.iai.it/en/pubblicazioni/perspectives-uncertain-world-japan-eu-views-united-states-and-russia (access date: 20.06.2019).

[82] Joint statement by the President of the European Commission, José Manuel Barroso, the President of the European Council, Herman Van Rompuy, and the Prime Minister of Japan, Shinzo Abe. Retrieved from: http://europa.eu/rapid/press-release_IP-13-276_en.htm (access date: 15.05.2019).

[83] Sometimes on the verge of ridicule, as in Commissioner K. De Gucht's Statement (from 18. 06. 2012): „I have made it very clear to my colleagues today that after one year of starting the negotiations, we will take stock on the progress Japan has made on dismantling the non- tariff barriers as set out in the roadmap we have agreed together. If the implementation has not been satisfactory, I will stop the negotiations. I don't think we can be any clearer than that in our ambitions. I have also made clear that Europe would not reduce any tariffs before Japan delivers concrete results on regulatory barriers – and this includes the car sector. So we will walk to the negotiation table with a very strong starting position."; - European Commissioner Karel De Gucht

[84] Negotiating EU trade agreements. Who does what and how reach a final deal. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf (access date: 8.04.2019).

4) after obtaining the authorization from the Parties, the agreement was initially signed (it is a co-decision of the Council and Parliament)[85]. Already after the start of the negotiations, it was decided to exclude from the agreement the domain of investment protection[86] and negotiate it separately; it was negotiated by another team led by M. Martin-Prat. This separation creates a new model for the conclusion of EU trade agreements ("free trade agreements architecture"), under which, according to the ECJ ruling of 16.05.2017, the issues falling within the exclusive competence of the EU were separated from the shared competences, where the concluded agreement is a mixed agreement.

The negotiations of EPA itself in its truncated version took about 5 years[87]. The head of EU team of negotiators was by R. M. Petriccione[88]. SPA[89] negotiations lasted 5 years[90] – the team of negotiators was led by V. I. Budura and were completed (17 June 2018) by signing of the agreement. In the case of this agreement, the Parties decided – referring, however, to an empty symbolism – to point out the longstanding cooperation that preceded the SPA and recalled in the Preamble the 1991 *Joint Declaration on relations between the EC and its Member States and Japan*, although this was not followed by any significant practice.

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[85] EU-Japan Economic Partnership Agreement. How it works. Retrieved from: http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/meetings-and-documents/ (access date: 8.04.2019).

[86] This took place in 2016 during the negotiations and was accompanied by the establishment of new negotiating teams; see: *Report of the 15th EU-Japan FTA/EPA negotiating round Brussels*, 29 February - 4 March 2016, point 7. Retrieved from: http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154368.pdf(access date: 8.04.2019).

[87] There have been 18 rounds of negotiations. Negotiations were concluded on 8 December 2017 and the signature of the agreement took place on 6 June 2018 during the EU-Japan summit.

[88] Deputy Director-General of the European Commission, Directorate-General for Trade. He retained the position of Chief Negotiator, taking the position of Director in the Asia-Pacific region.

[89] The idea was formulated as a result of the 20th EU-Japan Summit in 2010, at which the Parties recognised themselves as like-minded global partners and "Kizuna" (the bonds of friendship).

[90] They were rapidly accelerated in 2017.

4. WEIGHT OF THE AGREEMENTS

In a world where instability is increasing and security is reduced, the Parties to the agreements (EU and Japan) meet their obligations as global civilian powers, bearing special responsibility for the implementation of the goals and represented values[91]. The agreements are a tool for defending international order against actions / persons threatening it. The cooperation of the Parties proves the *spill-over* effect[92]. The Parties have recognized that the cooperation is a source of benefits. The agreements not only refer to values, but – potentially – they also strengthen and institutionalize these values.

In the western hemisphere, and consequently in the world, the paradigm of international relations is being questioned, that the necessary condition for achieving peace and justice – the values declared by the societies and countries of the "western hemisphere" as desirable in international relations – is "free and fair trade"[93]. The co-author of this paradigm was the USA, and this country, as part of its policy of leadership, worked to implement it. This paradigm was associated with the possibility of socio-economic and political transformations in the world, resulting in an increase in the wealth of individuals and societies, economic development and respect for fundamental human rights and freedoms, and justice[94]. The scale and direction of the change in all parameters of social development that co-existed with the implementation of the paradigm[95] is so significant

[91] See Lord Castlereagh's view on the role and functions of the great powers; see Charles K. Webster (ed.), British Diplomacy 1813-1815. Selected Documents Dealing with the Reconciliation of Europe. Sagwan Press. 2015.

[92] See: Ernst B. Haas, "International Integration. The European and Universal Process", International Organizations, 15(1961), 367-368.

[93] Critical view see: Alexander Hamilton, "Concerning Dangers from Dissensions Between the States", Federalist, 6(1786-1800). Retrieved from: https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-6 (access date: 15.07.2018).

[94] See: Kenneth N. Waltz, Structural Realism after the Cold War, "International Security", Vol. 25, 1(2000), 7, Retrieved from: http://www.columbia.edu/itc/sipa/U6800/readings-sm/Waltz_Structural%20Realism.pdf (access date: 15.07.2018).

[95] More: Christopher Layne, "Kant or Cant. The Myth of the Democratic Peace", International Security, Vol. 19, 2(1994), 5.

that it can be identified with influence[96]. A multi-element (because it encompasses principles that shape the political- and socio-economic system) regime of "western" values influenced both internal and external relations. Relations between countries belonging to the "west" can be treated as evidence of a positive verification of the "Dell hypothesis"[97]. At the same time, the United States' potential has grown throughout this period, and the country has eventually become an essential hyperpower[98]. The American leadership also included the role of an intermediary in the transcontinental relations of the Allies. Transcontinental political and socio-economic relations of European, Asian and (both) Americas' countries belonging to the "west" were maintained (predominantly) *via* the USA.

All this structure – including values, norms, institutions and practices – is consistently demolished by President Trump. The rejection (or at

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[96] Fukuyama has defined this as an ideal correlation; Francis Fukuyama, "Liberal Democracy as a Global Phenomenon", Political Science and Politics, Vol. 24, 4(1991), 662.

[97] According to it: „No two countries that are both part of a major global supply chain, like Dell's, will ever fight a war against each other as long as they are both part of the same global supply chain". This concept has been generalised in modern times by Thomas L. Friedman to "McDonald's theory of international relations", according to which no country in which McDonald's operates will ever attack the (other) country in which McDonald's is located. See: Thomas L. Friedman, The World is Flat. A Brief History of the Twenty-first Century, New York: Farrar, Straus, Giroux, 2005, 421. It is based on the conviction that participation in the global value chain is an expression of the integration of the domestic economy with the global economy and of cultural openness, which determines the economic unprofitability of war. This hypothesis extends by economic principles the catalogue of systemic factors eliminating the use of armed force in interstate disputes. In the past, these principles included only those that defined the political system. See: Kenneth N. Waltz, Structural Realism after the Cold War, 7 („The democratic peace thesis holds that democracies do not fight democracies. Notice that I say "thesis," not "theory." The belief that democracies constitute a zone of peace rests on a perceived high correlation between governmental form and international outcome.").

[98] See: Secretary of State Madeleine K. Albright Interview on NBC-TV "The Today Show" with Matt Lauer, 19.02.1998, U.S. Department of State. Retrieved from: https://1997-2001.state.gov/statements/1998/980219a.html (access date: 14.04.2018) and Immanuel Wallerstein, "The Curve of American Power", New Left Review, 40(2006), pp. 77-94, Retrieved from: http://www.iwallerstein.com/wp-content/uploads/ docs/NLRCURVE.PDF (access date: 10.05.2018); Joseph S. Nye Jr., "Amerikas Macht", In: Empire Amerika – Perspektiven einer neuen Weltordnung, ed. Ulrich Speck, Natan Sznaider, Stuttgart: Deutsche Verlags-Anstalt, 2003, 156-172.

the very least the undermining) of the values and norms, underpinning US policy and American alliances has put US strategic partners in the European and Pacific regions in the position of having to compensate for the US vacuum, caused by neo-isolationism and interdependent downgrading[99]. Under these conditions, a transpacific bridge[100] connecting the EU with Asia is being built. This bridge – potentially, after the end of turbulence in US policy – will allow to create a stable triangle of the states of two oceans (Atlantic and Pacific). The strategic triangle is a desirable response to threats to stability and security in the world. The states of this space can institutionalize the security community, ensuring their nations the sustainable development and protecting the remaining ones from the effects of the safety vacuum[101].

From the perspective of these threats, it is particularly important to uphold the rules of "free and fair" trade and to institutionalize the community of values between the EU and Asian countries. The EU-Japan agreements (together with, inter alia, the EU-Vietnam, Singapore, New Zealand and Australia agreements) are, in this perspective, an important tool for the implementation of the indicated values-standards[102]. At the same time, they are an element of building a deep trans-regional bond. The Parties are convinced of the possibility – limited in time – of substituting the role of the US in maintaining the "west" by creating by-passes connecting the Allies from the regions of Europe, America (Canada and

[99] For example, for the first time in the history of the United States of America, a "permanent member" of the Security Council did not receive the support of a single member of the SC in the vote on its proposed project. See: Press Release, S.C./13362, 01.06.2018. Retrieved from: https://www.un.org/press/en/2018/sc13362.doc.htm (access date: 14.04.2018).

[100] This bridge could become a mirror version of the (Atlantic) bridge connecting the EU and the US. See: Robert J., "Art, Fixing Atlantic Bridges", Foreign Policy, 46(1982), 67-85.

[101] Future (direct) EU-Japan security cooperation will complement the US and Japan cooperation as well as Japan and NATO cooperation. In the NATO-Japan formula, the participants consider themselves as "natural partners". See: Individual Partnership and Cooperation Programme between Japan and NATO https://www.mofa.go.jp/mofaj/files/000382902.pdf (access date: 22.02.2020).

[102] The EU's relations with the countries of the Asia region include a broad and growing range of actors.

the countries at the south of Rio Grande del Norte), Asia and the Pacific, maintaining order, value and paradigm[103]. They see the possibility to meet the challenges of both strategic rivals (China, Russia) and the strategic partner (USA). The EU (and its Member States) and Japan are connected by common values and co-create a functional security community[104].

Political (western) relations between Europe and Japan, from the perspective of Europe, were directly related to US-Japan relations. Despite the community of values[105], principles and interests, these relations were always *de facto* maintained by and with the participation of a third party – the USA. The integrating Europe recognised Japan not only as an American sphere of influence, but also as an exclusive responsibility of the USA. The paradox of the second half of the twentieth century was the turning away of the Parties which already in the nineteenth century co-created the international community as fully-fledged actors[106]. At the same time, the post-war pacifism of Japan, combined with the constitutional restrictions on activity and political and military potential granted by the USA, resulted in a long-term absence of Japan from world politics in its international activities. For decades, Japan has been a "big mute" in world politics – at the same time being a great payer, a state that stands out in a humanitarian and development assistance. However, both Japanese silence and Japanese action were not perceived by public opinion to an extent proportional to the scale of phenomena. An indirect testimony to this is the low ranking of Japan in the institutional structures of the United Nations System, which is inadequate, among other things, for its financial contribution. What the public perceived in Europe with regard to Japan was its economic activity. Relatively rapid evolution of the Japanese economy from an imitator to an innovator, from a producer and seller of low-quality

[103] Looking forward to the return of the USA to the strategy presented by Richard L. Armitage, Joseph S. Nye Jr., The U.S.-Japan Alliance. Getting Asia Right through 2020, CSIS, February 2007.

[104] As the Euro-Asian institutional security community was not built.

[105] The SPA preamble confirms "REAFFIRMING their commitment to the common values and principles, in particular, the democracy, human rights and fundamental freedoms".

[106] Japan after the Treaty of Shimonoseki (in 1895) was recognized as a "great power" by the European powers.

cheap products to a competitor in the rivalry for market dominance was arousing – effectively fomented and strengthened by European economic entities – fears of failure in competition with Japan. As a result, Europe erected an economic wall that was supposed to separate (protect) it from Japan[107], while in the political and security sphere it did not build bridges connecting it with Japan. The economic policy of Japan was a mirror image of this. Contrary to so many and such important factors connecting the EU and Japan, these actors remained for decades at a distance, which was only partly due to the geographical distance. The process of establishing and institutionalising relations between European countries and Japan was slow and not linear.

5. THE AGREEMENTS IN THE PRISM OF PLURI- AND MULTILATERAL RELATIONS

The Asia-Pacific region is at the forefront of the ranking of regions according to the criterion of conflict potential. This is determined by the co-occurrence of a set of factors, including the number of countries with military nuclear capability and states capable of immediate production of it. Among the countries of the region with military nuclear capability are Russia, China, India, Pakistan, North Korea, USA, and capable of producing it immediately are: Japan and South Korea[108]. The countries of the region with significant military potential are conducting disputes, including territorial disputes, such as those between India and Pakistan, Japan and Russia, China-neighbourhood[109]. Some of these territorial disputes are in a state of hibernation, in others the parties are on the point of confrontation. In this region there are fallen states, active terrorists, and

[107] Analogous to that erected by Japan.

[108] This accounts for 2/3 of the total number of nuclear states, as France, Great Britain and Israel are outside the region.

[109] Among other things, China controls trade routes in the South China Sea and is building fortifications on disputed islands (e.g. in the Spratly Islands between Vietnam and the Philippines).

drugs produced[110]. The level of danger is enhanced by the fact that North Korea is a contra-system (in relation to a system based on international law)[111]. These factors determine the level of security threats.

The importance of the region increased after the Cold War, as a consequence of the concentration of nuclear threats in the region, international terrorism, organized crime and significant instability. These threats, in the context of the situation in other regions, determined the American pivot towards Asia[112]. After the end of World War II, the US assigned significant importance to the East Asia, South East Asia and Pacific region. The allies in the region were to be beneficiaries and co-creators of regional and global stability. The presence of the USA in the region was of a military (defensive) and political nature.

President Trump has rejected this strategy. The change was to include the withdrawal from the transpacific plurilateral agreements in the economic and social sphere, the contestation of cooperation in the sphere of security, undermining the unconditional nature of security guarantees

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[110] The first opium producer in the world is Afghanistan and the second is Myanmar; World Drug Report, UNODC, 2017. Retrieved from: https://www.unodc.org/wdr2017/ (access date: 20.04.2018).

[111] In its National Defense Strategy, the US once again uses the term *rogue state* to describe this country: “Rogue regimes such as North Korea and Iran are destabilizing regions through their pursuit of nuclear weapons or sponsorship of terrorism. North Korea seeks to guarantee regime survival and increased leverage by seeking a mixture of nuclear, biological, chemical, conventional, and unconventional weapons and a growing ballistic missile capability to gain coercive influence over South Korea, Japan, and the United States. In the Middle East, Iran is competing with its neighbors, asserting an arc of influence and instability while vying for regional hegemony, using state-sponsored terrorist activities, a growing network of proxies, and its missile program to achieve its objectives”; see: Summary of the National Defense Strategy. Sharpening the American Military’s Competitive Edge, Department of Defense, 2018. Retrieved from: https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf (access date: 20.10.2018).

[112] This regional and global policy was named by the Obama administration *pivot to Asia*. Kenneth Lieberthal, The American Pivot to Asia, Foreign Policy, December 21, 2011, https://foreignpolicy.com/2011/12/21/the-american-pivot-to-asia/ (access date: 1.12.2019).

for the countries of the region[113] and the rejection of the free trade paradigm. It was initiated by the termination[114] of the Trans-Pacific Partnership (TPP)[115]. The decision raised doubts not only as to economic rationality but also to the way international policy was conducted. Unilaterality and brutality demonstrated disregard for the partners. In this situation the USA's announcement of the willingness to conclude bilateral trade agreements with TPP parties disregarded the assessment of the US's ability to conclude international agreements in the assessment of potential parties. Trump, confronted with reality, had to give up the declared strategy quickly. Already in November 2017, in a speech at the APEC summit, Trump presented a vision of a "free and open Indo-Pacific[116]" to strengthen the friendship and trade ties between all Indo-Pacific nations, where trade will be based on "fairness and reciprocity"[117]. 2017 closed with a radical turnaround in foreign policy. The National Security Strategy (NSS)[118] pre-

[113] The President raised the obligation to participate in the costs of ensuring security (Peter Baker, "Trump Says NATO Allies Don't Pay Their Share. Is That True?", The New York Times, 26.05.2017. Retrieved from: https://www.nytimes.com/2017/05/26/world/europe/nato-trump-spending.html (access date: 14.04.2018). Directly on the conditionality of the security guarantee see: David E. Sanger, Maggie Haberman, "Donald Trump sets conditions for defending NATO Allies against attack", New York Times, July 20, 2016. Retrieved from: https://www.nytimes.com/2016/07/21/us/politics/donald-trump-issues.html (access date: 14.04.2018).

[114] Presidential Memorandum regarding withdrawal of the United States from Trans-Pacific Partnership Negotiations and Agreement, 23.01.2017. Retrieved from: https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/ (access date: 10.04.2018).

[115] Agreement regulating trade relations, signed on 4.02.2016 between: Australia, Brunei Darussalam, Chile, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, USA and Vietnam.

[116] The US has therefore supported Prime Minister Shinzo Abe's initiative.

[117] Remarks by President Trump at APEC CEO Summit, The White House, 10.11. 2017. Retrieved from: https://www.whitehouse.gov/briefings-statements/remarks-president-trump-apec-ceo-summit-da-nang-vietnam/ (18.03.2019).

[118] National Security Strategy of USA, The White House, 2017. Retrieved from: https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf (access date: 18.03.2019).

sented by the President[119] identifies new, major threats to the US security. The source of them is no longer terrorism[120] but great power competition with "revisionist powers", China and Russia[121]. The response to Chinese hegemony and the aggressive policy of Russia – the authoritarian states that were considered "strategic competitors" – is to be an army whose potential in the region is to be significantly increased. The decision is based on the recognition that the US has enduring interests and commitments in the Indo-Pacific region[122], regardless of financial contributions.

The NSS positively assessed the balance of 75 years of cooperation with the allies (in the Pacific and European region)[123]. Australia, South

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[119] Remarks by President Trump on the Administration's National Security Strategy, The White House, 18.12.2017. Retrieved from: https://www.whitehouse.gov/briefings-statements/remarks-president-trump-administrations-national-security-strategy/ (access date: 18.03.2019). It's analysis in: Anthony H. Cordesman, "President Trump's New National Security Strategy", Center for Strategic & International Studies, 18.12.2017. Retrieved from: https://www.csis.org/analysis/president-trumps-new-national-security-strategy (access date: 19.03.2019).

[120] Weights assigned to threats have been changed: „States are the principal actors on the global stage, but *non-state actors* also threaten the security environment with increasingly sophisticated capabilities. Terrorists, trans-national criminal organizations, cyber hackers and other malicious non-state actors have transformed global affairs with increased capabilities of mass disruption".

[121] „China and Russia are now undermining the international order from within the system by exploiting its benefits while simultaneously undercutting its principles and 'rules of the road'." Summary of the National Defense Strategy. Sharpening the American Military's Competitive Edge, U.S. Department of Defense, 2018, https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf (access date: 20.03.2019).

[122] General Joseph Dundorf – the chairman of the Joint Chiefs of Staff stated „If you look at the health of our alliances in the region… The evidence reflects anything other than a decline in Pacific power. We have enduring interests here, we have enduring commitment and an enduring presence in the Pacific." "US power not in decline across Asia-Pacific: Dunford", AFP, Feb. 6, 2018, https://www.shephardmedia.com/news/defence-notes/us-power-not-decline-across-asia-pacific-dunford/ (access date: 10.03.2019).

[123] „Mutually beneficial alliances and partnerships are crucial to our strategy, providing a durable, asymmetric strategic advantage that no competitor or rival can match. This approach has served the United States well, in peace and war, for the past 75 years. Our allies and partners came to our aid after the terrorist attacks on 9/11, and have contributed to every major U.S.-led military engagement since. Every day, our allies and partners

Korea, India, Japan and New Zealand are strategic partners of the USA in the region. In the NSS, the US also attached great importance to the cooperation of the Indo-Pacific countries in the new formula of the plurilateral institution – cooperation of four: Australia, India, Japan and the USA.

New in the U.S. strategy is the name of the region: "Asia-Pacific" has been replaced by "Indo-Pacific"[124]. The term (used with regard to the safety of shipping) is unclear. What is clear, however, is the inclusion of India in the cooperation[125] (although the decisions were not preceded by any consultations with India[126]), which, however, reinforces China's fears of a being encircled and expresses its support for India in its rivalry with Pakistan[127]. The assessment of the decision is ambiguous[128], but it undoubtedly hinders cooperation with China in relations with North Korea[129]. The US

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join us in defending freedom, deterring war, and maintaining the rules which underwrite a free and open international order." *Summary of the National Defense Strategy. Sharpening the American Military's Competitive Edge,* U.S. Department of Defense, 2018, https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf (access date: 20.03.2019*)*.

[124] The author of the term is an Indian Navy officer Gurpeet S. Khurrana, but he referred it to sea shipping routes. Gurpeet S. Khurana, "Security of Sea Lines: Prospects for India-Japan Cooperation", Strategic Analysis, vol. 31, 1 (2007), 139.

[125] A state that was not in alliance with the USA, has broken the NPT regime and is evolving into an authoritarian religious republic.

[126] India's position, see: Jonathan Eyal, "Japan-India: An Alliance with a difference", The Straits Time, 07.11.2016. Retrieved from: http://www.straitstimes.com/opinion/japan-india-an-alliance-with-a-difference (access date: 1.12.2017).

[127] Who is a necessary ally in the fight against terrorism in Afghanistan.

[128] More: Bhavan Jaipragas, "Why is the US calling Asia-Pacific the Indo-Pacific? Donald Trump to 'Clarify'", 07.11.2017. Retrieved from: http://www.scmp.com/week-asia/politics/article/2118806/why-us-calling-asia-pacific-indo-pacific-trump-clarify (access date: 1.12.2017); Rory Medcalf, "The Indo-Pacific. What's in a Name? Brookings", October 2013. Retrieved from: https://www.brookings.edu/articles/the-indo-pacific-whats-in-a-name/ (access date: 16.06.2017).

[129] Secretary of State of the United States R. Tillerson stated that Chinese provocations in the South China Sea, in violation of international law, are not only directed against the sovereignty of the neighbours, but also harm the interests of the US and its friends; more broadly, they are directed against the sovereignty of the neighbours and against the interests of the US and its friends. More: Nicole Gaouette, "Tillerson raps China as 'predatory' rule breaker", CNN Politics, 19.10.2017. Retrieved from: http://edition.cnn.com/2017/10/18/politics/tillerson-china-rebuke-speech/index.html (access date:

also refers to the Japanese Prime Minister Shinzo Abe's initiative to describe Asia as "Asia's democratic security diamond".

Of course, arguments for a change of terminology in correlation with a change of strategy can be put forward. If we consider that the world's economic centre of gravity is shifting towards Asia, then, given the relationship between geo-economics and ocean space, it determines the importance of the Indo-Pacific zone. There is no doubt that the Indo-Pacific is a real geopolitical structure with geo-economic significance. The geopolitical continuity of the Indian and (Western) Pacific oceans in all spheres, including security, is beyond doubt[130]. China's supply routes pass through the Indian Ocean, which allows the Indian Navy to attribute the ability to influence Chinese policy. This dependence was noticed by Prime Minister Abe already in 2007[131]. The new nomenclature (new strategy) is also supported by legitimate expectations towards India[132], which are unjustifiably depreciated in the Asia-Pacific strategy.

Democratic Asian and Pacific states and the EU want to be co-creators of the new order. Japan advocated the institutionalization of multilateralism (*de facto* plurilateralism). The withdrawal of the US from the TPP has stimulated the activity of participants of cooperation. An alternative form of institutional economic cooperation was created. On 8 March 2018, 11 countries (TPP minus the US) signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[133]. The Agreement

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1.12.2017); Patricia Lourdes Viray, "US: We will not ignore China's challenge to rules-based order", The Philippine Star, 19.10.2017. Retrieved from: http://www.philstar.com/headlines/2017/10/19/1750399/us-we-will-not-ignore-chinas-challenge-rules-based-order (access date: 1.12.2017).

[130] The economy of East Asia is dependent on resources from West Asia and Africa being transported through the Indian Ocean. The transfer of weapons and technology between bandit countries links West Asia and the rest of the world. (Iran, Syria) with East Asia (North Korea).

[131] Address to the Indian Parliament. Shinzo Abe, "Confluence of Two Seas", Ministry of Foreign Affairs of Japan, 22.08.2007. Retrieved from: http://www.mofa.go.jp/region/asia-paci/pmv0708/speech-2.html (access date: 16.06.2017).

[132] Although in the Indo-Pacific term, the word "Indo" is synonymous with the ocean, not the state.

[133] Since the beginning of 2019 the CPTPP is in force between Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam.

is a typical "third wave" RTA going beyond the liberalisation of trade in goods and services. It also regulates labour issues, environmental protection and public procurement. However, it is not that the CPTPP is exactly the same agreement as TPP was supposed to be. The ambition of President Barack Obama was to create a (new) pattern of world trade by means of TPP. The TPP consisted of 30 chapters covering – apart from the liberalization of trade in goods and services – everything from labour standards to intellectual property rights. The CPTPP is narrower (22 TPP provisions were suspended), but the agreement proves the parties' ability to cooperate[134]. The CPTPP can be the foundation of the institutionalisation of regional cooperation, the start of integration, starting with reconciliation between the states in conflicts in the past. TPP11 also turns out to be attractive to other countries in the region, whose accession will strengthen CPTPP. Intention to join "11" declares South Korea, Bangladesh, Philippines, India, Cambodia, Colombia, Indonesia, Laos, Sri Lanka and Thailand.

From the EU perspective, the collapse of the TPP process as a consequence of the US decision represented a threat to the global order and cooperation with the countries of the Asia-Pacific region. It could have turned out that the position of the US will be taken by China (and that this situation will be of benefit to Russia). The CPTPP puts these threats aside. Thanks to the CPTPP, its Parties weigh more (both in economic and security terms) than the sum of the unit weights (synergy effect). The Parties to the CPTPP and the EU are attractive partners to each other.

In the case of Japan, the EU-Japan partnership represents a major policy change. Japan's foreign policy has evolved from bilateral cooperation with the US to expanding the circle of partners under the "Arc of Freedom and Prosperity" formula. The new partnership means *de facto* lowering the importance of cooperation with the US and losing hope for a broad partnership with the countries indicated in the "Arc of Freedom

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[134] More: "What on earth is the CPTPP", The Economist, 12.03.2018. Retrieved from: https://www.economist.com/blogs/economist-explains/2018/03/economist-explains-8 (access date: 15.03.2019).

and Prosperity"[135]. This is determined both by President Trump's policy and the collapse of the trend leading to the sharing of common values by many non-Western countries (especially Russia and China)[136].

EU economic cooperation in the form of "third wave" RTAs with South Korea, Japan, Singapore (concluded) and with Australia and New Zealand (in the process of negotiations) is a response to economic challenges related to globalization and the challenges of new economic powers (especially China).

In the sphere of security, an attempt was made to fill – potentially – the vacuum created after the withdrawal of American security guarantees. Withdrawal of the US is to be compensated by cooperation, the beginning of which (since May 2017) has been patrolling the Pacific waters by the US, Japan, France and Great Britain[137]. In addition, the United Kingdom in the face of Brexit shows interest in cooperating with CPTPP[138]. The reactions of European allies to the Japanese proposal to deepen cooperation by going beyond the sphere of economic relations and the institutionalization of ties in the sphere of security and defence policy are clearly positive[139].

Trans-regional economic, political and defence cooperation between the EU and the Asian countries of the Western hemisphere creates the con-

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[135] This idea was formulated by the government headed by Junichiro Koizumi (predecessor and mentor of Shinzo Abe); see: Tomohiko Taniguchi, "Beyond "The Arc of Freedom and Prosperity": Debating Universal Values in Japanese Grand Strategy, The German Marshall Fund of the United States", Asia Paper Series, October 2010, http://www.gmfus.org/publications/beyond-arc-freedom-and-prosperity-debating-universal-values-japanese-grand-strategy (access date: 1.12.2019).

[136] See: Speech by Mr. Taro Aso, Minister for Foreign Affairs on the Occasion of the Japan Institute of International Affairs Seminar "Arc of Freedom and Prosperity: Japan's Expanding Diplomatic Horizons", November 30, 2006, https://www.mofa.go.jp/announce/fm/aso/speech0611.html (access date: 22.02.2020).

[137] David Hutt, "The 'Indo-Pacific' Vision: Room for Britain And France?", Forbes, 14.11.2017. Retrieved from: https://www.forbes.com/sites/davidhutt/2017/11/14/the-indo-pacific-vision-room-for-britain-and-france/ (access date: 18.04.2018).

[138] Julia Gregory, "Britain exploring membership of the TPP to boost trade after Brexit", The Guardian, 03.01.2018. Retrieved from: https://www.theguardian.com/politics/2018/jan/03/britain-in-talks-to-join-the-tpp-to-boost-trade-after-brexit (access date: 18.04.2018).

[139] See: Emil J. Kirchner, Han Dorussen, EU-Japan Security Cooperation. Trends and Prospects, London-New York: Routledge, 2019.

ditions for stopping destabilization and strengthening security in the regional and global dimension.

6. CONCLUSIONS

The Agreements institutionalise the EU-Japan security community – a Pacific bridge where the security and defence policy component is still relatively weak, but is also being developed[140]. The three agreements making closer political and economic ties between the UE and Japan open the way to the creation of the EU's security community with "democratic diamonds" in the Asia–Pacific region. The importance of the Agreements is co-decided by:

- endogenous factors, resulting from economic and political potentials of the Parties;
- exogenous factors, in the form of external determinants of co-operation.

Exogenous factors do indeed give meaning to the agreements. These factors include: turbulence in the US policy combined with the US abandonment of international commitments and contestation of values fundamental for the Western community; unpredictability of Russia in the Russian hegemonic policy; and China's hegemony.

We find that the Agreements are a tool for the defence of international order against threats. The political context of the agreements is determined by the US policy in relation to regions and problems, which is in contradiction with long-term strategy of the US. This is a source of instability, particularly dangerous for the strategic actions of the rivals of the "west", challenging the international order. The US, rejecting the paradigm of free and fair trade and collective self-defence of the free world, put the Allies in a safety vacuum and made them unable to face threats. In addition, it happened under Trump's neo-isolationism policy and under the conditions of undermining US obligations.

[140] See more: Andżelika Kuźnar, Jerzy Menkes, „Indo-Azja-Pacyfik – instytucjonalizacja współpracy", In: Handel i finanse międzynarodowe w świetle wyzwań XXI wieku, ed. Małgorzata Bartosik-Purgat, Alicja Hadryś-Nowak, Warsaw: CeDeWu, 2018, 63-74.

The Agreements pave the way for a strategic partnership between the EU and Japan, co-creating an EU security community with "democratic diamonds" in the Asia-Pacific region. At the same time, the Agreements protect against the emergence of a safety vacuum.

The Agreements additionally activate Japan, in the desired direction, from the point of view of EU interests, by changing its political orientation. Japan ceases to be a „big mute in world politics", taking on global responsibility in cooperation with the EU.

Cooperation between Parties proves the spill-over effects. The EPA is especially source of economic and social benefits, but it also creates the unprecedented ties in EU-Asia relations which are comparable with EU-US relations. Entry into force of the EPA is beneficial for all Parties from the point of view of: – direct impact on the economy (bilateral relations); – indirect impact, as it strengthens the position of the Parties in cooperation with strategic partners and in global competition; – influence on the power of the Parties.

The Agreements do not create a rigid legal framework for cooperation. It may be a subject to both deepening and broadening. We claim that Asia and Pacific countries and the EU, when confronted with the threat (above all the American neo-isolationism), show the ability to independently take up the challenge. This cooperation, leading to the construction of a trans-pacific bridge, may become – after the return of the US to traditional policy – a pillar of the cooperation of the states of the Atlantic and Pacific Oceans. The EU and the Asian countries, by creating a network of contractual links, give a new content to the statement by John Hay (US Secretary of State 1898-1905) that "The Mediterranean[141] is the ocean of the past, The Atlantic, the ocean of the present, and the Pacific, the ocean of the future". This future can be better – different from the Atlantic past filled with human tragedies[142].

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[141] It was a metaphor of the unilateral order (limited to Europe).

[142] More: Jean-Pierre Lehmann, Valérie Engammare, "Beyond Economic Integration: European Lessons for Asia Pacific?" The Globalist, 03.02.2014. Retrieved from: https://www.theglobalist.com/beyond-economic-integration-european-lessons-asia-pacific/ (access date: 13.03.2017).

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ROLE OF THE SUB-MUNICIPAL GOVERNMENT IN CROATIA – LEARNING FROM A POSITIVE EXPERIENCE

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ABSTRACT

Sub-municipal government is a democratic instrument complementing traditional forms of citizen participation and as such contributing to the decentralization of the local political decision-making process. The main task of the sub-municipal government in Croatia is to serve as the consultation and communication mechanism within local units that parallel to local councils allows alternative representation of small communities' interests. However, the sub-municipal government has a rather weak position in terms of autonomy, financing, transparency, size and other. Nevertheless, examples of some Croatian towns demonstrate the democratization potential of the sub-municipal government. In this paper, a survey has been conducted in the City of Rijeka (the third-largest city in Croatia). The questionnaire has been sent to all of its sub-municipal self-government units. The goal of the survey was to research their primary roles. The results have shown that the role of local activities' initiator is the most developed role of the sub-municipal local units. They are then used to suggest further improvement of the system of the sub-municipal government in Croatia.

Key words: Croatia, sub-municipal government, City of Rijeka

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1. INTRODUCTION

This paper explores the role of sub-municipal self-government units in Croatia. Namely, these units are one of the instruments used to increase citizens' participation and their role in the local society. These units are being formed in a narrower part of a larger local unit. Although they usually have a certain level of autonomy, they are under control of the local unit's political bodies. Sub-municipal self-government units usually have their own representative body elected by citizens with residency in that territory[1]. They exist in a lot of countries[2], however, their influence is not the same in all of them.

Previous research dealing with sub-municipal self-government units in Croatia[3] have shown that although in Croatia there are more than 3.800 of them, most of them have weak competencies and significant financial constraints. Citizens still do not recognize them as an instrument of articulation and aggregation of sub-municipal interests. This has reflected in the lack of research studies in this area. There are no official data on sub-municipal self-government units' roles in different municipalities. Therefore, the purpose of this paper is to gain insight into the role of sub-municipal self-government units from their perspective. The research has included the sub-municipal self-government units of the City of Rijeka, the third-largest city in Croatia. This city is selected for the fact that the preliminary analysis using the e-government developmental index has shown that Rijeka has the most elaborated website concerning its sub-municipal government units. This indicates that this city devotes attention to these units, thus opening the space for the study of their roles. A questionnaire aiming to explore their roles has been sent to all sub-municipal

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[1] Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, "Introduction: Decentralization Beyond the Municipal Tier", In: Sub-Municipal Governance in Europe – Decentralization Beyond the Municipal Tier, ed. *Nikolaos-Komninos* Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, London: Palgrave Macmillan, 2018, 1-15.

[2] Ibidem, 6-20.

[3] See in particular: Ivan Koprić, Mirko Klarić, "New Developments in Local Democracy in Croatia and its Neighbouring Countries", Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration, 15/2(2015): 389–414.

self-government units in Rijeka (34 in total), with a response rate of 47%. The analysis of the collected data provides an insight into how sub-municipal self-government units see their role and what possible changes they might need.

The second chapter of the paper provides a theoretical overview of the purpose and role of sub-municipal self-government units, with a particular emphasis on Croatia. The methodology is presented in the third chapter, while the fourth chapter contains an analysis of the research results. The final chapter is devoted to the concluding remarks.

2. SUB-MUNICIPAL SELF-GOVERNMENT UNITS: DEFINITION AND ROLES

Sub-municipal government is a form of internal decentralization of local units, serving as an instrument of citizens' participation with the aim of contributing to the decentralization of the local political decision-making process[4]. This type of intra-municipal decentralization assumes the recognition of autonomy and the right to decide on local affairs in the narrower part of the local territory. Therefore, it "*enables decision-making processes to be brought closer to citizens, to adapt to the specific needs of a territory and to decentralize tasks that are otherwise within municipal jurisdiction*"[5].

Summing up from the scientific literature, Hlepas et al.[6] underline four expected benefits that can be achieved by the formation of territorially

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[4] Sub-municipal government is supposed to enhance local democracy but, according to the analysis of selected countries performed by Hlepas et al. it is not always a case. In some countries, their role is weak or even somewhat symbolic. For further discussion, See: Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, "Introduction: Decentralization Beyond the Municipal Tier", In: Sub-Municipal Governance in Europe – Decentralization Beyond the Municipal Tier, ed. Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, London: Palgrave Macmillan, 2018, 1-24.

[5] Miro Haček, Anja Grabner, "Local Sub-Decentralization and Sub-Municipal Divisions in Slovenia", Hrvatska i komparativna javna uprava - Croatian and Comparative Public Administration, 13/1(2013): 215.

[6] Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, "Introduction: Decentralization Beyond the Municipal Tier"

decentralized bodies. First is the *civic rationale*, meaning that sub-municipal governance can increase citizen participation in local governance and revitalize civic culture and the local community. Second is the *social rationale* that facilitates a citizen-focused approach to governance and provides feedback from citizens to local leaders. The third is the *political rationale* that presumes the improvement of local democracy and political activity of citizens who can more easily be elected between themselves, but also easier to control elected representatives of local decentralized bodies. *Economic rationale* assumes these bodies can be much more flexible in public management, improving the performance of local services whose provision is within the jurisdiction of these bodies. Also, sub-municipal self-government units also serve as a monitoring mechanism for deviant processes in the local unit as a whole[7].

There are several reasons for introducing the sub-municipal government[8]. The size of a local unit might be one of them. Where there is a large local unit, by either population or surface area, decision-making and solving a problem of local importance may be difficult, and it is necessary to establish sub-municipal self-government units. However, they can also exist in countries with smaller local units in order to encourage citizens to engage in local affairs. Sub-municipal self-government units can also be introduced to supervise the work of local bodies, as a corrective for decision-making on local interests.

In: Sub-Municipal Governance in Europe – Decentralization Beyond the Municipal Tier, ed. Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, London: Palgrave Macmillan, 2018, 6. These benefits have first been presented by Vivien Lowndess and Helen Sullivan in 2008 and adopted by Hlepas et al. in their 2018 book - Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, "Introduction: Decentralization Beyond the Municipal Tier" In: Sub-Municipal Governance in Europe – Decentralization Beyond the Municipal Tier, ed. Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, London: Palgrave Macmillan, 2018, 6.

[7] Mirko Klarić, „Nova uloga mjesne samouprave", In: Nova hrvatska lokalna i regionalna samouprava, ed. Jakša Barbić, Zagreb: Hrvatska akademija znanosti i umjetnosti, 2010, 295.

[8] Ivan Koprić, Romea Manojlović, "Participacija građana u lokalnoj samoupravi - nova hrvatska pravna regulacija i neka komparativna iskustva", In: Četvrti Skopsko-zagrebački pravni kolokvij, ed. Borče Davitkovski, Skopje: Pravni fakultet, 2013, 15.

Sub-municipal government is widespread in Europe, but its fundamental purpose, roles, and competencies are regulated differently, depending on the territorial organization and division of competencies in each country. Furthermore, the popularity of this kind of intra-municipal decentralization varies from country to country to a large extent[9]. The most common forms of sub-municipal government are parishes, neighborhoods and town districts[10]. It may have its own representative body or some form of decision-making body in narrower parts of a local unit[11].

What about the role of sub-municipal self-government units? It has been already stated that their role(s) vary between countries but also within an individual political system. For research purposes, the most exhaustive and systematic approach to sub-municipal self-government units' roles has been summarized by Hlepas et al[12]. They distinguish five potential roles:

1. *Facilitator (animator) of the local activity* - sub-municipal self-government units initiate or support various kinds of cultural, sports and educational events. Within this broader role, they can a) organize various events or b) support events organized by civil society organizations or directly by citizens.

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9 Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, "Conclusions", In: Sub-Municipal Governance in Europe – Decentralization Beyond the Municipal Tier, ed. Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, London: Palgrave Macmillan, 2018, 248-253.

10 Ivan Koprić, Mirko Klarić, "New Developments in Local Democracy in Croatia and its Neighbouring Countries", Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration 15/2(2015): 389–414.

11 For example, Hlepas et al. have analyzed the situation in several European countries and found that in most cases, sub-municipal self-government units have directly elected councils (Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, "Conclusions", In: Sub-Municipal Governance in Europe – Decentralization Beyond the Municipal Tier, ed. Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, London: Palgrave Macmillan, 2018, 249-252).

12 Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, "Introduction: Decentralization Beyond the Municipal Tier", In: Sub-Municipal Governance in Europe – Decentralization Beyond the Municipal Tier, ed. Nikolaos-Komninos Hlepas, Norbert Kersting, Sabine Kuhlmann, Pawel Swianiewicz, Felipe Teles, London: Palgrave Macmillan, 2018, 7–8.

2. A *representative of local interests in the city* - sub-municipal self-government units represent local interests in different ways: a) decision-making in a limited scope of affairs (for example, small investments or repairs), b) consult municipal government in decision-making, c) lobbying for some actions to be undertaken by the municipal government.
3. *Service provider* - sub-municipal self-government units not only decide on specific public affairs but also organize their performance (service delivery).
4. *Driving belt* – transmitting information about local unit's policies, serving as a means of informing citizens.
5. *A breeding ground for political talents – an* arena for preparation for political functions at the local or national level or a place to recover and re-start political career for politicians whose political function at a higher level ended.

2.1. Sub-municipal self-government units in Croatia

Local self-government in Croatia is organized as a two-tier system with municipalities and towns on the first level and counties on the second level. There are 555 local self-government units (127 towns and 428 municipalities), 20 counties and the capital city of Zagreb, which has a twofold status, as a city and as a county. Municipalities are *de facto* units of predominantly rural character, encompassing more inhabited settlements according to the principle of interest homogeneity, meaning that common interests of the inhabitants represent an integrative factor of these units[13]. Towns are conceived as predominantly urban units and can gain their status according to several legal criteria – population, administrative, gravitational and the so-called criterion of exception which allows the establishment of a city for special reasons and significance- historical, economic, geopolitical, etc. Counties are a specific type of regional self-government units established to perform tasks of regional interest.

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[13] Ivan Koprić „Stanje lokalne samouprave u Hrvatskoj", Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration 10/3(2010): 668.

As in most European political systems, representative bodies are the hub of the local decision- making[14]. However, citizens can influence local governance through institutions of direct democracy and citizen participation in local decision-making[15].

Sub-municipal government units are public bodies established by local governments with the task of enhancing citizens' participation in local politics and giving advice to the local representative bodies. They are established to represent interests of narrower parts (settlements or parts of the settlements) of local units. Each sub-municipal self-government unit has its own council (*vijeće mjesnog odbora*) directly elected by citizens with a residency on the territory of that unit.

There is no legal obligation for local units to establish a sub-municipal self-government unit with the respective council. The proposition for the establishment of sub-municipal self-government units can be made by the members of the local representative body, but also by citizens and other groups and organizations, determined by the statute of that local unit. The establishment, responsibilities, financing and basic rules governing the work of sub-municipal self-government units are all determined by

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[14] Ivan Koprić, Tijana Vukojičić, "Lokalni politički sustav nakon uvođenja neposrednog izbora načelnika – stanje i prijepori", In: Reforma lokalne i regionalne samouprave u Republici Hrvatskoj, ed. Ivan Koprić, Zagreb: Institut za javnu upravu, 2013, 155-156.

[15] Different forms of citizens' participation could be classified into two main groups: traditional and modern forms. There are several traditional forms of citizen participation in decision-making at the local level: referendum, citizens' initiative, sub-municipal governance and citizens' assemblies. There are numerous modern instruments for improving local legitimacy, such as the direct election of mayors, strengthening the leadership role of mayors and other local executives, recall referendums and independent local political actors. Among new channels of citizens' participation, there are public consultations, open space conferences, quotas for minorities, youth councils, e-referendum, participatory budgeting and others. For more information see: Ivan Koprić, Romea Manojlović, "Participacija građana u lokalnoj samoupravi - nova hrvatska pravna regulacija i neka komparativna iskustva", In: Četvrti Skopsko-zagrebački pravni kolokvij, ed. Borče Davitkovski, Skopje: Pravni fakultet, 2013, 11-17; Ivan Koprić, Mirko Klarić, "New Developments in Local Democracy in Croatia and its Neighbouring Countries", Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration 15/2(2015): 389–414; Norbert Kersting, Local Political Participation in Europe: Elections and Referendums, Hrvatska i komparativna javna uprava - Croatian and Comparative Public Administration15/2(2015): 319–334.

the statute of each local unit. However, each sub-municipal council passes its acts which regulate its work. The exact number of sub-municipal council members, as well as the entire election process, is administrated and regulated by legal acts of the local government. Each sub-municipal council elects a president among its members. The supervision over the sub-municipal council is exercised by the mayor, upon whose proposition the council can be dissolved (art. 57- 66 Law on Local and Regional Self-Government, hereinafter LLRSG)[16]. LLRSG sets the rules on sub-municipals council's work rather extensively, leaving it to local government units' regulation in their local statutes. Thus, two scenarios may exist: a) the rules and regulations of sub-municipal councils are determined in the local government unit's statute or b) local government units' statute allows sub-municipal councils to enact their rules and regulations by themselves[17].

Sub-municipal self-government units' councils are well known in many European countries and they can have different roles[18]. In Croatia, the autonomy of each local government unit in determining the work and competencies of sub-municipal councils leads to no uniform rules for sub-municipal councils, and so their roles vary from town to town. Research has shown[19] that legal regulation allows sub-municipal councils to have most of the stated roles and some local government units are taking over these roles. There are examples of good practice showing some sub-municipal self-government units carry out innovative activities that should enable citizens to participate in local affairs[20]. However, in most local units there is a problem of limited resources allocated to sub-munici-

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[16] Official Gazette 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17.

[17] Romea Manojlović Toman, Tijana Vukojičić Tomić, Ivan Koprić, "Neuspješna europeizacija hrvatske mjesne samouprave: nedovoljna atraktivnost ili loše institucionalno oblikovanje", Godišnjak Akademije pravnih znanosti, X/1(2019): 197.

[18] See chapter 2 for more information on potential roles of sub-municipal self-government units.

[19] Romea Manojlović Toman, Tijana Vukojičić Tomić, Ivan Koprić, "Neuspješna europeizacija hrvatske mjesne samouprave: nedovoljna atraktivnost ili loše institucionalno oblikovanje", Godišnjak Akademije pravnih znanosti, X/1(2019): 185-210.

[20] Romea Manojlović Toman, Tijana Vukojičić Tomić, Ivan Koprić, "Neuspješna europeizacija hrvatske mjesne samouprave: nedovoljna atraktivnost ili loše institucionalno oblikovanje", Godišnjak Akademije pravnih znanosti, X/1(2019): 199.

pal councils, which considerably diminishes their competencies, roles, and influence on local society.

Although there is no legal obligation for the establishment of sub-municipal councils, the great majority of Croatian local units have created them. Namely, there are 3.809 sub-municipal councils in Croatia; only 31% (175 out of 556) of local units do not have them. Among the latter are primarily municipalities (166 out of 176 local units without sub-municipal council belong to the category of municipalities), which are small and rural local units with less than 10.000 inhabitants (in reality more than 85% of municipalities have fewer than 5.000 inhabitants, and 36% of them have less than 2.000 inhabitants). Thus, sub-municipal councils are less important in small rural units in which direct contact between the mayor and citizens can be more easily established and thus there is no need for sub-municipal councils as mediators[21]. Sub-municipal councils have a certain role in the City of Zagreb where they are considered to be the "*focal points for various actors through which they can exert influence on local affairs*"[22]. However, in other larger towns, the share of budget allocated to sub-municipal councils is minimal (around 1%), which diminishes their possibility of action and influence[23]. Additionally, the research coming from Split (the second-largest city in Croatia) shows more than 44% of interviewed citizens do not know what their sub-municipal council does or where it is situated[24] and the share of citizens taking part in the election for sub-municipal council is often lower than 10%[25]. Because of their limited budget, sub-municipal self-government units in Croatia can be

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[21] Ivan Koprić, Mirko Klarić, "New Developments in Local Democracy in Croatia and its Neighbouring Countries", Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration, 15/2(2015): 389–414.

[22] Ibidem, 403.

[23] Romea Manojlović Toman, Tijana Vukojičić Tomić, Ivan Koprić, "Neuspješna europeizacija hrvatske mjesne samouprave: nedovoljna atraktivnost ili loše institucionalno oblikovanje", Godišnjak Akademije pravnih znanosti, X/1(2019): 193.

[24] Mirko Klarić, Nova uloga mjesne samouprave, In: Nova hrvatska lokalna i regionalna samouprava, ed. Jakša Barbić, Zagreb: Hrvatska akademija znanosti i umjetnosti, 2010, 302–303.

[25] Ivan Koprić, Uspavano srce demokracije: Lokalna samouprava za građane i zajednicu, Vrbovec: Avis Rara, 2018, 177.

predominantly considered to be instruments of the consultation and communication mechanism within local government units.

3. METHODOLOGY

The purpose of the paper is to gain insight into the role of sub-municipal self-government units from their perspective.

In order to do so, the city of Rijeka has been selected as a case study. Rijeka has been chosen because it can be considered as an example of best practice regarding the sub-municipal government system in Croatia. Namely, previous research[26] has shown that only 12 Croatian towns (out of 119 that have sub-municipal self-government units) have certain documents/news on sub-municipal self-government published on the sub-municipal self-government units' websites. In comparison, other towns have no information on sub-municipal self-government whatsoever (9 towns) or only necessary information thereof has been provided (98 towns have published the number on sub-municipal self-government units and their contact data online). Out of the remaining towns, only Rijeka and Krk have enabled their citizens to pose questions to local administration directly using the website's interface. However, only the city of Rijeka has this feature designed explicitly for sub-municipal government units. It is important to emphasize that the City of Zagreb has been excluded from the research since it is a capital city with special status. Namely, there is a special law (Law on the City of Zagreb[27]) regulating it status and by virtue, thereof Zagreb has a dual status of both first-level unit of local self-government as well as of county as the second-level unit of (regional) self-government. Besides, Zagreb is the largest city in Croatia with almost 800.000 inhabitants (out of 4.289.889 inhabitants in Croatia[28]) and with the largest budget. When it comes to its structure of sub-munici-

[26] Romea Manojlović Toman, Tijana Vukojičić Tomić, Ivan Koprić, "Neuspješna europeizacija hrvatske mjesne samouprave: nedovoljna atraktivnost ili loše institucionalno oblikovanje", Godišnjak Akademije pravnih znanosti, X/1(2019): 185-210.

[27] Official Gazette 62/01, 125/08, 36/09, 119/14, 98/19.

[28] https://www.dzs.hr/Hrv/censuses/census2011/results/htm/H01_01_03/H01_01_03.html (access date: 01.12.2019).

pal self-government, Zagreb is the only city in Croatian with a two-tier sub-municipal government[29]. Since the purpose of this paper is to examine the roles that sub-municipal self-government units usually have in Croatia, Zagreb had to be excluded as for the above-described reasons it is not comparable to any other unit of local self-government in Croatia.

In accordance with the purpose of this paper, five roles theoretically explained by Hlepas et al.[30] has been operationalized through an online questionnaire that has been sent to all of Rijeka's 34 sub-municipal self-government units. The questionnaire has been sent to the secretary of each unit and it was fully anonymous. It was sent in two rounds (13–27 May and 28 May – 3 June 2019), with a response rate of 47%. The questions were designed by using a combination of five-point Likert scale or open questions, and the analysis has been done using descriptive statistics. The questionnaire contained 17 questions, but only those necessary for determining the role of sub-municipal self-government units are presented in this paper[31].

4. DISCUSSION OF RESULTS

4.1. General data on sub-municipal self-government units in Rijeka

Rijeka is the third-largest city in Croatia (120.000 inhabitants) subdivided into 34 sub-municipal self-government units. Rijeka has invested much energy into making sub-municipal self-government units recognizable and accessible to its citizens. Namely, the city of Rijeka's official website[32] contains all the information on sub-municipal self-government units' scope of affairs and elected members of the sub-municipal council. What is even more important is the fact that the list of all planned activities

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[29] More on the system of sub-municipal self-government in Zagreb see: Juraj Hrženjak, "Ustrojstvo i funkcioniranje mjesne samouprave u Gradu Zagrebu", Hrvatska i komparativna javna uprava – Croatian and Comparative Public Administration11/1(2011): 43–69.

[30] See: Chapter 2.

[31] The exact formulation of questions is presented in Chapter 4.

[32] https://www.rijeka.hr/mjesna-samouprava/ (access date: 01.12.2019).

offered by sub-municipal self-government units is presented in advance, together with the total amount of funds allocated for those activities. Each sub-municipal self-government unit has to publish its annual report on its activities.

The activities exercised by sub-municipal self-government units can be divided into seven categories (culture, sports, environmental protection, communal activities, infield competition, donations, day-to-day activities of the elected council). Although activities undertaken by sub-municipal self-government units financially have a small impact, the transparency and publicity of their work contribute to the overall awareness of their role. Also, their headquarters serve as a place where different information about the city's policies can be obtained, and the online submission of questions to a particular sub-municipal government unit is enabled.[33] Thus, Rijeka serves as a positive example of promoting the transparency and openness of the work of sub-municipal self-government units through the use of modern technologies.

4.2. Results and discussion

The questionnaire has been answered by 16 out of 34 sub-municipal government units. The secretaries of 12 units have answered the questionnaire, while in the remaining four a member of the sub-municipal council has answered it. Since both the secretary as well as the council members have direct knowledge of the functioning of the sub-municipal government system, these responses are considered reliable.

In order to determine whether sub-municipal self-government units see themselves as *activators* of local activities, the respondents were asked to assess the importance of sub-municipal self-government units in setting up different activities. As shown in Table 1, a great majority of respondents - 13 (81% of respondents), have chosen the level 4 and 5 (average level of 3.93), thus showing that they perceive sub-municipal government units have an important role in initiating local activities.

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[33] For example: https://www.rijeka.hr/mjesni-odbori/bulevard/postavite-pitanje-svojem-mo/ (access date: 01.12.2019).

Table 1: Assessment of sub-municipal self-government units' role as an activator of local activities

Assess on a scale from 1 (lowest level) to 5 (highest level) the degree of importance you think sub-municipal self-government unit has in:	**1**	**2**	**3**	**4**	**5**	**Does not know/does not want to answer**	**Average**
Setting up and initiating activities on its territory	1	0	2	9	4	0	3.93

Source: authors

In order to determine the role of a *public service* provider, two questions were asked. First, an open question was used, asking the respondents to indicate the most important services provided by their sub-municipal self-government units. These answers were combined with the question of the height of their budget. Since the first question was an open question, there were a variety of answers, but all the answers referred to communal services and communal activities, showing that this indeed is of real interest and area of activity for sub-municipal government units. Besides, they have indicated activities such as the discussion on traffic conditions on their territory, repairing public lights system and setting up and maintenance of children's playgrounds. Additionally, they initiate activities such as small tournaments and festivals.

When asked about their yearly budget, the respondents have indicated that they have a budget ranging from around 20.000,00 - 50.000,00 HRK designated for their activities (around 2.650,00 – 6.650,00 EUR), plus additional funding for communal activities that range from around 200.000,00 – 750.000,00 HRK (26.650,00 – 100.000,00 EUR). Approximately 4.000 EUR of yearly funding for all social activities is not high, predominantly making sub-municipal self-government units the providers of small size services. Although the financial amount designated for communal activities is higher, it is necessary to take into consideration that they are operatively much more expensive *per se* and that amount can still not be considered as enough. Looking at the total amount designated for sub-municipal self-government units in the City of Rijeka, in 2018 these

units receive only 1.41% of the total city budget[34]. The lack of resources was stressed by some respondents also in open and non-obligatory questions in which the respondents were asked to indicate the main problems of the sub-municipal government system in Rijeka. Overall, the role of sub-municipal self-government units as service providers is highly constrained due to the lack of sufficient financial resources.

The role of *representation of local interests* was explored by asking the respondents to indicate the extent to which they assess that sub-municipal self-government units have an influence on the decisions adopted by the local unit's representative body. Table 2 shows that sub-municipal self-government units see only limited potential in influencing the local representative body. Namely, only 6 (37.5%) of all respondents see sub-municipal self-government units having a high level of influence. As with the previous role, this result points to the low-medium importance of this role in Croatian sub-municipal self-government units.

Table 2: Assessment of sub-municipal self-government units' role as local interests' representative

Assess on a scale from 1 (lowest level) to 5 (highest level) the degree of importance you think sub-municipal self-government unit has in:	**1**	**2**	**3**	**4**	**5**	**Does not know/does not want to answer**	**Average**
Influencing the decisions of the local representative body	1	4	5	4	2	0	3.12

Source: authors

When the role of spokespeople *(driving belt)* on local politics is discussed, the results seem much better. Namely, 11 (68.7%) respondents think sub-municipal self-government units are essential for disseminating knowledge on local policies (Table 3).

[34] Romea Manojlović Toman, Tijana Vukojičić Tomić, Ivan Koprić, "Neuspješna europeizacija hrvatske mjesne samouprave: nedovoljna atraktivnost ili loše institucionalno oblikovanje", Godišnjak Akademije pravnih znanosti, X/1(2019): 193.

Table 3: Assessment of sub-municipal self-government units' role as spokesmen (*driving belt*)

Assess on a scale from 1 (lowest level) to 5 (highest level) the degree of importance you think sub-municipal self-government unit has in:	**1**	**2**	**3**	**4**	**5**	**Does not know/does not want to answer**	**Average**
Informing the citizens on local government unit's policies	2	2	1	8	3	0	3.5

Source: authors

These results seem to indicate that the latter role is of high importance for the sub-municipal self-government units. However, there are indications that the possibility of sub-municipal self-government units to spread the word about local policies is limited. Specifically, the respondents were asked to indicate the level to which they assess citizens' interest in the sub-municipal government. As Table 4 shows, the respondents think that most of the citizens have a low (level 2) or medium (level 3) interest in sub-municipal self-government units. The lack of interest logically decreases the possibility of sub-municipal self-government units to act as spokesmen for local policies since there is no audience interested in what they have to say.

Table 4: Assessment of citizens' interest in sub-municipal government

Assess on a scale from 1 (lowest level) to 5 (highest level):	**1**	**2**	**3**	**4**	**5**	**Does not know/does not want to answer**	**Average**
The degree in which citizens' are interested in the work of sub-municipal self-government units	0	5	9	2	0	0	2.81

Source: authors

This is further confirmed by the fact that 9 (56%) of respondents think that citizens have low or medium knowledge on sub-municipal

self-government units (Table 5). In addition, in the last question in which the respondents were asked to indicate changes that could improve Rijeka's system of sub-municipal governance, out of 9 answers in total, 8 of them have indicated the need to increase citizens' interest in sub-municipal self-government units.

Overall, it seems that sub-municipal self-government units perceive themselves as spokespersons of local policies, but their possibilities to reach citizens are limited due to the lack of interest in citizens' part.

Table 5: Assessment of citizens' knowledge of sub-municipal government role and activities

Assess on a scale from 1 (lowest level) to 5 (highest level):	**1**	**2**	**3**	**4**	**5**	**Does not know/does not want to answer**	**Average**
The degree in which citizens' have knowledge of sub-municipal government role and activities	0	2	7	7	0	0	3.3

Source: authors

Finally, the role of sub-municipal self-government units as a *breeding ground for local politicians* seems not to hold for the city of Rijeka. This role was operationalized by looking at the turnout for sub-municipal elections. Namely, in case the turnout is high, this could indicate that citizens are interested in politicians who represent them in these bodies and it could foster their political career. In case the turnout is low, it decreases the possibility for politicians to have many voters interested in their work and to provide them support to prepare for a higher level political positions (at the local or national level).

The respondents were asked to indicate the turnout to last sub-municipal elections in Rijeka, held in December 2018, and it has ranged from 5–15%, with an average of around 9%. This meager turnout is one more proof of the fact that citizens are not interested in sub-municipal self-government units, which in its present form cannot act as a breeding ground for local politicians.

5. CONCLUSIONS: HOW TO PROCEED?

Sub-municipal self-government units in Croatia are introduced as a form of direct citizen participation in decision-making on local affairs and envisaged as having a significant impact on the lives of citizens living in narrower parts of local units. Although there is no legal obligation for local units to establish a sub-municipal self-government unit, a great majority of local units (69%) have formed them. There are 3.809 sub-municipal councils in Croatia, directly elected by citizens with a residency on the territory of that sub-municipal self-government unit. However, the establishment, responsibilities, financing and basic rules governing the work of sub-municipal self-government units are determined by the statute of each local unit. In contrast, some local units allow sub-municipal councils to regulate their rules more precisely with their own rules and work program. In this way, sub-municipal self-government units are left at the mercy of the local representative body. Since there are no uniform rules for sub-municipal self-government units, their roles vary considerably.

In order to build upon previous research findings[35] on the roles of sub-municipal self-government units from their perspective, one city and its sub-municipal self-government units were selected for a case study. The selected city is Rijeka (third largest in Croatia) which has shown itself as a study of good practice. The online questionnaire was sent to all of Rijeka's 34 sub-municipal self-government units, and the analysis has been done using descriptive statistics. In short, the results show that sub-municipal self-government units have important role in initiating local activities; they are most active in performing small communal services but are highly constrained by the lack of sufficient financial resources; they have only limited potentials in influencing the decisions of the local representative body; they have an important role in disseminating the knowledge on local policies which is, however, limited due to lack of knowledge and involvement of the citizens; the low turnout in sub-municipal elections indicates

[35] Romea Manojlović Toman, Tijana Vukojičić Tomić, Ivan Koprić, "Neuspješna europeizacija hrvatske mjesne samouprave: nedovoljna atraktivnost ili loše institucionalno oblikovanje", Godišnjak Akademije pravnih znanosti, X/1(2019): 185-210.

a negligible role of sub-municipal self-government units in preparing politicians for climbing the political ladder.

Based on the research findings, recommendations for strengthening the role of sub-municipal self-government units are given and can serve as guidelines. These recommendations can refer to the relation of sub-municipal self-government units to political bodies and their relation to citizens.

1) *In relation to political bodies,* it is necessary to regulate competencies, tasks, and financing of sub-municipal self-government units in central state law. This would enable them to have at least a certain level of autonomy towards the local representative body. In addition, the increase of their financial powers and autonomy could foster a greater level of citizens' engagement and relevance of sub-municipal government units. Their share in the local government budget and a simultaneous introduction of consultation with the sub-municipal government in the process of budget drafting should be guaranteed.
2) *In relation to citizens,* it is of utmost importance to increase citizens' interest in sub-municipal self-government units' roles and activities. It can be done by increasing:
   – The use of modern technology (ICT) for raising awareness about sub-municipal tasks among citizens,
   – The use of ICT for advanced involvement of citizens (e.g. participative budgeting in which sub-municipal self-government units partake),
   – Using other methods for disseminating information (e.g. social networking, community meetings in small/rural units).

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SIMPLE JOINT-STOCK COMPANY – A NEW TYPE OF POLISH COMMERCIAL COMPANY DEDICATED (MOSTLY) TO NEW-TECHNOLOGY ENTITIES

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ABSTRACT

This article presents a new Polish regulation concerning the simple joint-stock company (Polish: *prosta spółka akcyjna*; SJSC). It is a legal form of a commercial company, dedicated mostly (but not exclusively) to new-technology entities. Its main advantage is the possibility to subscribe shares in exchange for a contribution in the form of work or services provided to the company. This will make it possible for SJSC promoters to attract investors in order to run the enterprise while maintaining control over the company and excluding personal liability for its obligations. Another characteristic is that the SJSC has no share capital. Even so, the degree of actual protection of a company's creditors does not seem lower than that provided by companies supplied with a share capital. This is because the creditors' interests are secured not only by the obligation to conduct the solvency test before paying out funds to a shareholder but also by restrictive rules of responsibility of management board members for the company's liabilities if the enforcement carried out against the company proves ineffective.

Key words: simple joint-stock company, new-technology company, share capital

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1. INTRODUCTION

Projects that use modern technologies, mostly related to IT, are increasingly important to the contemporary economy. The area of the economy where technology companies operate is characteristic, since a business concerning new technologies, as any innovative activity, is often riskier (the probability of economic failure is higher than in other industries). At the same time, the activity in this field requires significant financial outlays. This arises not only from high capital demand for research and implementation activities but also from strong market competition. The most competitive entrepreneurs will not be those who possess the best and most advanced technological solutions but those who can quickly acquire and maintain their clients. This, in turn, implies expenditure on marketing and advertising operations, and sometimes also investment outlays (for instance when taking over other companies that render similar services)[1]. Given the high capital intensity of their undertaking, the promoters would obviously like to benefit from the exclusion of personal liability for the company's obligations. Their expectations towards the investors in such undertakings are also different. The promoters of technology companies, who usually also invent the solutions they use and develop, wish to find capital support but at the same time keep their control over the company. However, they mostly cannot offer the investors anything except their own knowledge, experience or creativity. Consequently, also the structure of assets in such companies is completely different from that existing in 'conventional' companies. Immovable property, vehicles, machinery, and equipment are replaced by information, knowledge, experience, and creativity.

These demands of legal transactions cannot be satisfied by the current 'classical' form of a commercial company. The formula of a partnership is out of the question due to the personal liability of the partners. Neither the promoters nor the investors want to be held liable. The absence of personal liability of the partners is assured by the form of a company, but that is also out of the question as the possibility of contributing

[1] See: Tomasz Sójka, „O potrzebie zmian unormowań niepublicznych spółek kapitałowych – uwagi na kanwie projektu przepisów o prostej spółce akcyjnej", Przegląd Prawa Handlowego 9(2018): 13 and specialist literature cited in footnote no 3.

work or services to the company is excluded. In fact, the expectations of technology company promoters are contrary to the traditional concept of a company.

To address the demands of the start-up community, the Polish legislator has decided to extend the Commercial Companies Code (CCC)[2] by a new type of company, which is the simple joint-stock company. This followed an extremely heated discussion amongst company law experts, most of whom strongly opposed the idea. The discussion was dominated by opinions that the regulation is unnecessary, as the objectives assumed by the legislator can also be achieved using other solutions; that the SJSC regulation puts the creditors of such companies at risk (no share capital, plus the fact that the company may have no assets); that it compromises the interest of potential shareholders (the shares may turn out to be worthless; no share priority limits, which may breach the rule of equal treatment of shareholders); and that it leads to chaos and breaks the cohesion of the Commercial Companies Code[3].

Despite that, the simple joint-stock company will appear in the Polish legal system as of 1 March 2021. However, Poland is not the first country to introduce such a regulation. It already exists in France as the simplified joint-stock company (*Société par Actions Simplifiée* (SAS)), regulated by Articles L. 227-1 to L. 227-20 of the French Commercial Code (*Code de commerce*)[4], and in Slovakia (*Jednoduchá Spoločnosť na Akcie*), regulated in § 220h to 220 zl of the Slovakian Commercial Code (*Obchodny Zakonnik*).

The aim of this article is to briefly present the new Polish regulation and to establish whether the SJSC may actually pursue the objectives as-

[2] The Act of 15 September 2000 (Polish Journal of Laws 2019, item 505).

[3] See: Aleksander Kappes, „Prosta spółka akcyjna – czy rzeczywiście prosta i czy potrzebna? Uwagi do projektu nowelizacji Kodeksu spółek handlowych, wprowadzającego prostą spółkę akcyjną (projektowane art. 300^{1}–300^{121}k.s.h.)", Przegląd Prawa Handlowego 5(2018): 10 et seq. Similarly: Piotr M. Wiórek, „O braku potrzeby wprowadzenia prostej spółki akcyjnej (PSA) z perspektywy prawnoporównawczej", Przegląd Prawa Handlowego, 5(2018): 4 et seq.

[4] More informationon the French simplified joint-stock company, see: Michał Przychoda, „Francuska spółka akcyjna uproszczona SAS", Przegląd Prawa Handlowego 2(2017): 53 et seq.

sumed by the legislator, which are: to ensure an optimum legal form for the founders of new-technology companies while respecting the rights of their creditors.

2. POSITION AND STRUCTURE OF THE REGULATION

The simple joint-stock company has been introduced to the Commercial Companies Code (CCC) under the Act of 19 July 2019 amending the Commercial Companies Code and certain other Acts[5]. The regulations concerning the SJSC (Articles 300^{1} to 300^{134} of the CCC) cover 134 sections. It is a lot, considering that the regulations governing the limited liability company nominally cover 149 provisions, and those concerning the joint-stock company include 189 provisions.

The position of the SJSC regulations in the Commercial Companies Code has been criticized. It was raised that the new company should be regulated (if at all) by a separate legal act, just like the European company[6]. The integration of the SJSC regulations into the Commercial Companies Code has affected the transparency of the provisions, but it remains correct. The SJSC is a domestic commercial company, and there is no reason to claim that the comprehensive nature of the CCC as an act governing commercial companies has been impaired. This is also supported by comparative arguments. A similar solution is used by the legislators in France and Slovakia. The only difference lies in the method of regulation. The regulation concerning the Polish SJSC is generally comprehensive, only in certain matters the Code refers to the provisions on the limited liability company or the joint-stock company (e.g. Article 300^{24} refers to Article 212 of the CCC, which governs the right of control held by a shareholder in a limited liability company, while Article 300^{15}(6) of the CCC refers to the provisions on the procedure for notifying joint-stock company's

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[5] Polish Journal of Laws, item 1655. The original text of the Act is available here: http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20190001655/O/D20191655.pdf (access date: 1.12.2019).

[6] See: Joanna Kruczalak-Jankowska, „Prosta spółka akcyjna – polską superspółką?", Przegląd Prawa Handlowego 9(2018): 27.

creditors of the reduction in share capital). Meanwhile, the French and Slovakian Commercial Codes only regulate matters specific to the simplified joint-stock company, and in the remaining scope, they require that the provisions on the joint-stock company be applied accordingly, specifying which of those provisions shall not apply to the simplified joint-stock company (see: Article L 227.1 of the French Commercial Code, and § 220h(3) of the Slovakian Commercial Code).

The SJSC regulation consists of six chapters: 1) Formation, 2) Rights and Obligations of the Shareholders, 3) Company Governing Bodies, 4) Amendment to the Articles and Issue of Shares, 5) Dissolution and Liquidation of the Company, 6) Civil-Law Liability. Below I briefly present the most characteristic issues.

3. FORMATION

The explanatory statement for the draft Act amending the CCC and introducing the SJSC emphasizes that the new legal structure has been created to address the expectations of the start-up community[7]. Although the SJSC was created as a legal form dedicated to companies in the new technology sector, it may be established by one or more persons to carry out any lawful business (Article 300^1 of the CCC).

The articles of association may be made in a conventional manner (as a notarial deed) or electronically (in the latter case it is necessary to complete the form available in the ICT system and to sign the articles with a qualified electronic signature or using a trusted profile or a personal e-signature). If the articles are signed electronically, the shares of the first issue may only be covered by cash contribution (Article 300^7 of the CCC).

[7] See: Explanatory statement for the draft Act, pp. 1–4, Parliamentary Paper No. 3236, http://orka.sejm.gov.pl/Druki8ka.nsf/0/5EA8D7DC70002162C12583A70034174A/%24File/3236.pdf (access date: 1.12.2019).

4. SUBJECT OF CONTRIBUTION TO THE SJSC

In accordance with Article $300^2(2)$ of the CCC, non-cash contribution aimed at covering shares may be any contribution of financial value, in particular the provision of work or services. It seems that this is the most important regulation concerning SJSC, which makes this legal form useful to technology companies. From the point of view of SJSC promoters, own work of shareholders contributed to the company is an optimum solution to commercialize their intellectual capital (knowledge, skills, experience, and creativity). However, the promoters' option to make such contribution generates risks both to the company investors and to its creditors. For the investors, the risk lies in overestimating the value of the contribution. There is no guarantee that the shareholder subscribing shares for such a contribution will be as effective and creative as the other investors expect. This risk, however, is an integral part of the SJSC nature, which the investors should be aware of. For the creditors, the risk lies in the fact that the contribution in such a form does not increase the company assets from which a creditor could satisfy their claim (work or services provided by shareholders cannot be subject to enforcement proceedings carried out against the company).

The valuation of contributions in kind depends on the promoters' decision. Since the shares have no par value, it is the promoters who decide about the value each contribution represents to the company. This value is reflected in the issue price for the shares the company offers to its shareholders.

5. PROTECTION OF CREDITORS

Traditionally, the basic tool for protecting the creditors of a continental company was the concept of share capital. It became a subject of strong criticism at the end of the 1990s. Critical opinions intensified once the European Court of Justice had allowed (as a sign of freedom of establishment) transferring the actual registered office of a company incorporated in one European Union Member State to another state[8]. Of course, this did not

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[8] See judgments of 9 March 1999, C-212/97 Centros; of 5 November 2002, C-208/00 Überseering; of 30 September 2003, C-167-01 Inspire Art, all available on

concern the migration of companies between continental European countries where regulations concerning the minimum capital were similar, but it was about incorporating a company in the United Kingdom and carrying on business in another EU country. This all happened because British law did not require shareholders in private companies to contribute a specified part of equity capital at the stage of company formation. In consequence, many companies incorporated in the United Kingdom actually operated in the other EU Member States. That development was subject to extensive doctrinal disputes, in both European and Polish literature[9]. It called to eliminate the share capital due to the ineffective protection of creditors and excessive restrictions. The massive migration of companies to the United Kingdom exerted pressure on legislators in continental Europe who waived the minimum capital requirements[10]. Several EU countries have introduced significant amendments to their regulations on limited liability companies, involving a total absence or considerable reduction of share capital required. Such regulations were adopted particularly in Germany, the Netherlands, Luxembourg, Italy, the Czech Republic, Portugal and Finland[11].

Share capital is not (and has never been) an effective measure for protecting the interests of company creditors. It is not an inviolable deposit which the company would be required to protect for the benefit of its

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https://curia.europa.eu; see also: Mathias Habersack, Dirk. A. Verse, Europäisches Gesellschaftsrecht, Munich: C.H. Beck, 2011, 16–35; Marieke Wyckaert, Filip Jenne, "Corporate Mobility", In: The European Company Law. Action Plan Revisited, ed.: Koen Geens, Klaus J. Hopt, Leuven: Leuven University Press 2010, 306–311.

[9] See, inter alia: Arkadiusz Radwan, „Sens i bezsens kapitału zakładowego – przyczynek do ekonomicznej analizy ustawowej ochrony wierzycieli spółek kapitałowych", In: Europejskie prawo spółek, vol. II, Instytucje prawne dyrektywy kapitałowej, part II, ed. Mirosław Cejmer, Jacek Napierała, Tomasz Sójka, Cracow: Zakamycze, 2005, 23–100, and the literature referred to therein.

[10] See: John Armour, Wolf Georg Ringe, "European Company Law 1999–2010: Renaissance and Crisis", Law Working Paper 175 (2011): 16 https://ssrn.com/abstract=1691688 (access date: 1.12.2019).

[11] See more: Cécile Bervoets, Eva-Désirée Lembeck, Die „GmbH Light" – ein Trend in Europa, Steuer und Wirtschaft International – Tax and Business Review 7 (2004): 355–363. In Polishliterature, see: Piotr M. Wiórek, O braku potrzeby wprowadzenia prostej spółki akcyjnej (PSA) z perspektywy prawnoporównawczej, 4–5.

creditors. Based on rigid financial criteria, it only binds company assets, irrespective of the company's actual economic standing. Share capital is also not a theoretical structural component of a company. Therefore, it may be eliminated. The only question concerns alternative protective measures for creditors[12].

No share capital (*kapitał zakładowy*) is required in the structure of the SJSC. It is replaced by equity capital (Polish: *kapitał akcyjny*), but its functions differ essentially from those of the share capital. The equity capital is indeed composed of contributions made by shareholders, but only of those which may be recognized in the balance sheet (so excluding inalienable rights and contributions involving the provision of work or services). Minimum equity capital has been set at PLN 1, and changes in its amount are not subject to the provisions concerning amendments to the articles of association (Article 300[3] of the CCC). The equity capital is also supported by compulsory write-offs on profit (8% of profit for each financial year, until reaching 5% of total company liabilities recognized in the approved financial statements for the last financial year – Article 300[19] of the CCC). At the same time, the equity capital may be used for payments made to shareholders (dividend, payment on the redemption of shares, covering the price for own shares acquired by the company). The admissibility of all these pay-outs depends on the result of the solvency test. Following Article 300[15](4) to (5) of the CCC, disbursement to shareholders shall be allowed unless it causes the company to lose, in normal circumstances, its capacity to settle the financial liabilities due within six months from the date of disbursement. This is assessed independently by the company management board. The lower limit of discretionary powers as to the disbursements is set at 5% of the total liabilities of the company, as recognized in the approved financial statements for the last financial year. If the management board wish to pay out a higher amount, they must conduct the so-called notification procedure (Polish: *postępowanie konwokacyjne*), which consists in notifying company creditors of the reduction in equity capital and checking whether they do not object (Article 300[15](4) of the CCC).

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[12] See more on the matter: Michał Żurek, Reforma regulacji prawnej kapitału zakładowego spółki z ograniczoną odpowiedzialnością. Problematyka ochrony wierzycieli, Warsaw: CH Beck, 2018, 113-203.

Shares in a joint-stock company do not take the form of documents (Article 300[29](1) of the CCC) and must be recorded in the shareholders' register (Article 300[30](1) of the CCC), maintained by an entity entitled to keep investment accounts under the Act on Trading in Financial Instruments, and by a notary. The register is maintained in electronic form and may exist as a distributed and decentralized database (Article 300[31] of the CCC), that is using blockchain technology. Shares in an SJSC are obviously transferable but may not be used for organized trading. Their alienation requires the form of a document, under pain of nullity (Article 300[36] of the CCC), and the mere act of alienation or encumbrance of shares is of a real nature, as it is effective only upon making an entry in the shareholders' register (Article 300[37] of the CCC), unless the shares are transferred by operation of law (such as in succession).

Similarly to the limited liability company, the articles of the simple joint-stock company may make the disposal of shares conditional on the consent provided by the company, or restrict it otherwise. If the shares have not been fully covered, their alienation is – by statute – conditional on the company's consent. The company may refuse such consent, not having to identify any other acquirer. If consent is granted, the acquirer holds joint and several liabilities with the alienor for making the residual part of the contribution.

Unlike the regulations concerning the joint-stock company, where the succession of shares may not be limited, the articles of the simple joint-stock company may restrict or exclude the successors of the deceased shareholder from joining the company. In this case, the articles of association should set out the conditions for paying off the successors not joining the company, on pain of the restriction or exclusion being ineffective. The payment due to the successors should take into account the ratio of the value of the contribution paid into the company to the value of the contribution unpaid. However, in the event of the death of a shareholder who held shares taken up for a contribution involving work or services which has not been fully paid, his/her successors may join the company only upon the company's consent, unless the articles of association provide otherwise (Article 300[41] of the CCC).

Recapitalization of the company at a later stage of its operation does not take place by increasing its equity capital but by issuing new shares. As a rule, a resolution on the issue of shares amends the articles of association and requires ¾ of votes (Article 300^{98}(2)(1) of the CCC), unless the articles already provide for the issue of shares and set the maximum number of shares and the date when they may be issued (Article 300^{103} of the CCC). The resolution on the issue of shares should also specify the issue price. Therefore, the value of contribution in kind is also at this stage determined by shareholders, even though in this case it is decided by the majority of votes. The restriction or exclusion of pre-emptive right is also permitted, but the appropriate resolution requires a 4/5 majority of votes (Article 300^{106}(2) of the CCC).

Shares are taken up under a share subscription agreement, by which the company undertakes to issue shares to the subscriber, and the subscriber undertakes to contribute. The share issue resolution and the share subscription agreements are notified to the register along with a statement by all management board members that the contributions to cover the new shares have been paid in the part provided for in the share issue resolution or the share subscription agreements, and a statement by all management board members specifying the amount of equity capital. The shares shall be issued upon entry into the register.

Aside from the issue of new shares on general terms, the CCC offers two solutions already known from the regulations on the joint-stock company, that is the authorisation for the management board to issue shares (which in the joint-stock company is called 'target capital') and the issue of shares which depends on certain conditions (which in the joint-stock company is known as 'conditional increase of share capital'). The former solution consists in authorising the management board to issue shares, this authorisation extending for not more than five years. The management board may exercise the authorisation by carrying out one or several share issues in that period, provided that the scope of the authorisation may not exceed one fourth of the total number of shares issued by the company as at the date the authorisation was granted. The authorisation for the management board to issue shares may be granted for subse-

quent periods not longer than five years. The granting of the authorisation requires an amendment to the articles of association (Article 300^{110} of the CCC). If this is the case, the management board resolution, adopted within the scope of the authorisation added to the articles, substitutes the resolution on the issue of shares passed by the general meeting. The management board decides on all matters related to the issue of shares, unless the provisions of a relevant chapter of the Code or the authorisation granted to the management board provide otherwise (Article 300^{112} of the CCC). The purpose of the conditional issue of shares is to allow acquisition of shares by the holders of convertible bonds or bonds with pre-emptive rights, persons who acquired such rights under an agreement made with the company, and holders of subscription warrants (securities issued by the company providing holders with the right of subscription for shares). Unlike the general terms, the rights under shares forming part of the contingent issue are not acquired upon entry into the National Court Register but upon entry into the shareholders' register (Article 300^{118} of the CCC).

8. RIGHTS AND OBLIGATIONS OF THE SHAREHOLDERS

The structure of two essential rights of the shareholders (the right to profit and dividend and the right to vote) has remained the same as in the joint-stock company and limited liability company. In consequence, dividend is distributed in proportion to the number of shares, unless the articles of association provide otherwise (Article 300^{15}(3) of the CCC). Similarly, the right to vote is attributed to each share (Article 300^{23} of the CCC). Rights are enjoyed by the shareholders under their shares, and do not depend on the type of contribution. From this point of view, the legal position of the shareholders who have made contributions to equity capital and those who have made contributions which cannot be recognised in the balance sheet remains identical.

An important advantage of the SJSC over other types of companies is considerable freedom of shareholders when shaping their membership rights, especially as to the possibility to deviate from the proportionality principle, which makes the scope of shareholder rights conditional on

the ratio of shares held to the total number of shares. Consequently, it is allowed to create non-voting shares, which must be preferred as to dividend (Article 300[27] of the CCC), and to set privileges related to the shares or shareholders, while the CCC imposes no restrictions on the scope of these privileges (other than in the limited liability company or the joint-stock company).

The legislator has also introduced the shareholders' right to individual control of the company, which had previously applied only to the limited liability company. An SJSC shareholder may demand the management board to provide information and explanations and to give access to the company documents (Article 300[24] of the CCC in conjunction with Article 212 of the CCC).

The SJSC regulation also allows another concept, previously applied in Polish law only to the limited liability company, that is the expulsion of a shareholder. An SJSC shareholder may be expelled only for good reason, under a court judgment or at the request of a shareholder or shareholders representing more than a half of the total number of votes (the articles of association may, however, restrict this right enjoyed by a shareholder or shareholders by setting a higher requirement applicable to the proportion of votes required – Article 300[49] of the CCC).

In the SJSC, it is also permitted to apply to court for a judgment on resignation of a shareholder at his/her request, if there is a good reason grounded on the relationships between the shareholders or between the company and the resigning shareholder, which causes gross detriment to the resigning shareholder (Article 300[50] of the CCC). This implements the right to leave the company, as demanded by legal doctrine[13]. Unlike in partnerships, a shareholder in a company cannot terminate the articles of association. Consequently, in extreme cases, particularly in the event of a corporate conflict, a shareholder may become 'trapped' in the company. The permission to take judicial action for leaving the company will secure the interests of such trapped shareholders.

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[13] See: Arkadiusz Radwan, Ius dissidentium. Granice konsensusu korporacyjnego i władzy większości w spółkach kapitałowych, Warsaw: CH Beck, 2016, 616.

Until the provisions on the simple joint-stock company is being entered into force, the Polish commercial companies law uses the dualistic model of corporate governance. It assumes that the company affairs are handled by the management board, while the supervisory board, being a separate body, supervises the company operations. The SJSC regulations introduce the option to create a monistic model of corporate governance, also known in other legal systems, by establishing a board of directors. Therefore, in the SJSC it is possible to establish either a management board and (optionally) a supervisory board or a board of directors. Of course, either of the two models involves the general meeting of shareholders.

In the dualistic model, the management board, composed of one or more members who, as a rule, is appointed by the general meeting, represents the company and manages its affairs. Supervision is exercised by the supervisory board, composed of at least three members, who are also appointed by the shareholders.

In the monistic model, the management of company affairs and the representation and supervision of the company remain with the board of directors. It consists of one or more directors, who are appointed and removed by the shareholders (Article 300^{73} of the CCC). However, the articles of association or the rules of procedure or a resolution of the board of directors may delegate all or a part of business management operations to a single director or certain directors (executive directors). In such a case, the directors not being executive directors (so the non-executive directors) supervise the management of company affairs on an ongoing basis. To carry out business management operations, it is possible to appoint an executive committee, composed only of the executive directors. In this case, the special duties of the non-executive directors include assessing whether the management board reports on company operations and the financial statements for the previous financial year are made correctly and reliably and providing the general meeting with an annual written report on the results of such assessment. To ensure permanent supervision over the management of company affairs, it is possible to establish a board of directors committee, composed only of the non-executive directors (Article 300^{76} of the CCC).

The regulations concerning the general meeting of shareholders in the SJSC are very similar to those regarding the shareholders' meeting in the limited liability company. The meeting is generally convened by the management board, but the extraordinary general meeting may also be convened by the supervisory board if it deems it appropriate. The right to demand convention of the meeting lies also with the shareholders representing at least one-twentieth of the total number of votes or shares. If the management board rejects the demand, the shareholders may apply to the court of registration for granting authorization to convene the meeting independently (Articles 300^{84} to 300^{85} of the CCC).

The right to participate in the meeting is enjoyed by a shareholder entered into the shareholders' register as of the date falling three days before the date of the general meeting (Article 300^{91} of the CCC).

The meeting may also be held electronically if so permitted by the articles of association, and is valid regardless of the number of shares represented (Article 300^{92} and Article 300^{94} of the CCC). As a rule, resolutions are passed by an absolute majority of votes (Article 300^{98} of the CCC).

10. DISSOLUTION AND LIQUIDATION OF THE SIMPLE JOINT-STOCK COMPANY

Generally, the SJSC is dissolved and liquidated just like the limited liability company and the joint-stock company. However, the provisions on the SJSC introduce a concept previously unknown to Polish companies. It is the possibility for a specified shareholder (acquiring shareholder) to acquire all the company's assets. This is regulated in Article 300^{122} of the CCC. The acquisition is conditional mainly on a relevant resolution by the general meeting, passed by a ¾ majority of votes in the presence of shareholders representing at least half of the total number of shares. Then the resolution is submitted to the registry court, which announces it and calls the creditors to lodge objections. The final decision is made by the registry court, which also examines any objections filed by the creditors. Another condition for the consent to the acquisition of assets is that the shareholder must demonstrate that, in all probability, the acquisition will cause no detriment to company creditors or shareholders, and any ob-

jection filed by a creditor must be deemed unsubstantiated. If an objection is lodged, the registry court shall decide to hold an open sitting. Immediately after the decision allowing the acquiring shareholder to take over the company assets becomes final and binding, the management board shall file a request to delete the company from the register. As of the date of such deletion, the acquiring shareholder shall assume all the rights and obligations of the deleted company.

Shareholder's option to acquire the company certainly makes the SJSC more attractive. In addition to the uncomplicated method of company formation, the convenient conditions of winding down company operations also favourably affect the efficacy of a given type of commercial company. The regulation is not free of doubts (such as those regarding the procedure and way of resolving creditors' objections[14]), but most of them will be dispelled by the judiciary. The prescribed measures for protecting other shareholders and creditors seem to be sufficient. The registry court may condition the shareholder's acquisition of assets on establishing collateral, and the acquisition resolution may be challenged on general terms.

11. LIABILITY OF MANAGEMENT BOARD MEMBERS

For the SJSC, the legislator has also introduced the concept of liability of management board members for the company's obligations, which had previously been characteristic only to the limited liability company. This occurs if enforcement carried out against the company turns out to be ineffective. A management board member may be released from such liability if he proves that a bankruptcy petition was filed in due time or that, at the same time, a decision was made to initiate the restructuring proceedings or to approve an arrangement in the proceedings for arrangement approval, or that he is not culpable for the failure to file the bankruptcy petition, or that the creditor has suffered no harm despite the failure to file the petition for bankruptcy and to make the decision to initiate the re-

[14] These are raised by Marcin Podleś, Lidia Siwik, „Likwidacja spółek z perspektywy projektowanej regulacji prostej spółki akcyjnej", Przegląd Prawa Handlowego 9(2018): 46.

structuring proceedings or to approve an arrangement in the proceedings for arrangement approval (Article 300132 of the CCC).

Personal liability of management board members for the company's obligations, if enforcement against the company's assets proves to be ineffective, seems to be a rather harsh solution from a comparative point of view. Under Polish law, however, it is not unusual. Such liability is provided by Article 299 of the CCC with a limited liability company. This does not affect the popularity of the limited liability company, which is the most numerous commercial company in Poland.

12. CONCLUSIONS

The modern concept of a company was not formed until the 19th century. This probably happened so late because it had been widely accepted for centuries that those who wish to run a business should hold personal liability for the related obligations. However, the Industrial Revolution and the associated demand for capital and optimum forms of running a business caused a departure from those assumptions and led to the creation of new legal forms of companies: first the joint-stock company and then the limited liability company. The modified axiology of commercial companies law assumed that since the shareholders are not liable for the company's obligations, they should supply the company with assets, which will then be used to satisfy the company's creditors (if still possible). Consequently, the possibility to provide work or services as a contribution to a company has been banned (the idea was that the object of contribution should have a real value to the creditor, that is – it should be enforceable for the creditor's benefit).

The obligation to make a contribution and the prohibition to return it has become the justification for the absence of personal liability of shareholders for the company's obligations. It was (rightly) claimed that a regulation that allows shareholders to benefit from the exclusion of personal liability and imposes no restrictions on them would be wrong. This assumption was pursued by the concept of share capital. On the one hand, it required the shareholders to engage a minimum but serious capital in their joint undertaking, and on the other hand, it blocked the assets for

the shareholders by banning any disbursements to them if the value of the assets fell below the value of the share capital

More than 150 years after the concept of a company was shaped, very serious changes were again experienced in the global economy. These changes can be compared to a certain extent with the economic changes that occurred at the end of the 18th century. The development of technology and the possibility to provide, on a mass scale, the services which are based on information processing and related technologies have increased the importance of 'intellectual capital'. The classical form of company, as a way of associating an idea and a capital, is no longer sufficient when confronted with the capital intensity of start-ups and the concern about the liability for the company's obligations justified by the scale of the business.

The emergence of the SJSC means that we deal with at least a partial modification of the concept of what 'a company' is. It is no longer based on combining the lack of personal liability and the prohibition to make a contribution in the form of work or services. In consequence, the promoters of SJSCs, mostly being the originators of the whole enterprise, will be able to keep control over the company by contributing 'intellectual capital'. This legal form also offers flexible methods of financing at a later stage of operation, by issuing bonds or subscription warrants convertible into bonds, as well as by offering a convenient management model (the option to establish a board of directors) and simplified methods of liquidation.

All this makes the SJSC a potentially effective legal form of business, not only for technology companies. We may rather expect that it will be used on a wider scale, and even predict that the number of new limited liability companies will decrease due to the possibility to set up an SJSC. This is because the SJSC is, in terms of its features, more similar to the limited liability company than to the joint-stock company.

There are obvious concerns related to the elimination of share capital and the new forms of protecting creditors' interests. The absence of minimum capital requirement and the solvency test used as an essential instrument to restrict money transfers between the company and its shareholders seem to impair creditor protection. However, did a fixed share capital protect creditors more effectively? Particularly in the Polish environment, where the minimum share capital was set at PLN 5,000 (slightly over EUR 1,000). Therefore, it seems that with the solvency test, com-

bined with compulsory write-offs on equity capital and personal liability of management board members for company's obligations, the effective degree of creditor protection will neither be higher nor lower than the degree provided by share capital, but it will be more efficient for companies.

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ON SOME INTERNATIONAL REGULATIONS IN GAIUS'S *INSTITUTES*

*Izabela Leraczyk**

ABSTRACT

The subject matter of the article concerns international regulations mentioned by Gaius in his *Institutes*. The work under discussion, which is also a textbook for students of law, refers in several fragments to the institutions respected at the international level – the status of the Latins, *peregrini dediticii* and *sponsio*, contracted at the international arena. The references made by Gaius to the above institutions was aimed at comparing them to private-law solutions, which was intended to facilitate understanding of the norms relating to individuals that were comprised in his work.

Key words: Gaius, Institutes, sponsio, peregrini dediticii, the Latins, international regulations

1. INTRODUCTION

The work entitled *Institutionum commentarii quattuor*[1] by the jurist Gaius[2], living in the 2nd century AD, is one of the most important works

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[1] This work was most probably written around the year 160 AD. Olga E. Tellegen-Couperus, A Short History of Roman Law, London-New York: Routledge, 1993, 100.

[2] Gaius, who is known only by his first name, is a rather mysterious figure. Despite of numerous hypotheses, it was not possible to reconstruct his life and even basic information, such as who he was and where he came from, is impossible to retrieve. Anthony

providing the grounds for research on the Roman law of the classical period[3]. Throughout the centuries it was believed that this work was lost and its fragments could be recreated only on the basis of other sources, among others the compilation of Emperor Justinian[4]. The ruler expressed his appreciation of Gaius's achievements, emphasizing that the work of the jurist was the most important source[5] on which the imperial *Institutes* were based, which is demonstrated for instance in the use of the same systematization[6]. Fragments of Gaius's *Institutes* are also to be found in the 5th-cen-

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M. Honoré, Gaius. A Biography, Cambridge: Clarendon Press, 1962, 12–17; Tomasz Giaro, "Gaius", In: Der Neue Pauly. Enzyklopädie der Antike, vol. 4, ed. H. Cancik, H. Schneider, Stuttgart: Metzler, 1998, 737.

[3] It is assumed that the classical period of Roman law lasted from the establishment of the principate by Octavian Augustus and ended with the end of the rule of the Severan dynasty. Max Kaser, Das römische Privatsrecht, vol. 1, ed. 2, Munich: CH BECK, 1955, 159–168.

[4] Gaius commented, among others, on the Law of the Twelve Tables, leges Iulia et Pappia Poppea, senatus consultus Tertulianum and s.c. Orfitianum, as well as on the edict of the municipal and provincial praetor. Their fragments were also found in the compilation of Justinian. Tony Honoré, Justinian's Digest: Character and Compilation, Oxford: Oxford University Press, 2010, 24. Although his contemporaries rarely referred to his opinions, he was appreciated in the era of post-classical law. The law on citation included in the Theodosian Code, issued in 426 AD by Valentinian III and Theodosius II, sanctioned a long-standing practice in accordance with which the opinions of Gaius, together with the writings of Papinianus, Paulus, Ulpian and Modestinus, had binding force so that their authority could be summoned before the court. C.Th. 1.4.3: *Impp. Theod. et Valentin ad senatum urbis Romae: Papiniani, Pauli, Gai, Ulpiani atque Modestini scripta universa firmamus ita, ut Gaium quae Paulum, Ulpianum et ceteros comitetur auctoritas lectionesque ex omni eius corpore recitentur.*

[5] Prooem. Inst. 6: *Quas ex omnibus antiquorum institutionibus et praecipue ex commentariis Gaii nostri tam institutionum quam rerum cottidianarum aliisque multis commentariis compositas* […] *et plenissimum nostrarum constitutionum robur eis accommodavimus*.

[6] The systematization *personae-res-actiones* created by Gaius was recreated by Justinian. The systematics had a great impact on the later fate of the systematization of law. A similar division was used for the content of the French Civil Code of 1804 (Code civil des Français) and the Austrian Civil Code of 1811 (ABGB). Also, the Canon Law Code of 1917 was based on this scheme. Andrzej Sacher, „Personae-res-actiones", In: Leksykon tradycji rzymskiego prawa prywatnego. Podstawowe pojęcia, ed. Antoni Dębiński, Maciej Jońca, Warsaw: CH BECK, 2016, 285–286. See also: Max Kaser, Das römische Privatsrecht, vol. 1, Munich: CH BECK, 1955, 167.

tury *Collection of Moses and Roman law* (*Mosaicarum et Romanarum legum collatio*), being a collection juxtaposing fragments of the Old Testament, the writings of the jurists from the classical period and the imperial constitutions[7]. Only in the year 1816, the German historian Barthold Georg Niebuhr announced that one of the manuscripts located in the collection of the Library of Verona is precisely Gaius's *Institutes*[8], unknown until then as a complete text. The text and its author have been therefore the subject of analysis for "merely" two hundred years and numerous articles and studies have already been devoted to it[9].

The discussed work is a textbook for studying law[10]. Written in a very communicative language, the work is divided into four commentaries. The first book, entitled *De personis*, concerns introductory knowledge – the division of law and its sources, the division of people into freemen, slaves, as well as the division into the freeborn and freed persons. Further, the text concentrates on the division of persons into the *sui iuris* and *alieni iuris,* and those remaining under care or guardianships. Book Two and Three entitled *De rebus* focus on property law – the division of property, its acquisition, types of ownership, as well as types of inheritance – and, finally, the law of obligations and its categories. The last book of the series, Book Four, is entitled *De actionibus* and includes an elaboration on the subject of complaints, together with a description of issues related to the conducting of legal trials.

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[7] Antoni Dębiński, Zbiór prawa Mojżeszowego i rzymskiego. Tekst łacińsko-polski, transl. and glossary, Lublin: Wydawnictwo KUL, 2011, 13.

[8] Artur A. Schiller, Roman Law: Mechanisms of Development, Berlin: Walter de Gruyter, 1978, 43–46.

[9] Among the output of Polish Romanists one should mention at least such works as Juliusz Wisłocki, "Spór o Gaiusa", Czasopismo Prawnicze i Ekonomiczne 33(1945): 93–98; Jan Kodrębski, "Gaius i Pomponius jako nauczyciele prawa rzymskiego", Zeszyty Naukowe Uniwersytetu Łódzkiego 108(1976): 15–28; Maria Zabłocka, "Czy w okresie renesansu znano Instytucje Gaiusa?", Studia Iuridica 37(1999): 183–190; Witold Wołodkiewicz, "Gaius weroński odzyskiwany", Palestra 58. 3–4 (2013): 242–247, together with the cited literature.

[10] Renato Quadrato, Le Institutiones nell'insegnamento di Gaio: omissioni e rinvii, Naples: Jovene, 1979, 3. The very term "institutes" derives from the verb "to instruct", "to train up", "to teach", "to educate" (*instituere*). Charlton T. Lewis, Charles Short, A Latin Dictionary, Oxford: The Clarendon Press, 1956, s.v. *instituo*, 969.

Even though the structure and content of the *Institutes* concern Roman law, some of the fragments include references to other legal orders[11]. The analysis below aims to establish whether they include international regulations.

2. *IUS GENTIUM*

In the first fragment of Book One Gaius remarks that "So the laws of the people of Rome are partly peculiar to itself, partly common to all nation"[12]. The "ius common to all men" is a law which natural reason establishes among all men and is observed by all peoples alike. It is called the ius gentium, as being the ius which all nations employ[13].

In Gaius's understanding, repeated by Justinian, *ius gentium* was juxtaposed with *ius civile*[14]. Thus, it referred to the provisions of private law applied by all the people, whose roots the Romans located in the natural law *(ius naturale)*[15]. It should not be forgotten that under the term *ius gentium* one could also find the effects of the law-making activity of the praetors, especially those made by the magistrate for foreigners (*praetor peregrinus*)[16]. This activity was based on introducing legal solutions applied in other legal

[11] In his Institutes Gaius makes references to other legal systems, even though those are very laconic remarks. Still, he emphasizes that "although if we ascertain what the law is among aliens by searching the records of other states we might come to a different conclusion" (Gai 3.96: *nam apud peregrinos quid iuris sit, singularum civitatium iura requirentes aliud intellegere poterimus*). Transl. Francis de Zulueta.

[12] Gai 1.1:…*Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur*.

[13] Gai. 1.1:…*quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, qusi pro iure omnes gentes utundur*.

[14] Inst. 1.2.1.

[15] Maciej Jońca, „Ius gentium", In: Leksykon tradycji rzymskiego prawa prywatnego, ed. Antoni Dębiński, Maciej Jońca, 202–203. See also: Martin David, Hein L.W. Nelson, Gai Institutionum Commentarii IV. Kommentar, vol. 1, Leiden: Brill, 1954, 3–6.

[16] Adolf Berger, Encyclopedic Dictionary of Roman Law, Philadelphia: The American Philosophical Society, 1953, s.v. ius gentium, 528–529. More on the subject of the ius gentium and its categorization: Max Kaser, Ius gentium, Koln: Böhlau, 1993, together with the reference material.

systems[17] to the annual edicts, which facilitated the resolution of disputes in which one of the sides did not have Roman citizenship[18]. At the same time, the ancient Romans used this term to denote, among others, the laws applied by parties being in a state of war with one another, regulations regarding the parliamentary immunity or the norms regulating the rights and obligations of the contracting parties[19]. Such an opinion was expressed not only by the historians but also by some jurists[20].

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[17] At the beginning of the annual office, the newly-chosen praetor would issue an edict in which he announced the principles he was going to follow during his term of office. In issuing such edicts, the praetors often relied on the solutions worked out by their predecessors, as well as on the regulations and institutions known in other legal orders. Theodor Mommsen, Römisches Staatsrecht, vol. 2.1, Basel 1888, reprint Cambridge: Cambridge University Press, 2009, 196. On the subject of the role of the praetor in the shaping of international regulations in the period of the Republic, see also: Gordon E. Sherman, "The Nature and Sources of International Law", The American Journal of International Law 15.3(1921): 355; Saskia T. Roselaar, "The Concept of Commercium in The Roman Republic", Phoenix 66.3–4 (2012): 396–398. The praetors' law-making activity ended with the issueing of edictum perpetuum on Emperor Hadrian's orders. Franz Wieacker, Römische Rechtsgeschichte, vol 1, Munich: CH BECK, 1988, 465.

[18] Eventually, when both parties did not have Roman citizenship but were resolving the dispute in Rome. D. 1.2.2.28. David Daube, "The Peregrine Praetor", The Journal of Roman Studies 41.1–2 (1951): 66–70.

[19] For instance, Livy emphasized that the violation of the bodily integrity of a foreign legate is a violation under the *ius gentium*. See: Izabela Leraczyk, "The Consequences of Violating the Immunity of Carthaginian Envoys in the Light of Liv. 38.42.7 And Val. Max. 6.6.3", Review of European and Comparative Law 32(2018): 19–40. At the same time, the ancient authors with regard to the international legal institutions also used some other expressions. Livy himself, in the first words of Book One Ab urbe condita indicates that the defeated Trojans were treated in accordance with the law of war (*ius belli*), which he considered to be cruel. Liv. 1.1.1. Describing the sacking of Capsa after the capturing of the city, Sallust wrote that the Roman deed was a violation of the law of war (ius belli). Sall. *Iug*. 91.7–8. Further, in Cicero's writings, one can find the *ius belli atque pacis* or *ius bellicum*. Cic. *de off*. 3.29.

[20] A fragment of the thirty-seventh book of Pomponius's commentary to the writings of Quintus Mucius Scaevola was added to the Digests, in which it was pointed out that hitting an emissary of the enemy country is a deed contrary to the *ius gentium*. (D. 50.7.18.1). Pomponius lived in the times of Emperor Hadrian and Antonius Pius. He was the author of treatises on civil law, including commentaries on the works of his predecessors. Adolf Berger, Encyclopedic Dictionary of Roman Law, s.v. Pomponius, Sextus, 635. Scaevola, on the other hand, lived in the times of the late Republic, in the 1st century BC. Adolf Berger,

Gaius did not explain what the *ius gentium* was for him and his contemporaries. A sentence taken out of the context might indeed indicate that the jurist could have had in mind not only the regulations applied between individuals but also the norms in force on the international arena, applied by such entities as states or peoples[21]. Therefore, in order to understand fully the discussed *passus*, we should reach to other fragments of the *Institutes* and analyze them in accordance with the layout of the content of the textbook.

Analyzing "the law which regards persons" (*ius, quod ad personas pertinet*) the jurist indicated that "Slaves are in the power of their proprietors a power recognized by ius gentium"[22]. He further explained that the rights of the owners with regard to slaves are similar to all people. For instance, slave owners had the power over life and death (*ius vitae necisque*), which meant that the owner could kill his slave but it did not incur civil liability[23]. The law was modified under the rule of Emperor Antoninus, who, as quoted by Gaius, issued a constitution stating that "neither Roman citizens nor any other persons who are under the empire of the Roman people are permitted to indulge in excessive or causeless harshness towards their slaves"[24]. The jurist presented a modification of the *ius gentium*, refer-

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Encyclopedic Dictionary of Roman Law, s.v. Mucius, 588. A closer look at the chronology of the life of the above jurists makes it possible to claim that the concept of the *ius gentium*, as also covering international relations, was well-established since the times of the Republic until the Justinian era.

[21] On the international arena, subjectivity was enjoyed by the entities described in the sources as *civitas*, which could be translated as "cities", "states", or "communes", but also as "peoples" or "population", with regard to whom the word *populus* was used. The above terms might include inter-city relations. Colleman Phillipson, The International Law and Custom of Ancient Greece and Rome, vol. 2, London: MacMillan, 1911, 34.

[22] Gai 1.52: *Quae quidem potestas iuris gentium est: Nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse, et quodcumque per servum adquiritur, id domino adquiritur*.

[23] Raymond Westbrook, "*Vitae Necisque Potestas*", Historia: Zeitschrift für Alte Geschichte 48.2(1999): 204.

[24] Gai 1.53: *Sed hoc tempore neque civibus Romanis nec ullis aliis hominibus, qui sub imperio Romani populi sunt, licet supra modumet et sine causa in servos suos saevire.* See: Martin David, Hein L.W. Nelson, Gai Institutionum Commentarii IV. Text, Leiden: Brill, 1954, 71–77.

ring simultaneously to one of the regulations applied on the international stage – the acknowledgment of the authority of the Roman people (*imperium populi Romani*). The acknowledgment of the superior role of Rome in international relations was guaranteed under the peace treaty regulations. The laws which in literature are referred to as the *maiestas-Klausel* appeared in international agreements in the period of the mature Republic when Rome with its conquests established its position of hegemony with regard to other nations[25].

The selected issues with regard to the acquisition of ownership were connected by Gaius with the natural law (*ius naturale*)[26] or the natural criterion (*naturalis ratio*)[27]. Taking into account the fragment opening the first book of the *Institutes*, it should be assumed that Gaius understood the concepts of the *ius gentium* and *ius naturale* as certainly synonymous terms, if not entirely identical[28]. According to the jurist, this group included the specific primary methods of acquiring property[29]. However, from the perspective of international regulations, only one fragment is especially significant, the one discussing the ownership of the spoils of war: "Capture from an enemy is another title of property by natural law"[30]. The property of the enemy (*res hostiles*) acquired as part of war activities be-

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[25] More on the subject: Izabela Leraczyk, Ius belli et pacis w republikańskim Rzymie, Lublin: Wydawnictwo KUL, 2018, 175–178, together with the cited literature.

[26] Gai 2.65; 73.

[27] Gai 2.69; 79. *Cf.* D. 41.1.1 pr.

[28] Coleman Phillipson, The International Law, vol. I, 80. In Gaius's theory, the *ius naturale* is not considered as equal to the *ius gentium* and *ius civile*, but provides both the source and justification for the *ius gentium* and *ius civile*. Martin David, Hein L.W. Nelson, Gai Institutionum Commentarii IV. Text, 3; Benedict Forschner, Law's Nature: Philosophy as a Legal Argument in Cicero's Writing, In: Cicero's Law. Rethinking Roman Law of the Late Republic, ed. Paul du Plessis, Edinburgh: Edinburgh University Press, 2016, 62–63. Herbert Wagner, Studien zur Allgemeinen Rechtslehre des Gaius. Ius gentium und ius naturale in ihrem Verhältnis zum ius civile, Zutphen: Terra, 1978, 120. For Ulpian, the sources of private law included already the *ius civile*, *ius gentium* and *ius naturale*. D. 1.1.2.

[29] Gai 2.66–79.

[30] Gai 2.69: *Ea quoque, quae ex hostibus capiuntur, naturali ratione nostra fiunt*. Gaius presented it in an almost identical way in a fragment of Book Two of his work *Everyday Matters or Golden Words* included in the Digests. D. 41.1.5.7

came the property of the Romans[31]. Those goods which were acquired on the territory of the enemy were sold and the income would go to the state treasury. The spoils of war acquired during an assault on a town (*direptio*) were left at the disposal of the soldiers[32].

Moving beyond the dichotomy *ius gentium* and *ius civile*, Gaius remarks that "if anything should be done to violate a treaty, an action is not brought under the stipulation, but the property is claimed by the law of war"[33]. The jurist thus literally points out to the fact that the consequences resulting from the breach of the provisions of the peace treaty are drawn under the laws of war, without referring to any other legal orders. Unfortunately, the lack of any references to *ius belli* in the textbook makes it impossible to determine whether this law was for Gaius a part of *ius gentium*.

3. *PEREGRINI DEDITICII* AND THE LATINS

While discussing the division into freemen and slaves, Gaius indicated that there are three classes of freedmen, namely, Roman citizens, Latins, and deditícii[34]. The jurist referred to the freedmen as Junian Latins. The fragment in which he was describing this group did not survive until the present times, however, from the preserved text it transpires that he derived that name from the colonial Latins, who enjoyed the privilege of the *ius Latii*. The origins of the privilege go back to the archaic times. In the times when the Roman Kingdom was ruled by the Kings and during

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[31] With regard to the property acquired from the enemy Roman jurists used descriptive terms, such as *ex hostibus capiuntur* or *res hostiles*, whereas in the literary sources the term praeda bellica appeared, denoting the spoils of war. Ferdinando Bona, "Preda di guerra e occupazione privata di res hostium", Studia et Documenta Historiae et Iuris 25 (1959), 355. See also: Rosanna Ortu, "Praeda bellica: La guerra tra economia e diritto nell'antica Roma", Diritto@ Storia 4 (2005): 1-70.

[32] Adam Ziółkowski, "Urbs direpta, or How the Romans Sacked Cities", In: *War and Society in the Roman World*, ed. John W. Rich, Graham Shipley, London-New York: Routledge, 2002, 90.

[33] Gai 3.94: *quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur*.

[34] Gai 1.12

the period of the early Republic, Rome was connected with Latin communities by way of treaties, which gave rise to the Latin League. The latter made international agreements guaranteeing the participating parties entitlements such as the right to enter into marriage (*ius conubii*), the right to conduct noble activities – in the light of Roman law (*ius commerci*), the right to free movement (*ius migrandi*), which allowed the adoption of the citizenship of a different commune by simple starting to live in it[35]. The existence of the League came to an end in the year 340 BC with the outbreak of the Latin war, caused by the misuse by Rome of its dominant position. After the conflict was ended, the Romans regulated their relations with the Latin towns on the grounds of bilateral treaties, differentiating the privileges which they bestowed on their towns (*ius Latii*). Such a state of affairs lasted until the year 90 BC when after another rebellion the Romans decided to grant the Latins Roman citizenship under the *lex Iulia de civitate Latinis danda*[36]. In the times of Gaius, on the other hand, there existed the colonial Latins, that is the inhabitants of the colonies established by the Romans. The *coloniae* were established for political, economic or military reasons and their creation was accompanied by the granting of certain entitlements. Those were entities strictly depended on Rome and on the authorities of specific provinces and therefore they were exempt from international regulations[37].

While describing the legal status of particular groups, Gaius indicated that under the *lex Aelia Sentia*[38], "slaves…[who have afterward been]

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[35] Gary Forsythe, A Critical History of Early Rome: From Prehistory to the First Punic War, Berkeley: University of California Press, 2006, 184.

[36] John Enoch Powell, "The Fate of the Foedus Cassianum", The Classical Review 48.1(1934): 14.

[37] Adrian N. Sherwin-White, The Roman Citizenship, Oxford: Clarendon Press, 1973, 117–118. With regard to the times close to Gaius, it is worth mentioning the problems with the supervision of municipal spendings in Apamea (*Colonia Iulia Concordia Apamea*), which Pliny the Younger, the governor of Bithynia and Pontus, described in his letter to Emperor Trajan. Plin. *Ep*. 10.47. Antoni Dębiński, Maciej Jońca, Izabela Leraczyk, Agata Łuka, Pliniusz Młodszy. Korespondencja z cesarzem Trajanem. Komentarz, Lublin: Wydawnictwo KUL, 2017, 150–154.

[38] *Lex Aelia Sentia* was established in year 4 AD and its aim was to limit the emancipation of slaves. The law established age restrictions both for the owners and slaves. It also modified the very procedure of granting freedom to slaves. Adam Wiliński, "Zur Frage

manumitted by the same, or by another proprietor" shall become free, and belong to the same class as that of enemies who have surrendered at discretion[39]. Such status was given to freedmen, who when still as slaves were punished by their owners by being tied up or by burning out a stigma on them. Slaves who during torture admitted to having committed an offense *(noxa)* were treated in a similar way. Similarly, the same fate awaited those who were sent to fight in combat or with wild animals, who were placed in a school for gladiators or prison and were later freed[40]. In the further part of his argumentation, Gaius points out that "Those enemies are called dediticii who, having formerly taken up arms and fought against the Roman people afterward have been conquered and have surrendered at discretion"[41].

Surrender (*deditio*) was known by the Romans already in the times of the Kings and the early Republic[42]. It was understood as a voluntary submission to the power of Rome or as surrender as a result of the end of military activity and losing the war[43]. Livy in his account says that this act consisted of asking questions and receiving answers in an alternating way and their content had been unaffected for centuries[44]. The procedure was aimed to establish several issues. The first one was to verify whether the legates from the other side had a sufficient mandate from their people

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von Latinern ex lege Aelia Sentia", Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung, 80(1963): 378–392. It was a second act, next to *Lex Fufia Caninia* of the year 2 AD, regulating those issues. Maria Zabłocka, „Polityka dynastii julijsko-klaudyjskiej wobec wyzwoleń i wyzwoleńców", Prawo kanoniczne 27.1–2(1984): 223–239.

[39] Gai 1.13: *Lege itaque Aelia Sentia cavetur, ut, qui servi… et postea vel ab eodem domino vel ab alio manumissi, eiusdem condicionis liberi fiant, cuius condicionis sunt peregrini dediticii*.

[40] The act of freeing could have been done by both the owner who had imposed punishments or any other next proprietor. Gai 1.13.

[41] Gai 1.14: *Vocantur autem peregrini dediticii hi, qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde victi se dediderunt*. Transl. S.P. Scott.

[42] Liv. 1.37.

[43] On the subject of the concept, types and legal character of surrender, See: Izabela Leraczyk, Ius belli et pacis w republikańskim Rzymie, Lublin: Wydawnictwo KUL, 2018, 187–223, together with the cited literature.

[44] Liv. 1.38.1–2.

to conduct surrender[45]. Further, they were asked whether the surrendering peoples were sovereign. Next, the main part of the submission took place, that is, a question was asked whether the legates submit themselves, their peoples and all the property belonging to them to the authority of Rome[46]. In the times of the Kings, the act of surrender was received by a ruler, and since the times of the Republic this role belonged to the chief commanders of the army, which is mostly consuls, in possession of the *imperium*[47].

The consequence of *deditio* was primarily the loss of sovereignty. The peoples who submitted to Rome lost their sovereignty on the international scene, becoming an entity entirely dependent on Rome. Free people, who so far had enjoyed privileges to which they were entitled by virtue of having specific citizenship, became *dediticii*. What is significant, their *status libertatis* did not change and they remained free people. However, it should be remembered that the Romans followed the rule of the subjectivity of the law, which meant that with regard to the people belonging to a specific *civitas*, they applied the laws of their people. Following their surrender, *peregrini dediticii* forfeited their right to rely on their civil rights. Therefore, the only order they were then subject to was the *ius gentium*[48].

With regard to the situation of the freedmen equalled in status with *peregrini dediticii*, Gaius refers to them descriptively as "belonging to

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[45] The verification whether the legates held the appropriate mandate took place in an oral form. However, Livy pointed out that after the capturing of Heraclea, the Aetolian emissaries arrived to the Roman consul and produced written authority stating that they were authorized to carry out the surrender. Liv. 36.28.2–3.

[46] Both Livy and Polybius indicate that in the formula of surrender there are questions concerning very specific issues: borders, temples, and tombs, as the things belonging to the triad *res sacrae-sanctae-religiosae*, private and public property, as well as questions about freemen and slaves. Liv. 1.38.1-2; Pol. 36.2.2-4. Henryk Insadowski, Opera selecta, Lublin: Wydawnictwo KUL, 2014, 32–33.

[47] As opposed to the solemn conclusion of the peace treaty (*foedus*) or the formal declaration of the just war (*bellum iustum*), the college of fetiales did not participate in the act of surrender. Alan Watson, International Law in Archaic Rome, Baltimore: John Hopkins University Press, 1993, 49–50.

[48] According to Max Kaser, Das römische Privatrecht, vol. 1, Munich: CH BECK, 1955, 179–181, *dediticii* could resort to the protections guaranteed to them by *pretor peregrinus*.

the category of the conquered" (*dediticiorum numero sunt*)[49], adding that "the lowest degree of freedom is possessed by those who belong to the class of dediticii nor is any way afforded them of obtaining Roman citizenship either by a law, by a Decree of the Senate, or by an Imperial Constitution"[50]. He also indicates that on the grounds of *lex Aelia Sentia* the freedmen could lose their freedom, staying or living in Rome or within 100 miles from the town[51]. Those regulations were implemented in a statutory procedure; thus, it is assumed that the freedom of foreigners who subjected themselves to surrender was not threatened in the same way. Gaius himself emphasizes that

> In conclusion, it should be noted that, as it is provided by the Lex Aelia, Sentia that slaves who have been manumitted for the purpose of defrauding a patron, or creditors, do not become free; for the Senate, at the suggestion of the Divine Hadrian, decreed that this rule should also apply to foreigners, while the other provisions of the same law do not apply to them[52].

Apart from the threat of losing freedom, the status of freedmen falling into the category of the subjugated differed in one more aspect from the status of the foreigners who were the *dediticii*. On the international stage, the lack of legal personality was most often a temporary state[53]. The Romans endeavored to establish a form of government and for this reason, they conducted restitution, consisting in the return to the state of previous freedom and property of the whole community[54]. Further, a peace treaty was concluded, regulating mutual relations[55].

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[49] Gai 1.12; 15; 25, 26.

[50] Gai 1.26: *Pessima itaque libertas eorum est, qui dediticiorum numero sunt; nec ulla lege aut senatus consulto aut constitutione principali aditus illis ad civitatem Romanam datur*. Transl. S.P. Scott.

[51] Gai 1.27. *Cf.* Gai 1.160.

[52] Gai 1.47: *In summa sciendum est, quod lege Aelia Sentia cautum sit, ut creditorum fraudandorum causa manumissi liberi non fiant, hoc etiam ad peregrinos pertinere, cetera vero iura eius legis ad peregrinos non pertinere*. Transl. S.P. Scott.

[53] Andrew Lintott, Imperium Romanum. Politics and Administration, London-New York: Routledge, 1993, 18.

[54] Dieter Nörr, Aspekte des römischen Völkerrechts: Die Bronzetafel von Alcantara, Munich: Bayerische Akademie der Wissenschaften, 1989, 51–64.

[55] Werner Dahlheim, Deditio und societas. Untersuchungen zur Entwicklung der römischen Aussenpolitik in der Blütezeit der Republik, Munich: Dissertation, 1965, 55.

The fragment of the *Institutes*, which undoubtedly refers to the international law is a *passus* from Book Three, located in the section on stipulations[56]:

> Therefore, it is said that there is one instance in which an alien may be bound by this phrase, that is to say, when our Emperor interrogates the ruler of a foreign people with reference to concluding peace, as follows: "Do you solemnly agree that peace shall exist?" or where the Emperor himself is interrogated in the same manner. This, however, is said to be too subtle a refinement, for if anything should be done to violate a treaty, an action is not brought under the stipulation, but the property is claimed by the law of war[57].

Gaius indicates that peace (*pax*) is a factual state, guaranteed by the contracting of an agreement (*pactum*)[58] by the parties. It is confirmed by Ulpian: an agreement (*pactum*) is named so from the word "to make an agreement" (*pactio*), which is also a root word for "peace" (*pax*)[59]. The provisions of such an agreement could pertain to all areas of life, including economic, political or religious issues, but the most important part were the common guarantees of refraining from conducting war activities.

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[56] On the grounds of Roman private law, stipulation (*stipulatio*) was an oral contract coming into being by voicing a question by the creditor (*stipulator*) and by the answering of the debtor (*promissor*) with the use of strictly specified formulas. It was based on an oath taken in precisely specified words – the creditor asked the question in such a form so that it could be answered with one word only: the verb "promise" (*spondeo*). Kazimierz Kolańczyk, Prawo rzymskie, Warsaw: Lexis Nexis, 1999, 373-375; Max Kaser, Das römische Privatrecht, vol. 1, 168.

[57] Gai 3.94: *Unde dicitur uno casu hoc verbo peregrinum quoque obligari posse, velut si imperator noster principem alicuius peregrini populi de pace ita interroget: PACEM FVTVRAM SPONDES? vel ipse eodem modo interrogetur. quod nimium subtiliter dictum est, quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur.* Transl. S.P. Scott.

[58] On the grounds of private law, the term *pactum* was applied with regard to informal agreements (*nuda pacta*), which either did not include in its content the provisions provided for by the law, or they were not concluded in the form determined by the law. Max Kaser, Rolf Knütel, Römisches Privatsrecht, Munich: CH BECK, 2003, 240–241.

[59] D.2.14.1.1: *Pactum autem a pactione dicitur (inde etiam pacis nomen appellatum est)*. The term *pactum* could mean also negotiations. D. 49.15.12 pr.

In the republican times, *sponsio* was, next to truce (*indutiae*)[60], a temporary treaty aimed to suspend the actual military activity. It was a personal commitment of a military commander who promised that the authorities of his state would honour the negotiated agreement. In the case of the lack of approval from relevant authorities, the responsibility with regard to the second party was borne by the general who had made the promise[61]. In literary sources there are few examples of concluding such agreements. The most famous examples include Livy's account of the events of 321 BC concerning the so-called Caudinian peace[62] and the agreement of 137 BC described by Livy and Appian concluded by consul Gaius Hostilius Mancinus who promised a peace treaty to the Numantines[63]. Nevertheless, in the subject literature it is indicated that the examples presented in the writings of the historians could have been the conclusions of peace agreements and the lack of the possibility of annulling such agreements would result in the application of a legal instrument facilitating the Roman withdrawal from the commitments made without any liability to the other party of the agreement[64].

The international agreement mentioned by Gaius would be concluded on behalf of Rome by the *imperator*, which in the translation by Francis de Zulueta appears as the "Emperor". In the times of the Kings and of the Republic this concept was used with regard to higher magistrates and military commanders in possession of the *imperium militiae*[65]. Since the times of Octavian Augustus, the term *imperator* was used in the official imperial

60 Truce was understood as a "rest from war" (Gell. 1. 25.1–2: *belli feriae*). The juridical sources include an explanation from Paulus: truce is a short and temporary agreement of the two parties about stopping mutual violence. (D. 49.15.19.1: *Indutiae sunt, cum in breve et in praesens tempus convenit, ne invicem se lacessant*). Theodor Mommsen, Römisches Staatsrecht, vol. 3, 1165.

61 C. Phillipson, International Law, vol. 2, London: MacMillan, 1911, 283.

62 Liv. 9.3–9.

63 App. *Ib*. 83; Liv. *Per*. 55–56.

64 Michael H. Crawford, "Foedus and Sponsio", Papers of the British School at Rome 41(1973): 1–7.

65 Robert Develin, "Lex curiata and the Competence of Magistrates", Mnemosyne 30.1(1977): 49–65.

titular[66]. This is the meaning that appears in German or English translations[67]. Thus, if we assume that it was the Emperor who acted on behalf of Rome, the *sponsio* had to be of a perpetual character[68].

Next to the similarities to the private-law stipulation contract, the form of concluding *sponsio* is compared to the above-mentioned republican procedure of accepting submission (*deditio*). Even though known from the archaic times, surrender began to be applied by the Romans on a broader scale around the 2nd century BC, that is in the times when they established their dominant position in the Mediterranean region. Due to that, they could impose their policies and strike agreements in which the other party would accept the superior position of Rome and its authority. It is visible in the very form of accepting surrender or the form of *sponsio* mentioned by Gaius. It was the "acquiring" party that asked the questions and the other party could merely voice confirmation or contradiction, using the specifically determined verbs (in the first person singular or plural). Therefore, the ceremony itself excluded the equivalence of the two sides[69].

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[66] *Cf.*: Plin. *Ep*. 10.1. Antoni Dębiński, Maciej Jońca, Izabela Leraczyk, Agata Łuka, Pliniusz Młodszy. Korespondencja z cesarzem Trajanem. Komentarz, Lublin: Wydawnictwo KUL, 2017, 22–23.

[67] Nadine Grotkamp, Völkerrecht im Prinzipat Höglichkeit und Verbreitung, Frankfurt am Main: Nomos, 2009, 49; Gai Institutiones or Institutes of Roman law, transl. Edward Poste, Introduction: Abel H.J. Greenidge, Oxford: Clarendon Press, 1904, 330.

[68] Nadine Grotkamp, Völkerrecht im Prinzipat Möglichkeit und Verbreitung, Frankfurt am Main: Nomos, 2009, 49. At the same time, it is worth taking into consideration Ulpian's opinion from his *Commentary* to the edict, in which he states that "the concluding of a peace agreement is a public agreement <which occurs> whenever the leaders who conducted war activities come to an agreement on the specific issues". D. 2.14.5: *Publica conventio est, quae fit per pacem, quotiens inter se duces belli quaedam paciscuntur.* Ulpian mentions generals (*dux*), which might suggest that the chief commanders of the army were entitled to strike agreements with the enemy. However, in such a case their decisions would have to be approved of by the emperor and until the approval such an agreement would not be binding.

[69] It looked entirely different in the case of the sacral-legal ceremony of concluding a peace treaty (*foedus*), where both sides swore to abide by the agreements provided for in the treaty. Obviously, it did not entail that the treaty guaranteed equal rights to both parties of the agreement. On the subject of the procedure of contracting a treaty, See: Robert J. Penella, "War, Peace, and the ius fetiale in Livy 1", The Classical Philology 82(1987): 233–237; Giovanni Turelli, Audi Iuppiter. Il Collegio dei Feziali nell'esperienza giuridica romana, Milan: Giuffrè, 2011, 55–81.

And even though the jurist emphasized that the emperor could also be "asked" about peace, it does not mean that during one ceremony both sides would make such mutual assertions. The use of the conjunction *vel* suggests that the jurist had in mind a different act.

At the end of his account, Gaius points out to the penalties which might be incurred should the provisions of the agreement be violated. He emphasized that there was no possibility of pursuing claims by way of legal procedure as was the case in private law agreements. The banality of this statement might be surprising, but it should be remembered that the *Institutes* was intended as a textbook for studying law and matters which, otherwise might seem fairly obvious, did not have to be so straightforward for the adepts of the legal science. The jurist indicates that the pursuit of one's rights is possible only on the grounds of the war laws (*sed iure belli res vindicatur*). In such understanding, the concept of *ius belli* refers to the international custom well-established in the antique world and the concept of the just war (*bellum iustum*) observed by the Romans[70].

The breaking of the provisions of the peace agreement was treated as sufficient condition for the declaration of war (*iusta causa belli*)[71]. However, in order to pursue one's claims by way of military action, the injured party had to first seek reparation for the sustained damage. Should that course of action fail, the affected side was allowed to initiate military action[72]. Thus, war was one of the methods of seeking solution to international disputes, but the declaration of war was subject to specific conditions.

5. CONCLUSION

In Gaius's *Institutes* one can find traces of international regulations, even though they are not exactly where we might want to see them in

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[70] Herbert Hausmaninger, "*Bellum iustum* und *iusta causa belli im älteren römischen Recht*", Osterreichische Zeitschrift fur offentliches Recht 11(1961): 337; Jörg Rüpke, Domi militiae. Die religiöse Konstruktion des Krieges in Rom, Stuttgart: Franz Steiner Verlag, 1990, 121.

[71] Coleman Phillipson, International Law, vol. 2, 182.

[72] Alan Watson, International Law, Baltimore: John Hopkins University Press, 1993, 10–11.

the first place. The *ius gentium* is for the jurist, at least for his textbook, the law regulating the relations between various entities, but not between the subjects recognized on the international stage. He mentions them mostly in the fragments in which he wanted to emphasize the origins of specific institutions applied by the Romans, especially their antique nature and the fact that they were shared by various peoples. As if on a side note, he points out to the custom of accepting the superiority of Rome on the international arena, as well as to the problem concerning the property belonging to the enemy.

References to the Latins and foreigners having the status of the *dediticii* point to the reminiscences of archaic institutions, raised to describe the legal situation of the freedmen. The very *peregrinin dediticii* are referred to only in the fragment in which Gaius explains that those were the peoples who "once" (*quondam*) remained in a state of war with Rome.

The institution of international law is the *sponsio*, even though on the basis of the available sources it is not possible to determine its legal status. The difficulties result primarily from the fact that in the times of the principate, after the conquests of Octavian Augustus, his successors significantly limited their military ambitions and abandoned the policy of conquests[73]. This period, lasting also during Gaius's lifetime, is referred to as the *Pax Romana*[74] and a significant decrease in the number of ongoing wars necessarily resulted in a diminished need for resorting to the international institutions and customs.

Gaius created a textbook for studying the law sciences, containing knowledge on the subject of then contemporary regulations in private law. It is from this perspective that the content of the *Institutes* is reconstructed and analyzed. The above conclusions prove, therefore, that this text provides ample material for research on antique, international custom.

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[73] Adam Ziółkowski, Historia powszechna. Starożytność, Warsaw: PWN, 2009, 800.

[74] The *Pax Romana* refers to the period of relative peace within the *Imperium Romanum* and the decrease in the number of external conflicts. This phenomenon is broadly accounted for in historical literature, See: Adrian Goldsworthy, Pax Romana: War, Peace and Conquest in the Roman World, New Haven: Yale University Press, 2016, together with the cited literature.

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IMPLEMENTATION OF THE EUROPEAN UNION REQUIREMENT TO COORDINATE ACTIVITIES OF PUBLIC ADMINISTRATION AUTHORITIES IN THE PROCESS OF THE AUTHORISATION, CERTIFICATION, AND LICENSING OF RENEWABLE ENERGY SOURCES INVESTMENTS

*Kamila Sobieraj**

ABSTRACT

The aim of this article is analysis of one of the barriers to the functioning of procedures for authorization, certification, and licensing of renewable energy sources (RES) investments - lack of coordination in actions of the public administration authorities while conducting those procedures, both in the context of EU law, as much national laws of selected Member States. Why this barrier is still dominant? The article is devoted to the analysis of possible and applied models for such coordination in the area of RES investments. Attention has also been drawn to restrictions that should be taken under consideration by the Member States while the regulations regarding procedures coordination implementing. Constructing and applying of coordination of public administration authorities activities in such a way as it might contribute to streamlining and accelerating administrative procedures in the area of RES investments and consequently achieve a designated RES energy share in the final gross energy consumption, is not an easy task. Inappropriately constructed and applied mechanisms may lead to an exactly opposite effect.

Key words: effectiveness of public administration, EU implementation, renewable energy sources

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1. INTRODUCTORY ISSUES

Obtaining permissions or other approvals necessary for executing renewable energy sources (RES) investments requires carrying out of procedures, in particular regarding environmental protection law, spatial planning and management law, as well as construction law. Following the analysis of the Member States' reports regarding the functioning of the national procedures for the authorization, certification, and licensing of RES, in summative report 2005, the European Commission indicated three categories of barriers to be dealt with by investors operating in the EU Member States[1]. These barriers resulted in delays throughout the investment process, which in turn led to a slowdown in achieving a particular contribution of renewable energy sources to gross final energy consumption particular share. Firstly, there was the effect of not taking RES sufficiently into account in spatial planning. In many countries and regions, the future development of RES projects has not been included in land development plans, in particular by not designating proper areas for wind energy projects and biomass energy projects. Secondly, in their summative report, the European Commission pointed out the complexity and vagueness of the procedures, and thirdly, the large number of authorities involved and the lack of coordination between them[2]. Although Member States have made some progress on reducing administrative burdens regarding executing RES investments during recent years, in their report 2017 the European Commission indicated that administrative barriers have still remained within that investment process (Commission emphasized mainly that one-stop shops have not been implemented and automatic permissions have not been granting after the deadlines)[3].

The reference book, however, emphasize the point that investors implementing other types of infrastructural projects struggle with the same

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[1] Commission of the European Communities, Communication from the Commission. The support of electricity from renewable energy sources, Brussels, 7.12.2005. COM(2005) 627 final, 15.

[2] Ibidem, p. 14.

[3] European Commission, Report from Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Renewable Energy Progress Report, Brussels, 1.2.2017 COM(2017) 57 final.

problems[4]. It must be added, however, that in case of the investment process regarding RES, the aforementioned barriers, and in particular the high number of public administration authorities involved and the lack of coordination between their activities, are becoming especially widespread[5]. The reason for a much higher scale (intensity) of the aforesaid barriers in the investment process regarding RES is the multitude of acts in different branches of law and, consequently, the obligations for investors arising from them with regard to obtaining permissions or other approvals necessary for the implementation of the RES investment process. According to Marjan Peeters and Thomas Schomerus "the whole legal package applicable to renewable energy activities could be described as a "maze": understanding the whole framework of laws applicable to a specific activity is a complicated task"[6]. The authors point out such areas of legal regulations as the environmental impact assessment law, spatial planning and construction law, nature conservation law, the industrial emissions law, and energy efficiency law[7]. Furthermore, they emphasize that "apart from the above list of applicable laws, specific EU and national legal standards may be relevant depending on the nature of the renewable energy project"[8] (biomass installation, water energy installation, a wind farm).

There are definitely more far-reaching consequences for RES investments following the existence of the aforementioned barriers, influencing the length of the entire investment process compared to other infrastructural projects. EU law (currently still Directive 2009/28/EC of the European Parliament and of the Council dated 23 April 2009 on the promotion of

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[4] Kars de Graaf, Albert Marseille, "Towards efficient administrative procedures for renewable energy projects? The Dutch experience with the Crisis and Recovery Act", In: Renewable Energy Law in the EU: Legal Perspectives on Bottom up-approaches, ed. Marjan Peeters, Thomas Schomerus, Cheltenham-Northampton: Edward Elgar Publishing, 2014, 123.

[5] Ibidem.

[6] Marjan Peeters, Thomas Schomerus, "An EU law perspective on the role of regional authorities in the field of renewable energy", In: Renewable Energy Law in the EU: Legal Perspectives on Bottom up-approaches, ed. Marjan Peeters, Thomas Schomerus, Cheltenham-Northampton: Edward Elgar Publishing, 2014, 23.

[7] Ibidem, 21.

[8] Ibidem, 22.

the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/ and 2003/30/EC[9]) establishes binding national shares of energy from renewable sources in the overall community energy consumption for the Member States[10]. A delay in the RES investment process leads to a slowdown in meeting national targets. Failure to meet that targets may, consequently, be connected with a specific liability of a Member State (which is not the case with regard to other infrastructural projects). Furthermore, with reference to the new directive 2018/2001 of the European Parliament and of the Council dated 11 December 2018 on the promotion of the use of energy from renewable sources[11], it must be taken into account that, in the future years, EU requirements regarding the necessary share in energy from renewable resources to be gained in the final energy consumption shall increase. In the context of increasing EU requirements with regard to RES, streamlining and expediting administrative procedures in the area of RES investment implementation is becoming more and more important. It also proves the importance of the topic discussed in that article.

The aim of this article is to provide an analysis of one of the above-mentioned barriers to the functioning of procedures for the authorization, certification and licensing of RES investments – the lack of coordination in the actions of public administration authorities in the process for obtaining permissions or other types of approvals necessary to implement RES investments, in the context of EU law as much as in the national laws of selected Member States. The thesis of the article is that the introduction of a specific model of coordination in the actions of public administration authorities requires a comprehensive consideration of many factors in the context of the particular Member State legal order. If not carefully considered, a given model of coordination in the actions of public administration authorities shall bring the opposite effect from the intended one (delay or even blocking the RES investment process).

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[9] OJ L 140/16, dated 05.06.2009, further referred to as "directive 2009/28/EC".

[10] See also: Mariusz Szyrski, Rola samorządu terytorialnego w rozwoju odnawialnych źródeł energii (OZE). Analiza administracyjnoprawna, Warsaw: Wolters Kluwer, 2017, 57–58; Anna Bohdan, Monika Przybylska, Podstawy prawne odnawialnych źródeł energii i gospodarki odpadami w Polsce, Warsaw: C.H. Beck, 2015, 1–5.

[11] OJ L 2018.328.82, dated 21.12.2018, further referred to as "directive 2018/2001".

Firstly, this article is discussing the scope (including the evolution process) of EU requirements with regard to coordinating the activities of public administration authorities involved in the process of the authorization, certification and licensing of RES investments. The Directive 2009/28/EC and Directive 2018/2001 provisions specifying requirements for coordination of the activities of public administration authorities have a wide scope of generality, discretion, and even vagueness. However, it shall be also proving (in the following part of the article) that the EU requirements for the coordination in the activities of public administration authorities within the RES investment process are not only those contained in Article 13 of Directive 2009/28/EC and Article 15 of Directive 2018/2001. Due to the fact that the provisions of EU law do not indicate a specific model of coordination that should be implemented by the Member States, the author tries to outline the possible models for such coordination in the area of RES investments. Attention has also been drawn to possible dilemmas the EU Member States may encounter introducing regulations for coordinating procedures (failure to consider them may result in that the given model for coordination may have the opposite effect than intended). Thirdly, this article is presenting a deficit of proper legal regulations with regard to the coordination of public administration activities, issuing permissions or other types of approvals necessary to carry out wind farm projects within the legal framework of Poland. The Polish institution of "co-operation" in proceedings regarding the assessment of wind farms' impact on the environment seems to be heading in the "opposite" direction[12]. These forms of coordination must be implemented in a well-thought and "individualized" way, not "automatic" taken over from the other Member States.

The basic research method used in the article is the dogmatic and legal method (analysis of legal acts, principles of law).

[12] Filip Marek Elżanowski, Maciej Miłosz Sokołowski, "Proces inwestycyjny w kontekście pakiety klimatyczno- energetycznego Unii Europejskiej", In:, Energetyka i ochrona środowiska w procesie inwestycyjnym, ed. Maksymilian Cherka, Filip Marek Elżanowski, Mariusz Swora, Krzysztof Andrzej Wąsowski, Warsaw: Wolters Kluwer, 2010, 133.

2. THE EU REGULATIONS WITH RESPECT TO COORDINATING NATIONAL PUBLIC ADMINISTRATION AUTHORITIES' ACTIONS WITH REGARD TO RES INVESTMENTS IMPLEMENTATION

EU law does not primarily interfere within the sphere of the organization of the Member States' administrative systems, or in the way, administrative procedures are applied. According to the accepted rule of institutional and procedural autonomy, the responsibility of Member States includes deciding on the structure, competence, and mode of the national authorities' operations, including their appointment and liquidation[13]. Member States also maintain their organizational and procedural autonomy when this is connected with implementing EU law. Each Member State is, however, responsible for organizing their structures, and for the division of competence, as well as constructing and carrying out administrative procedures, so that particular tasks resulting from the EU law could be properly carried out (autonomy rule is limited by the rule of equivalence and effectiveness[14]).

For the EU legislator, the issue of increasing the effectiveness and pace of administrative procedures within RES investments to achieve a specific percentage of RES share in the final gross energy consumption may be confirmed by the fact the EU legislator has referred to the issue in the very first EU directive regarding RES, i.e. in Directive 2001/77/EC of the European Parliament and of the Council of September 2001 on the promo-

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[13] See also: Zbigniew Kmieciak, „Zasada autonomii proceduralnej państw członkowskich UE i jej konsekwencje dla procesu orzekania przez sądy administracyjne i organy administracji publicznej", Zeszyty Naukowe Sądownictwa Administracyjnego 2(2009): 9–25; Andrzej Wróbel, „Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej", Ruch Prawniczy, Ekonomiczny i Socjologiczny 1(2005): 35–58; Maciej Taborowski, Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe, Warsaw: Wolters Kluwer, 2012, 48–50.

[14] See also: Sebastian Gajewski, „Wzruszenie ostatecznej decyzji administracyjnej z powodu jej niezgodności z wykładnią prawa UE przyjętą w późniejszym orzeczeniu TSUE (w świetle k.p.a.)", In: Europeizacja prawa administracyjnego i administracji publicznej ed. Ewa Wójcicka, Bogusław Przywor, Częstochowa: Akademia Jana Długosza 2016, 166; Piotr Brzeziński, Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej, Warsaw: Wolters Kluwer, 2010, 50–93; Maciej Taborowski, supra note 13, 259.

tion of electricity produced from renewable energy sources in the internal electricity market[15]. Bearing in mind the principle of institutional and procedural autonomy, Directive 2001/77/EC did not impose upon the Member States any obligation to introduce a particular way of coordinating the actions of public administration authorities while conducting procedures regarding RES investments[16]. The resolutions of art. 6 of Directive 2001/77/EC only required the Member States to evaluate their existing administrative procedures, establishing that they do not pose a barrier or hamper the Directive's indicative goals. In the reports of the Member States regarding the evaluation though, there ought to have been a degree of advancement concerning actions, among others, to coordinate the work of different administrative authorities with respect to the terms, accepting and processing applications to grant permissions.

The issue of assuring coordination between administration authorities concerning carrying out procedures of RES investments for authorization, certification and licensing became important during works at the next directive. In point 24 of the introduction to the proposal presented by the European Commission on 23 January 2008 of the new RES Directive, it was indicated that "the lack of transparent rules and coordination between the different authorization bodies has been shown to hinder the deployment of energy from renewable sources"[17]. In the reference sources[18] we are reminded that the European Parliament's amendment to the above-quoted point 24 was worded as follows "A single administrative body responsible for all necessary authorizations should be established. That body should operate at the level closest to the projects, preferably at

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[15] OJ L 283/33, dated 27.10.2001, further referred to as „directive 2001/77/EC". See also about this directive: Marcin Nowacki, Prawne aspekty bezpieczeństwa energetycznego Unii Europejskiej, Warsaw: Wolters Kluwer, 2010, 165-167; Mariusz Szyrski, supra note 10, 49–50.

[16] Kars de Graaf, Albert Marseille, *supra* note 4, 124.

[17] Commission of the European Community, Proposal for Directive of European Parliament and the Council on the promotion of the use of energy from the renewable sources, Brussels, 23.01.2008, (COM(2008) 30 final.

[18] Kars de Graaf, Albert Marseille, *supra* note 4, 126.

the municipal or regional level"[19]. This amendment was supported/justified by the fact that "The rapid deployment of renewable energies is often hindered by complicated procedures, too many layers of decision power and a lack of concentration. A one-stop shopping approach is desirable. But this should not mean that it is necessary that the permission authority would only lie at the national level"[20]. Although the amendment was not approved, in the reference sources it is stated it proves the significance, according to the EU institutions, of taking actions aimed at streamlining and accelerating RES administrative procedures[21]. The amendment expressed the idea of coordinating administrative procedures and introducing one administrative authority responsible for RES investments' authorization, certification and licensing in the Member States[22].

Directive 2009/28/EC establishes more detailed (compared to Directive 2001/77/EC) requirements regarding procedures for the authorization, certification and licensing of RES investments, and also concerning coordinated administrative procedures. Provisions of art. 13 item 1 sentence 2 pt (a) of Directive 2009/28/EC the obligate Member States to take appropriate steps needed for a clear definition and coordination of administrative obligations concerning the national, regional and local administrative bodies responsible for authorization, certification and licensing procedures, including spatial planning. In the reference books, it is emphasized, however, that this criterion (plus other ones included in art. 13 item 1 sentence 2 of Directive 2009/28/EC) leaves a wide scope of generality, vagueness and thereby discretion to the Member States[23]. There are doubts about the scope of the obligation, i.e. to what extent the procedures must be coordinated[24] (if a one-stop-shop administrative authority responsible for authorization, certification and licensing of RES investments is required).

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[19] Report of 26 September 2008 on the proposal for a directive of the European Parliament and of the Council on the promotion of the use of energy from the renewable sources (COM(2008)0019 – C6-0046/2008 – 2008/0016(COD)).

[20] Ibidem.

[21] Kars de Graaf, Albert Marseille, *supra* note 4, 126.

[22] Ibidem.

[23] Ibidem, 127.

[24] Marjan Peeters, Thomas Schomerus, *supra* note 6, 22.

The aim of new Directive 2018/2001 is, among others, to streamline and accelerate administrative procedures in the area of RES investments, including dealing with the lack of coordination between the different authorities issuing permits. According to the provisions of point 50 of the introduction to the directive 2018/2001, the lack of transparent rules and coordination between the different authorization bodies has been shown to hinder the deployment of energy from renewable sources. Providing guidance to applicants throughout their administrative permit application and granting processes by means of an administrative contact point is intended to reduce complexity for project developers and increase efficiency and transparency, including for renewables self-consumers and renewable energy communities". The Directive 2018/2001 provides for a modification of art. 13 item 1 of Directive 2009/28/EC (new art. 15 item 1) and introduces, among others, an additional art. 16. Article 15 item 1 of Directive 2018/2001 includes general guidelines according to which national rules concerning the authorization, certification and licensing procedures of the defined RES investments shall be proportionate and necessary and contribute to the implementation of the energy efficiency first principle. Article 16 item 1 of the Directive 2018/2001 introduces an obligation to set up an administrative contact point which shall coordinate the entire permit-granting process for applicants with respect to permits to build and operate plants and associated transmission and distribution network infrastructures for the production of energy from renewable energy sources. The aforesaid one-stop-shop shall guide the applicant through the application process in a transparent manner, provide the applicant with all necessary information, coordinate and involve, where appropriate, other authorities, and deliver a legally binding decision at the end of the process. The one-stop-shop shall coordinate conducting, or be responsible for conducting, all the necessary procedures. Following the rule of institutional and procedural autonomy, the Directive 2018/2001 shall leave the Member States with a choice for the organization and scope of the contact point tasks.

3. AN OUTLINE OF POSSIBLE FORMS OF COORDINATING THE ACTIVITIES OF NATIONAL ADMINISTRATION AUTHORITIES

In view of a general nature of Member States' duties, allowing a wide scope of discretion, included in art. 13 item 1 sentence 2 point (a) of Directive 2009/28/EC and in art. 15 item 1 of Directive 2018/2001, with regard to assuring coordination of administration authorities activities in the scope of RES investments, it might be assumed coordination may have different forms. Making an attempt to be precise about the necessary scope of coordinating administration authorities' actions in the area of RES investments administrative procedures, above all the aim, which the introduced forms of coordination must carry out, needs to be taken into account, i.e. streamlining and accelerating the investment process, and consequently achieving a particular share of the RES application. Certainly, we shall not achieve this at "the expense" of rights and freedoms, limiting rights connected with the institution of public participation or the right to file the measures of appeal (e.g. by excessive reduction of terms to apply those rights, limiting the grounds for filing such measures or narrowing the range of entities entitled to appeal). Certainly, we will not achieve this either at the "expense" of the values and objectives for accomplishing of which the administrative procedures subject to coordination have been established (i.e. environmental protection[25], spatial order[26], public security[27]) or the constitutional principles for shaping the structure

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[25] Regarding the values and objectives implemented by environmental law: Zbigniew Bukowski, "Aksjologiczne podstawy stanowienia prawa ochrony środowiska", In: Aksjologia prawa administracyjnego.Volume II, ed. Jan Zimmermann, Warsaw: Wolters Kluwer, 2017, 233–242.

[26] Regarding the values and objectives implemented by spatial development law: Marek Szewczyk, "Aksjologia prawa zagospodarowania przestrzeni", In: Aksjologia prawa administracyjnego. Volume II, ed. Jan Zimmermann, Warsaw: Wolters Kluwer, 2017, 523–538.

[27] Regarding the values and objectives implemented by construction law: Dominik Sypniewski, "Bezpieczeństwo jako wartość podlegająca ochronie w procesie budowlanym", In: Aksjologia prawa administracyjnego. Volume II, ed. Jan Zimmermann, Warsaw: Wolters Kluwer, 2017, 595–604.

and competence of administrative authorities established in a given Member State.

Decisions issued in such proceedings shall raise public objections, doubts as to their material and procedural accuracy and they will be "opposed" or challenged by means of appeal, which shall lengthen the whole investment process. Legally defective permissions, or another type of approval, shall be a risk to the investor as, despite it being legally binding, it may still be revoked, which shall block the initiated investment process (the proceedings shall need to recommence). The investor needs streamlined and fast administrative procedures, but also certainty about the substantial and procedural accuracy of the permissions or approvals obtained. Constructing and applying administrative procedures within RES investments, including attempts to coordinate them, therefore requires careful consideration of different values and interests[28].

The forms of coordinating the national administration authorities' actions for the procedures of authorization, certification and licensing of RES investments may be in either one of two categories: a) coordinating the work of two or more authorities (proceedings conducted by them) aimed at issuing all types of permissions or other approvals necessary to carry out RES investments ("external" coordination concerning some separate proceedings); b) coordinating the activities of an authority taking the decision in a case and authority or authorities giving opinions or affirmation within that case ("internal" coordination). So-called "external" coordination may also take different forms: a) one administration authority takes over the competence of several other authorities competent to carry out all the required procedures and issues one decision (a single joint proceeding and one decision); b) several administration authorities jointly examine all the cases and issue one decision; c) several administration authorities simultaneously examine all the cases and issue a few separate decisions (which may be separately appealed against).

The concept of one administrative authority, which takes over the competence of several authorities competent to consider all necessary cases within a single investment process and issues one decision, seems to be difficult to implement. At this point, it must be reminded that according

[28] Marjan Peeters, Thomas Schomerus, *supra* note 6, 28 and 31.

to the rule, the investment process regarding RES is regulated by many (a "maze") of acts in different areas of law, often requiring know-how in different fields). These acts of law are followed by numerous obligations related to various procedures necessary to obtain permissions or other types of approvals. It seems, therefore, that the concept of "one authority" may be considered only in case of very simple RES investment processes requiring few decisions and, additionally, in which specialist knowledge is not required. It must also be noted that one of the rules followed by the states while creating the national structure of administrative authorities is the rule of economic effectiveness (authority cost-effectiveness). For that reason, it is doubtful that the idea of setting up a specialist authority exclusively for carrying out the procedures regarding the investment process for particular types of RES investments may be implemented.

Another form of so-called "external" coordination of administration authorities' activities with respect to procedures of RES investments authorization, certification and licensing is the appointment of one complex administrative service contact point (a one-stop-shop). Its task is exclusively the coordination of currying out procedures, but not conducting of all procedures aimed at issuing permissions or other types of approvals (the investor contacts one authority). We may deal, in this case, with either a coordinated single decision-making process or coordinated processes of decision-taking (a few decisions). In both situations, several authorities participate, whereby in the first case one (joint) decision is issued, and in the latter case several (separate) decisions are issued.

It seems that also this form of coordinating the work of administrative authorities shall not be appropriate for all RES undertakings. Above all, in this situation, all highly complex undertakings must be excluded, where at the initial stage of the investment process the final decisions have not yet been taken, in particular with respect to technical or technological conditions of the investment implementation. It is highly likely that at a later stage, depending on the way "the situation develops", permission or another type of approval issued within such a coordinated procedure, shall have to be modified, and thus new proceedings shall have to be carried out.

In case of coordination in the form of appointing a one-stop-shop, it must be considered which authority may be entrusted with the function. Entrusting the central government authority with the function may be

followed by an allegation of limiting the competence and the influence of local or regional authorities upon the decision-making process with regard to "their area"[29]. On the other hand, entrusting authority to the lowest level with the function may pose a risk with regard to their capacity to carry out the task properly. From the investor's point of view, it seems that the authority to which the investor applies for issuing the first decision within the investment process ought to be entrusted with such a function.

Some form of coordinating the work of administration authorities with regard to issuing permissions and other types of approvals for RES investments might also be the cooperation of the decision-taking authority and the authority or authorities responsible for expressing an opinion or approving within one administrative procedure. According to J. Zimmermann, "cooperation" is a notion defining a mutual way of administering subjects' interaction and it is a type of relation close to coordination that may only occur in a decentralized system[30]. The essence of "cooperation" means that the legislator entrusts one authority with the competence to take a substantial decision in the case, also encumbering the authority with the duty of obtaining an opinion of another authority in the course of the decision-taking process. The other authority is assigned the competence to take a stand or issue an opinion in the case decided by another authority. The institution of "cooperation" is used when the solving of a problem is beyond one authority's scope of activity (organization department), whereas it covers the scope of activity of two or more entities[31]. Owing to this institution, the legislator may limit the number of proceedings pending (decisions issued), within which it is necessary to consider a few issues that require knowledge in various fields, and thereby accelerate the whole investment process.

[29] Kars de Graaf, Albert Marseille, *supra* note 4, 126.

[30] Jan Zimmermann, Prawo administracyjne, Warsaw: Wolters Kluwer, 2012, 148–152.

[31] Stanisław Biernat, Działania wspólne w administracji państwowej, Wrocław: Ossolineum, 1979, 83–85.

4. EXAMPLES OF IMPLEMENTING THE COORDINATION OF ADMINISTRATIVE AUTHORITIES ACTIVITIES

An example of Dutch law seems to confirm that the concept of "one authority" may be considered only in case of very simple RES investment processes. On 31 March 2010, the Crisis and Recovery Act (*Crisis-en herstelwet*) was included in the Dutch legal framework[32]. The law introduced special rules into the Dutch General Administrative Law Act (*Algemene Wet Bestuursrecht*) and into other laws. The law, having regard for mitigating the effects of economic crisis, established a few legal instruments aimed at streamlining and accelerating administrative procedures, including the idea of "one authority"[33]. The range of applying "one contact point" however, was very limited. The institution of "one authority", regulated in part II of the Crisis and Recovery Act, may be introduced exclusively for the purpose of "developing new housing districts formed of 12 up to 2,000 new houses" (mainly for the construction of houses and residential infrastructure)[34]. The institution was based on integrating the process of decisions taken for the residential areas. The investor filed one application and one authority issued one integrated decision. If in a given case, regulations on public participation applied, the procedure was held once only[35]. The idea of "one authority" automatically "excluded" the competence of other authorities in relation to a particular project. The authority taking the decision in such an "integrated" case had to take into account all regulations referring to a given project (environmental law, spatial management law, regulations on water management and protection). The idea might not be used, however, in the situation wherein international or EU law-based regulations applied.

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[32] Kars Jan de Graaf, Hanna Dürtge Tolsma, "Country Report: The Netherlands. The Future Environment and Planning Act and the Impact of the Crisis and Recovery Act", IUCN Academy of Environmental Law e-Journal 6(2015): 293.

[33] Katinka Jesse, "Country Report: The Netherlands. Big Changes in Environmental Planning Law On The Way", IUCN Academy of Environmental Law e-Journal 4(2013): 178–179.

[34] Jonathan Verschuuren, 13 "The Dutch Crisis and Recovery Act: Economic Recovery and Legal Crisis?", Potchefstroom Electronic Law Journal 5(2010): 9.

[35] Ibidem, 198.

The aforementioned Dutch Crisis and Recovery Law have also introduced the institution of a one-stop-shop for RES investments. The competence for drawing up and passing land use plans, which are binding for the process of RES investment location, has been divided among the local, provincial and national authorities in the Netherlands[36]. The Dutch Crisis and Recovery Law introduced into The Dutch Electricity Act (*Electricitenitswet*), regulations (art. 9e and 9 f) stating that a wind farm larger than 5 MW and smaller than 100 MW shall be considered as meeting the needs of a provincial spatial interest and the provincial public authority is also competent to adopt a land-use plan allowing for such wind farms[37]. On the other hand, wind farms of over 100 MW capacity are considered to meet the needs of national interest and national authorities have obtained proper competences. The national authorities, at the time they were adopting proper land use plans allowing the location of wind farms of over 100 MW capacity, were also assigned competences regarding coordinating decision-taking with regard to permissions or other types of approvals needed to carry out the investments (art. 9b of The Electricity Act)[38]. Provincial authorities have been assigned not only competences to coordinate the decision-taking process, but they have also been assigned decision-taking competences with regard to other approvals regarding wind farms, which excluded, in that situation, competences of the local authorities[39].

It seems that it would be difficult, however, to implement such construction in Poland. In the Polish law, issuing decisions with respect to spatial planning and management has been reserved for the local commune's authorities (the lowest level local government authorities). If in the light of the above, the function of the one-stop-shop is granted to the authority issuing the decision on investment location, doubts may occur if the Polish commune authority will be substantively able to guide the whole decision-making process in case of large land wind farms. At the same time, in Polish law the possibility of establishing a one-stop-shop to provide service for construction of offshore wind farms (following the pattern of Germany

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[36] Ibidem, 131.

[37] Ibidem, 132.

[38] Ibidem.

[39] Ibidem.

which has started such a (federal) institution with regard to offshore wind farms). Regulations of the Polish law on marine areas dated 21 March 1991[40] provide for two location decisions: permission to erect and use artificial islands, constructions, and devices, as well as a decision establishing location and conditions of keeping cables or pipelines. Those decisions, as a rule, are issued (depending on the type of maritime area) by the minister appropriate for water economy or by the locally competent director of maritime office (art. 23 item 1 point 1 and 2).

In the process of implementing the one-stop-shop service, whose task is only to coordinate the conduct, and not to conduct all the required procedures, the most difficult issue seems to be the "selection" of the appropriate authority to which this role will be entrusted.

Inappropriate construction and application of a "cooperation" institution may, also, lead to exactly the opposite effect (even recommencement of the proceedings), which may be exemplified by the experiences of Poland in the use of the institution of "cooperation" at proceedings regarding the assessment of wind farms' impact upon the environment.

The investor willing to carry out a particular investment process (also within RES) in Poland is most often obligated to contact both the national and local government authorities, i.e. both general and special competence authorities. What is more, the structure of administrative authorities in Poland, including decision-making authorities (also within RES) has been shaped under the influence of decentralization rule included in the Constitution of the Republic of Poland dated 2 April 1997[41], consisting above all in the process of regular extension of lower-level public authorities' competencies by entrusting them with tasks, competences and indispensable measures[42] as well as the rule of subsidiarity. Unfortunately, in the Pol-

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[40] Dziennik Ustaw (English: Journal of Laws) of 2016, item 2145 as amended.

[41] Dziennik Ustaw (English: Journal of Laws) of 1997 No. 78, item 483 as amended.

[42] This principle is widely discussed in the literature of the subject, e.g. Ewa Jolanta Nowacka, Samorząd terytorialny jako forma decentralizacji administracji publicznej, Warsaw: Lexis Nexis, 2010, 15–31; Katarzyna Marszał, "Wpływ czynników zewnętrznych na samorząd terytorialny – analiza czynników ograniczających samodzielność jednostek samorządu terytorialnego", In: Samorząd terytorialny w Polsce a samorządowa kontrola administracji ed. Bogdan Dolnicki, Jan Paweł Tarno, Warsaw: Wolters Kluwer, 2012, 230–235; Dorota Dąbek, Jan Zimmermann, "Decentralizacja poprzez samorząd terytorial-

ish law, the rule of decentralization and subsidiarity has been in many cases adopted "automatically" (that is without sufficient consideration of the possibility to perform the tasks efficiently, effectively and properly[43]) in issues that require highly specialist and diverse knowledge, which is not at disposal of the commune authorities in particular. To compensate for entrusting the resolving of cases, requiring know-how in the environmental protection field for their substantive correctness, general local government authorities without this kind of specialist knowledge seem to be served by an institution of "cooperation". However, inappropriately built and applied institution of "cooperation", in particular in the proceedings regarding the assessment of wind farms' impact upon the environment, led to a considerable lengthening of the investment process (in many cases the proceedings have been re-commenced) and even to block it.

Proceeding in case of assessment of the impact of wind farms upon the environment is in the Polish legal framework an example of the extensively developed model of cooperation, both in the subjective and objective scope[44]. The proceedings are conducted at the stage of establishing conditions for an undertaking implementation, and in case of undertakings of potentially considerable impact upon the environment - also at the stage of establishing the obligation to carry out the assessment and establishing the range of the report. Carrying out such environmental impact assessment is obligatory in case of installations using wind energy to produce electricity of the total nominal power not lower than 100 MW and located in marine areas[45]. In case of the other than the afore-men-

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ny w ustawodawstwie i orzecznictwie pokonstytucyjnym", In: Samorząd terytorialny. Zasady ustrojowe i praktyka, ed. Paweł Sarnecki, Warsaw: Wydawnictwo Sejmowe, 2005, 7–10.

[43] Grzegorz Dobrowolski indicates that due consideration of these factors is a prerequisite for the correct application of the principle of decentralization and subsidiarity. Grzegorz Dobrowolski, "Authorities competent to issue a decision on the environmental conditions", In: Assessment of the legal model of environmental protection in Poland and Slovakia, ed. Elżbieta Ura, Jerzy Stelmasiak, Stanisław Pieprzny, Kosice: Equilibria, 2012, 259.

[44] Małgorzata Szalewska, „Współdziałanie organów administracji publicznej w procedurze wydawania decyzji o środowiskowych uwarunkowaniach przedsięwzięcia", In: Oceny oddziaływania na środowisko w praktyce, ed. Bartosz Rakoczy, Warsaw: Woltes Kluver, 2017, 81.

[45] Rozporządzenie Rady Ministrów z dnia 9 listopada 2010 r. w sprawie przedsięwzięć mogących znacząco oddziaływać na środowisko (Regulation of the Council of Min-

tioned installations located in areas covered by forms of nature protection (excluding installations intended exclusively for supplying road and railway signs, control or monitoring devices for road or rail traffic, navigation signs, lighting devices, and billboards), as well as of a total height not lower than 30 m - the obligation to carry out the assessment depends on the authority discretion. Until The Wind-farms Act took effect, the authority competent to issue a decision on the environmental conditions for a wind farm of the total installed generation capacity over 40 kW had been the commune's executive authority. Consequently, the cooperating (coordinating) authority with regard to the investment environmental constraints had been the Regional Director for Environmental Protection (RDEP), The State Sanitary Inspection, the Director of Maritime Office (in case of marine areas), as well as executive authorities of other communes, in case an undertaking extended beyond the area of one commune (currently this list has been extended)[46].

In the legal framework in force until 16 July 2016 regarding wind farms of over 40 kW capacity, there were many doubts concerning the model of cooperation between the executive authority of a commune (as the authority examining the case) and the Regional Director for Environmental Protection (as the coordinating authority). Firstly, cooperation between the aforesaid authorities led to a diffusion of responsibility by way of defining the environmental conditions for the investment implementation. The decision-making authority ought to verify each time the stand of the cooperating authority, as it takes final responsibility for the result of proceedings. The ability to verify highly specialist findings and conclusions by an authority not being at disposal of such know-how, i.e. by the commune's executive authority, was highly doubtful, on the other hand.

Secondly, art. 77 item 7 of the law dated 3 October 2008 on access to information about the environment and its protection, on public participa-

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isters of November 9, 2010 on projects that may significantly affect the environment), consolidated text Dziennik Ustaw (English: Journal of Laws) of 2016, item 71. See also: Dominik Jakub Kościuk, Artur Krzysztof Modrzejewski, „Farmy fotowoltaiczne i wiatrowe a ochrona środowiska w procesie inwestycyjnym – uwarunkowania prawne", In: Problemy pogranicza prawa administracyjnego i prawa ochrony środowiska, ed. Małgorzata Stahl, Piotr Korzeniowski, Aneta Kaźmierska-Patrzyczna, Warsaw: Wolters Kluwer, 2017, 287.

[46] Małgorzata Szalewska, *supra* note 44, 88–89.

tion in environmental protection, as well as on assessments of environmental impact[47] excluded suability of the cooperation acts issued among others by the Regional Director for Environmental Protection (i.e. cooperation act issued by the RDEP in case of coordinating the conditions of an undertaking implementation). According to art. 142 of the administrative procedure code, a cooperation act that may not be complained against, may only be challenged by appealing against the final decision (decision on the environmental conditions). According to the Polish law, an appeal against matters connected with cooperation act (considering within an appeal against decision on the environmental conditions) shall not result in instituting separate proceedings regarding the appealed cooperation acts, it does not provide grounds either to adjudicate in form of a separate administrative act of justifiability of the raised objections. Consideration by the appeals authority of the objections raised against the cooperation act issued by the RDEP, acting as a cooperating authority, resulted in overruling the decision on the environmental conditions, and not only the cooperation act of RDEP[48]. Furthermore, the appeals authority competent to examine the appeal against the decision on the environmental conditions is an authority superior to the one conducting the main proceedings, and not the authority superior to the cooperating one. The appeals authority, in that case, was, therefore, the self-government appeals court, which did not possess the know-how in environmental protection and had to verify objections against environmental constraints regarding an investment implementation. In case an inappropriately verified decision becomes final, the investor takes a risk that in the future (in an extraordinary mode) such a decision may be revoked, and the investment process commenced may be blocked.

Thirdly, regulations of the law on the access to information (…) excluded the possibility of applying against RDEP any legal measures to counteract the authority's tardiness (i.e. reminders)[49]. No deadlines were established either for issuing cooperation act by RDEP as the cooperating authority (in case of other authorities such deadlines are established).

[47] Consolidated text *Dziennik Ustaw* (English: Journal of Laws) of 2017, item 1405 as amended.

[48] Małgorzata Szalewska, *supra* note 44, 117–118.

[49] Ibidem.

Provisions of the act on wind-farms have amended art. 75 item 1 of the law on access to information (…). The authority appropriate to issue a decision on environmental conditions for a wind farm of over 40 kW capacity is currently RDEP. The institution of cooperating has thus been excluded at least in the relation between the commune's executive authority and RDEP. The aforesaid doubts remain however up-to-date to some extent with regard to other authorities cooperating in the process of issuing decisions on environmental conditions for wind farms.

In order for an institution of cooperation to assure acceleration and improvement of administrative procedures, it must be properly constructed and applied. The authority examining the case must be equipped with legal instruments that shall guarantee the proper course of the cooperation. An example of such a measure might be, introduced since 1 June 2017[50] into the Polish administrative procedure code, the right of case resolving authority to summon a meeting within the cooperation mode, in case it might expedite another authority's taking their stand (art. 106a of the administrative procedure code), as well as bestow the rank of general rule of administrative procedure to the obligation of authorities to actively cooperate with one another at full explanation of the case by means of relevant measures (art. 7b of the administrative procedure code)[51].

5. SUMMARY

The lack of proper coordination in activities of public administration authorities within the process of authorization, certification and licensing of RES investments is still »the dominant barrier of efficient administrative procedures in the field of RES investment. It seems that the reason for the above is that the investment process regarding RES (in particular

[50] Ustawa z 7 kwietnia 2017 r. o zmianie ustawy – Kodeks postępowania administracyjnego oraz niektórych innych ustaw usprawnienia (The Act of 7 April 2017 amending the act – Code of Administrative Procedure and some other acts), consolidated text *Dziennik Ustaw* (English: Journal of Laws) of 2017, item 1257.

[51] Piotr Marek Przybysz, *Komentarz do art. 7 (b) Kodeksu postępowania administracyjnego*, In: Piotr Marek Przybysz. Kodeks postępowania administracyjnego. Komentarz aktualizowany. LEX/el/2019.

in the field of large investments regarding wind and water energy) is regulated by many (a "maze") of acts in different areas of law, often requiring know-how in different fields. The above-mentioned reason makes often impossible to indicate the authority capable to resolve few cases in which highly specialized knowledge is not required.

Bearing in mind the need to respect the principle of institutional and procedural autonomy, which – as it must be emphasized – is not an absolutely binding rule (this principle's limitations are allowed). The EU legislator has left a considerable scope of discretion to the Member States with regard to the coordination form of public administration authorities' actions in the process of issuing permissions or other types of approvals necessary to carry out RES investments. It must be remembered though that the way the obligation is interpreted is related to the increase of EU requirements with regard to the expected level of RES. Each of the Member States is obliged to achieve a designated (regularly increased) RES energy share in the final gross energy consumption (which shall not be achieved unless proper administrative procedures are introduced). The lack of proper coordination in activities of public administration authorities influences a delay of RES overall investment process, which as a result leads to a slowdown in a designated share of RES to gross final energy consumption.

Having awareness of the above, the Member States have introduced different forms of coordinating public administration authorities activity in the process of RES investments' authorization, certification and licensing. Such coordination may be based on coordinating the course of all procedures and even taking over conducting all procedures concerning permissions or other types of approvals by an administrative one-stop-shop. A certain form of public administration authority activities' coordination may also be the institution of cooperation between authority resolving the case and opinionating or agreeing authorities (acting within one proceeding).

Constructing and applying coordination of public administration authorities in such a way as it might contribute to streamlining and accelerating administrative procedures in the area of RES investments is not an easy task for the national legislator. Inappropriately constructed and applied mechanisms may lead to an exactly opposite effect. The national legislator certainly shall not achieve the effect of streamlining and expediting administrative procedures "at the expense" of rights and freedoms

(mainly with regard to entitlements connected with the institution of public participation or the right to file the measures of appeal. We will certainly not achieve an expected result either at the "expense" of values and objectives for accomplishing of which the administrative procedures subject to coordination have been established (environmental protection, spatial order, public safety), or the constitutional principles for shaping the structure and competence of administrative authorities established in a given Member State. Decisions issued in such proceedings shall raise public objections, doubts as to their material and procedural accuracy and they will be "opposed" or challenged by means of appeal, which shall lengthen the whole investment process.

Constructing and using administrative procedures within RES investments requires therefore careful analysis of various values and interests. It is also important to realize that each model of administration authorities' coordination has its advantages and disadvantages. A specific model of coordination must be adjusted to a particular RES undertaking. With reference to one type of RES undertakings, it may bring positive effects, in other cases negative ones, which may additionally bring different effects in the different Member States. In many cases, the effectiveness of such mechanisms may even depend on a particular RES actual stage of implementation. The national legislator ought to consider the validity of constructing regulations in a way allowing authorities to apply certain solutions (depending on the state of fact), and not obligate them to follow regulations uncompromisingly.

We must also bear in mind that lack of coordination in activities of public administration authorities is only one (out of three) reasons for a delay in the whole RES investment process, which in consequence leads to a slowdown in meeting a particular contribution of RES to gross final energy consumption. By introducing regulations for coordination of administration authorities' activity, the national legislator ought to apply this in a wider context, i.e. allow thereby to overcome the barriers to the RES investment process. Only the broad-based solutions may yield the desired effect.

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GOVERNMENT AGENCIES IN POLAND – AN EXAMPLE OF AGENCIFICATION OF PUBLIC ADMINISTRATION. COMPARATIVE LEGAL ANALYSIS OF SELECTED MODELS OF AGENCIES IN EUROPEAN COUNTRIES

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ABSTRACT

"Agencification" is a term proposed to define the process of creating government agencies, which started in the early 1990s. According to the author, this term should be incorporated into the nomenclature of Polish administrative law, mainly due to the fact that administrative law scholars from other countries have been using it in the same sense as in this article for more than ten years. Therefore, the paper briefly discusses the models of agencies functioning in the legal systems of some European countries where they play an important role.

Key words: agencification, government agencies, model of agency, German agencies, French agencies/autonomous entities, British agencies

1. INTRODUCTION

The agencification of public administration in Poland began in the late 1980s. Primarily, such a form of public administration organization stemmed from the need to adapt the state and its legal system to new public tasks. The term "agencification" has not yet been rooted in the Polish legal thought. For this reason, my intention is not only to explicate this

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term and discuss its origins but also to determine why Polish government agencies are created.

Government agencies in Poland were created to adapt to EU requirements and to emerging new public tasks. There was no legal instrument in Poland that could realize the needs of a society that were still arising. It should also be emphasized that all comparisons based on the agency model from a selected country versus the Polish agency model are difficult for many reasons. First, remember the legal systems in which the agencies have been regulated. Secondly, their cause of creation and internal structure. Thirdly, the tasks and competencies held by the agencies. Commonly in the literature on the subject, there is an erroneous statement by representatives of the doctrine that Polish government agencies are entities that are created at central and local levels, which is visible, for example, in the German system.

In the Polish legal system, government agencies are public administration entities of a special nature that arose as a result of distrusting the powers of governmental authority. It is not without reason that they have been referred to as "government agencies", and this is because the agencies are supervised by the competent minister in the matter, and this supervision is really the management. The personal, service and structural relationship between a given government agency in Poland or the president of the agency and the competent minister have been regulated by legal provisions in the constitutional law of the agency.

As can be seen, the task that was set to be achieved in this article may be full of contradictions and, unfortunately, it is impossible to compare different models of European agencies in a one-to-one relationship. The difference in the legal system in which the agency operates and in the tasks assigned to it for implementation must be taken into account.

2. AN ATTEMPT TO DEFINE "AGENCIFICATION" OF PUBLIC ADMINISTRATION

The literature[1] lacks a uniform definition of the agency that would describe its legal position and role in a democratic state of law. In order to define the term "agency", it should be considered both in a strict[2] and a broad sense[3]. This is due to the eclectic nature of such entities and the variety of tasks they perform. There is no distinction between the terms "agency" and "government agency" in the literature. They are treated as one, which should obviously be considered inappropriate and unjustified. It is also inappropriate to use the terms "government agency" and "executive agency"[4] interchangeably,

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1 According to J. Niczyporuk, agencies should be divided into economic agencies, created to perform state economic tasks and agencies that perform typical administrative tasks dealt with by typical government administration. Cf. Janusz Niczyporuk, "Rządowe agencje gospodarcze", In: Administracja i prawo administracyjne u progu trzeciego tysiąclecia, ed. Małgorzata Stahl, Jan Paweł Tarno, Marek Górski, Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2000, 341. According to A. Miruć, government agencies may be created by way of an act and take the form of state legal persons, or have the status of a central public administration body. The author also distinguishes the third group of agencies that functions in the form of commercial law companies. In thine case of this group, an agency is established by way of a notarial deed by the founding body, i.e. supreme state administration bodies. Cf. Alina Miruć, "Wielość podmiotów administrujących", In: Nowe problemy badawcze w teorii prawa, ed. Jan Boć, Andrzej Chajbowicz, Wrocław: Kolonia Limited, 2009, 336.

2 It is only about the agencies that are state-owned legal entities named "government agencies".

3 In broad terms, agencies should be understood as entities of various organizational forms acting as sole-shareholder companies of the State Treasury and administrative offices.

4 The concept of the agency was also used by the legislator in the Public Finance Act, (Journal of Laws of 2019, item 869, hereinafter as: u.f.p.) According to art. 18 u.f.p. an executive agency is a state legal entity established on the basis of a separate act to implement the tasks of the state. According to the intention of the legislator, executive agencies in Poland should be modeled on executive agencies operating in the European Union. In addition, state tasks performed by Polish executive agencies should be of a "key" character. It is worth considering here how the term "key" should be understood. It seems reasonable to assume that if the normator in the Act on he did not create a strictly defined catalog of quasi-closed tasks to be carried out by executive agencies, it should be recognized that in fact, every task is "key" for the state and for the agency.

The above standpoint stems from the fact that agencies considered in a broad sense[5] form a group of diverse entities such as sole-shareholder companies of the State Treasury and administrative offices, whereas agencies approached in a strict sense[6] should be understood only as state legal persons which have been formed to perform public tasks and share a number of characteristic features. When it comes to the term "executive agency", its sense is wider than that of "government agency", for apart from government agencies (agencies *sensu stricto*), it also encompasses such entities as the National Centre for Research and Development and the National Science Centre. The above entities do not display the features of government agencies and thus there are no grounds for considering them agencies *sensu stricto*.

In my opinion, the term "agencification" should be understood as a process of forming agencies whose main objective is to perform tasks in special (specific) subject areas both in public and private law firms of operation[7]. I think it would be wise to use the term "agencification" only to

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[5] In the 1990s, the agencies that prevailed were those functioning in a private form. They were one of the basic forms of public task implementation. This category of entities included: State Agency for Restructuring Black Coal, Agency for the Development of Industry, State Agency for Foreign Investments. Currently, their number has decreased and there is only one agency functioning in this form, the Polish Press Agency. It should be emphasized here that agencies operating in the form of single-shareholder companies of the Treasury, including the Polish Press Agency, have been excluded from the list of public finance sector entities due to the fact that their activity is related to the privatization of public tasks.

[6] Agency for Restructuring and Modernization of Agriculture [Act of 9.5.2008 on the Agency for Restructuring and Modernization of Agriculture (i.e. Journal of Laws of 2017, item 2137)], Military Property Agency [Act of 10.7.2015 on the Military Property Agency (i.e. Journal of Laws of 2019, item 492, 1214)], Material Reserves Agency [Act of 29.10.2010 on strategic reserves (i.e. Journal of Laws of 2017, item 1846)], National Center for Support of Agriculture [Act of 10.2.2017 on the National Agricultural Support Center (i.e. Journal of Laws of 2019, item 1080)], and Polish Agency for Enterprise Development [Act of 9.11.2000 establishing the Polish Agency for Enterprise Development (i.e. Journal of Laws of 2019, item 310, 836)].

[7] In the foreign literature, the term agencification is defined as the process of transforming organizational forms typical of a specific legal system into forms that diverge from them in terms of organizational structure, the scope of tasks performed, the relationship between the representatives of public authority, and the legal forms used. They have not

describe agencies *sensu stricto*, that is government agencies, mainly due to their purpose as well as certain coherence and repeatability of their features.

The formation of Polish government agencies is traced back to the change of political system in the late 1980s when new public tasks to be carried out by public administration were regulated. Unfortunately, the then administration lacked bodies or entities that would have competences and legal tools necessary to perform tasks in the economic and military spheres. Due to the lack of bodies specialized in these areas, government agencies seemed to be a golden mean and a kind of compromise for the legislator. The process of forming government agencies, that started in the 1990s, can be divided into three stages. During the first stage, first government agencies were established in Poland: Agency for Restructuring and Modernization of Agriculture, Agricultural Market Agency, Military Property Agency, and Military Housing Agency. During the second stage (2000–2010), the legislator continued creating state agencies and the following ones were established: Polish Agency for Enterprise Development, Agricultural Property Agency, and Material Reserves Agency. During the last stage (2015–2016), the Military Property Agency and the Military Housing Agency were merged to form a new agency, the Military Property Agency. In addition, the Agricultural Property Agency and the Agricultural Market Agency were liquidated, the latter being included in the Agency for Restructuring and Modernization of Agriculture. The gap left after those two was filled by a new government agency, the National Centre for Agricultural Support.

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been regulated and named the same way in every legal system, but what they have in common is the implementation of public tasks. Cf. for example government agencies in the United States of America (Brainard Guy Peters, "United States of America", In: Government Agencies. Practices and Lessons from 30 Countries, ed. Koen Verhoest, Sandra van Thiel, Geert Bouckaert, Per Laegreig, United Kingdom: Palgrave Macmillan UK, 2012; European Union agencies [Alexander Kreher, "Agencies in the European Community – a step towards administrative integration in Europe", Journal of the European Public Policy, 4(1997):226] and direct agencies in the Federal Republic of Germany (Tobias Bach, Martina Jann, "Structure and governance of Germany: A lot of continuity and little change", In: Change and continuity in public sector organizations, ed. Paul G. Roness, Harald Saetren, Bergen: Fakbokforlaget, 2009, 127 et seq.).

The creation of government agencies in Poland has allowed also citizens to exercise their rights to subsidies (e.g. in the case of farming, the right to a structural pension, running a small or medium-sized enterprise, production of regional products, etc.) for the specific activity they conduct. Of course, the exercise of such a right requires the prior fulfillment of requirements imposed by EU and Polish law simultaneously[8].

Thus, we can see that the creation of the agency, although it resulted from adapting to EU requirements, or from the growing needs of society, citizens can use the activities and opportunities offered by Polish government agencies daily.

3. THE PURPOSE OF CREATING AGENCIES IN SELECTED EUROPEAN COUNTRIES

According to the views prevailing in the literature, agencies are created so that public tasks of economic nature are performed by specialized entities (e.g. government agencies). Most of the scholars point out that agencies have been formed to relieve public administration bodies of performing tasks, and also to adapt to the new needs of the state and society[9].

Although it is hard not to agree with the above, answering the question why government agencies are created requires a deeper examination of the goal (goals) the legislator had in their mind while establishing those entities. Therefore, it would be wise to analyse the bills on forming particular government agencies and parliamentary stenographic records.

As regards Poland, in the bill of 2009 on public finances, the legislator expressed a view that government agencies were established to perform key

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[8] Paulina Bieś-Srokosz, “Public tasks performed by government agencies and quality of life in self-government communities”, In: Local Government in Selected Central and Eastern European Countries. Experiences, Reforms and Determinants of Development, ed. Katarzyna Kuć-Czajkowska, Mariusz Sienkiewicz, Lublin: Wydawnictwo UMCS, 2016, 219–233.

[9] Paulina Bieś-Srokosz, ”Creating government agencies – the legislator’s response to the needs of society”, In: Public administration in the face of social challenges and expectations, ed. Małgorzata Giełda, Renata Raszewska-Skałecka, Wrocław: Kolonia Limited, 2015, 23–26.

public tasks. Unfortunately, they provided no explanation of what they understood as "key". Furthermore, they wished Polish government agencies would take the form of the EU executive agencies. It was then when that idea should have already been criticized. This is due to the fact that government agencies are not and will never be identical or similar to one another, neither in terms of the tasks they are to perform nor their status, activities or competences. Similarly to the EU agencies, Polish government agencies possess legal personality, but it is the only similarity between them.

3.1. German state agencies

One may often have an impression that the legislator's actions are not always guided by a specific idea or intention, but that they aim at copying the solutions existing in other legal systems. The same holds for Polish government agencies that imitate the German model of agency.

As provided for in the Basic Law (Constitution) for the Federal Republic of Germany[10], there are two types of agencies: direct (*unmittelbare Bundesverwaltung*), which from the legal point of view are part of the state and are not legally independent, and indirect (*mittelbare Bundesverwaltung*), which have a legal personality based on public law. The major difference between them is that indirect agencies have autonomy guaranteed by law, which can be demonstrated with their budget. The budget of the indirect agency is prepared by the agency itself and then approved by a competent minister, whereas the budget of the direct agency is part of the budgetary

[10] The Constitution of the Federal Republic of Germany of 29 July 2009 (BGBl. I S. 2248), mainly the article 86. The federal agencies in Germany are established to assist the country's executive branch on the federal level according to They are hierarchically organized on four levels: 1. low-level federal agencies are subordinate to middle-level agencies and are responsible for relatively small areas such as District Recruiting Offices, Waterways, and Shipping Offices or Chief Customs Offices; 2. middle-level federal agencies are situated between a federal ministry and the lowest administrative level. Their responsibilities are limited to specific regions; 3. upper-level federal agencies can be established. These agencies are directly attached subordinate to a federal ministry and mostly do not have any agencies subordinate to them and 4. yop-level federal agencies which are distinguished from all other levels as they are specifically for e.g.: the administrative office of the Bundesrat, the Press and Information Agency of the Federal Government.

plans of a ministry the agency is subordinate to. As a consequence, direct agencies cannot freely implement regulations on financial management in the public sector. As regards human resources management, the same provisions apply to those two types of agencies. They can employ public officials and employees also on the basis of a civil law contract.

Direct and indirect agencies differ in terms of the management structure. Indirect agencies have ordinary management boards consisting of lobbyists, MPs, representatives of ministries, or all of them together. For instance, the board of the Federal Employment Agency involves unions, employers, and representatives of the government. The boards decide about the draft budgets of indirect agencies and exercise supervision over the agency management. By contrast, direct agencies do not have distinct managing groups (they may have advisory bodies which, however, have no formal decision-making authorization). Furthermore, considering the fact that direct agencies are managed by chairmen, boards are more common in indirect agencies.

Another clear difference between direct and indirect agencies is also visible in their social policy activities. As a rule, only direct agencies perform basic functions of the public sector, which involves mainly passing regulations on drugs, general competition, immigration, statistics, industrial property law, and protection of public order[11]. Those functions are usually devolved by way of an act to higher or intermediate federal authorities (which resemble decentralized organizations). When it comes to federal institutions, they are established by way of a ministerial decree in order to: do research, provide consulting services, perform health promotion, do research on agriculture and IT.

Most of the indirect agencies have the status of state bodies that are normally responsible for social security systems (unemployment, accidents, illnesses, long-term care). Most of those bodies are not directly supervised by ministries, and there are no government representatives in their management boards. It means that the minister is not authorized to

[11] Tobias Bach, Martina Jann, "Structure and governance of Germany: A lot of continuity and little change", In: Change and continuity in public sector organizations, ed. Paul G. Roness, Harald Saetren, Bergen: Fakbokforlaget, 2009, 127 et seq.

supervise and administer those bodies. Agencies are usually financed (with some exceptions) from the state budget.

As regards the state policy implementation, federal agencies have been given quite a high level of autonomy, which refers particularly to their main activity and setting their priorities. Indirect agencies are characterized by a much higher degree of autonomy in their general activity and in setting their priorities[12]. It should be noted that an agency's involvement in shaping its policy manifests itself in the fact that agencies often serve as sources of information for ministries they are subordinate to[13]. It is a task performed by numerous agencies. The results of a survey conducted by *Comparative Public Organization Data Base for Research and Analysis*[14] indicate various levels of the politicization of agencies and a variety of actions undertaken as part of their development[15]. It is worth mentioning that the agencies' involvement in the development of the financial policy depends, to a large extent, on the will of the government administration which determines the level of the agencies' contribution to the state policy. In addition, the experience of agencies is utilized mainly during the preparation of political solutions regarding their organization and finances.

Direct agencies are, as a rule, subject to two types of supervision: hierarchical-functional and legal. The functional supervision concerns employees, organizational structure, and the use of formal procedures. The legal supervision (*Rechtsaufsicht*) is more limited, for it enables the competent minister to check the compliance of the regulations applied by the agency with superior legal acts. When it comes to indirect agencies, the competent minister exercises only legal supervision. Only several ministries have principles governing the exercise of functional supervision distinctly stipulated.

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[12] Ibid., 127–147.

[13] Cf. Marian Döhler, Die politische Steuerung der Verwaltung. Eine empirische Studie über politisch-administrative Interaktionen auf der Bundesebene, Baden-Baden: Broschiert, 2007.

[14] COBRA.

[15] Tobias Bach, "Policy and management autonomy of federal agencies in Germany", In: Governance of Public Sector Organizations-Proliferation, Autonomy and Performance, ed. Per Leagreid, Koen Verhoest, Hampshire: Palgrave Macmillan UK, 2010, 89–110.

In 2008, the ministers agreed to adopt inter-departmental guidelines on the exercise of functional supervision. According to the departmental principle of sovereignty, each ministry can independently decide whether or how to implement those guidelines (which are general and contain mainly a list of the aims of that supervision and the tools necessary to exercise it)[16].

According to the research conducted by COBRA company, the ministerial supervision exercised over indirect agencies was more diverse than the supervision exercised over direct agencies. The supervision exercised by ministers concerned mainly management issues rather than the policy, which finds reflection in the high level of the agencies' autonomy, the possibility to make hierarchical interventions in political decisions, and numerous restrictions as regards making decisions about finances and personnel issues[17]. It stems from "a strong conviction that giving authorities a mandate is sufficient to ensure administrative efficiency"[18]. That mandate is rooted in the administrative tradition of the country (*Rechtsstaat*).

Unlike in other countries, new *quasi*-autonomous entities are not being created in Germany, and the number of agencies is decreasing because of transforming and merging them into more autonomous legal bodies. Although some agencies had clearly worded contracts with competent ministers, it seems that quality management tools are more frequently used for the purposes of the internal management of agencies rather than efficiency-based ministerial supervision.

3.2. French agencies

Before discussing the agencies functioning in the French legal system, it should be noted that agencification of the French public administration began in the early 1990s with the establishment of responsibility centres.

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[16] Tobias Bach, "Germany", In: Government Agencies. Practices and Lessons from 30 Countries, ed. Koen Verhoest, Sandra van Thiel, Geert Bouckaert, Per Laegreig, United Kingdom: Palgrave Macmillan UK, 2012, 177.

[17] Tobias Bach, "Policy and management autonomy...", 91 et seq.

[18] Tobias Bach, Marianna Jann, "Animals in the administrative zoo: the organizational change and agency autonomy in Germany", International Review of Administrative Sciences 3(2010): 462.

The main and characteristic features of these centres were employed in shaping the majority of state operational units (created in 2000), as well as in a new category of non-autonomous state bodies (created in 1997).

In February 1989, the Prime Minister of the French Republic announced the reform program "Renewal of public service" (Renouveau du service public). It was a turning point in the modernization of the French administration. The program assumed, among others, creating "more autonomous administrative units" called centres of responsibility (*centre de responsabilité*). The inspiration for adopting such solutions was drawn most likely from the British legal system, from British executive agencies to be more precise. Creating responsibility centres entailed creating entities that would have more autonomy in managing human resources. Thus, responsibility centres were to have increased autonomy in financial management owing to the simpler (*ex ante*) control of financial procedure[19]. In 1995, the process of de-concentration of state administration was initiated, which encompassed the state central administration. The basic criterion for transforming administrative units into responsibility centres was the services that were to be provided to the general public and public administration bodies.

Nevertheless, the term "executive agencies" (agencies) does not function independently in the literature. Instead, there are "autonomous public units", which are an example of the agencification of entities functioning in the French legal order, i.e. those entities that are public units and have legal personality. Autonomous public units form an important part of the French state administration. Currently, there are approximately 584 autonomous units, which have about 366,000 full-time employees (the total number of administration employees is about 2.4 million).

The French autonomous public units were created *ad hoc*, not always in line with the previously adopted plan for how to create them and how they should function. Initially, the assumption was that autonomous units would become specialized in specific areas and thus better prepared for performing such special tasks. Currently, they are perceived as a kind of

[19] Francois Lafarge, "France", In: Government Agencies. Practices and Lessons from 30 Countries, ed. Koen Verhoest, Sandra van Thiel, Geert Bouckaert, Per Laegreig, United Kingdom: Palgrave Macmillan UK, 2012, 99.

"escape" from administrative regulations. It is worth noting, however, that the tendency to "escape" from the regulation of administrative law resulted in some units applying only part of administrative law. The fact that the units have legal personality contributes to the increase in the significance of their actions. Moreover, having legal autonomy means having own management bodies and budget. The establishment of autonomous public units in the sectors of the state policy was unsystematic. Therefore, activities are currently undertaken simultaneously by the central or local administration, and by the autonomous entities[20].

The French model of a unit with legal personality was widely used by the state administration to create entities that were to undertake a profit-oriented private activity or non-profit activity (mainly associations and foundations). In addition to public autonomous units, alternative entities were created, which were subject to administrative law regulation to a considerably lesser extent. In 1982, a public interest group was created to facilitate cooperation between public institutions and public and private law entities. It is emphasized that this is how the sphere of administrative law was made accessible to private law. Nevertheless, it is not possible to make a clear distinction and draw a borderline between private and administrative law. Hence, it is judicial decisions that have been the source of solutions in that respect. Both the judges and the scholars question the validity of the criteria (principles) which were the basis for determining whether the public activity of a given organization should be considered in terms of administrative law or private law. This is due to the fact that similar actions taken by various autonomous public units were in some cases classified as public law and in other cases as private law activities. It would be advisable that their legal position is determined in detail at the highest level of political structure.

The first of the rules allowing to determine the legal form of a given unit is the principle of attachement. It helps to describe the level of dependency of an autonomous public entity and its close relations with the state. It stems from the fact that autonomous public entities: 1.) are created by the state, 2.) are financed mainly by the state, and 3.) implement state tasks. Even if the consequences arising from this principle are

[20] Ibid., 100 et seq.

far from being formalized, they are of great importance, for it means a representation of the state in relations with other entities, as well as the state's participation in strategic supervision and in the process of making the most important strategic decisions[21].

The principle of attachement can be a source of two main problems in relations between the state and its autonomous public units. Firstly, the ministry can develop a procedure for supervising the activities of its subordinate bodies (entities). Secondly, more than one ministry is usually in charge of one body (entity), which means that the former tries to influence the actions of the latter by orienting them towards their own priorities. As a result, strategic supervision and even *tout court* (court supervision) is not clear or even does not exist.

Autonomous public institutions are subject to financial control. It covers all their expenditure decisions even if they participate in various financial audits resulting from their mission. Generally speaking, commercial and industrial activities undertaken by autonomous public entities are subject to control referred to as "general economic and financial control of the state", which was originally intended for controlling the activities of state-owned enterprises and companies co-owned by the state.

According to F. Lafarge[22], the French state creates new categories of executive agencies (defined as national services, a category created in 1997), but with state executive agencies (in particular autonomous public bodies) being granted a wider scope of autonomy. The author's opinion is that if the majority of currently introduced changes are similar to NPM tools[23], the main political program introducing these changes should not be considered inspired by NPM.

In order to reduce the costs incurred by the French Republic to finance the activities of autonomous public bodies, these entities underwent restructuring, which concerned mainly their management and financial control. Owing to the changes that have been being introduced since 2000,

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[21] Étienne Fatóme, A propos du rattachement des établissements publics, ed. Mélanges Jacques Moreau, Paris: Economica, 2003, p. 151.

[22] Francois Lafarge, "France", In: Government Agencies. Practices and Lessons from 30 Countries, ed. Koen Verhoest, Sandra van Thiel, Geert Bouckaert, Per Laegreig, United Kingdom: Palgrave Macmillan UK, 2012, 108.

[23] *New Public Management.*

executive entities (bodies) that may be close (in terms of their operation) to the model of the executive agency are nowadays quite rare.

3.3. British government agencies

Currently, there are about 1148 *quasi*-autonomous public institutions known as agencies in the public sector of the United Kingdom of Great Britain and Northern Ireland. These entities operate at the level of government administration or act as administratively decentralized institutions, particularly in Scotland, Wales and Northern Ireland. Executive agencies should be classified as *quasi*-autonomous organizations[24]. They are headed by directors who cooperate with competent ministers. Executive agencies in the United Kingdom carry out tasks that cover the following areas: defense, social security, health administration, environmental protection, agriculture, fishery, justice, transport, land registration, and intellectual property. Most of them are focused on satisfying the needs of society and pursuing its public interests, while others deal with conducting research or drafting legal regulations.

Executive agencies have their own budget, which can be created in three ways. First of all, they can be financed entirely from the state budget. However, the number of funds to be allocated to a particular agency should first be voted by the parliament. Executive agencies functioning this way are subject to total control, both in terms of expenses and revenues. The second way is net financing. Since the state partially finances the agency's activities, it exclusively exercises control but only of its expenditure. Under the net financial system, the agency's expenditure threshold may be increased, but only if it has seen an adequate increase in revenue. The third way is self-financing. As a consequence of such financing, the agency is defined as a market entity that is free to set and differentiate (depending on the demand) the prices of the services provided to customers[25].

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[24] Oliver James, Sandra van Thiel, "Structural Devolution to Agencies", In: The Ashgate Companion to New Public Management, ed. Tom Christensen, Per Laegreid, Farnham: MPG Books Group UK, 2010, 209–222.

[25] Office of Public Services Reform and HM Treasury, "Better government services: Executive Agencies in the 21st Century", London, 2002.

There are a variety of management structures in executive agencies. The model of employment is stipulated in the agency's framework document[26]. Each agency should have a departmental sponsor, who can be the oldest civil servant enjoying the trust of the minister and the president of the agency. The departmental sponsor is a "source of advice" located outside the government administration. They help achieve efficiency and establish the framework for managing the agency, advise the minister on providing information on the agency's performance, and advise the president of the agency on its actions.

Another element of the internal structure of British agencies is the management board, whose task is to support the agency's president. It consists of at least two members from outside the agency's executive bodies. These members' task is to provide the supervisory board with external expert opinions. Although they advise and support, they have not been authorized to issue instructions, and they are not responsible for the agency's actions.

The UK's model of the executive agency has been designed in such a way so as to strengthen the separation of politics from government administration management by giving the minister the control over the management, and the agency's president the autonomy from political decisions. The broad political framework and general vision of the agency's work are set by the competent minister after consultation with the minister of Treasury and with the office of the minister of civil service. The framework document published for each agency contains a detailed list of tasks and activities, as well as the agency's political goals. It also shapes the relationship and the division of responsibility between the agency's president and the minister and other parties. The agency's president is directly accountable to the minister for its efficient and effective work, whereas the minister is responsible for its political goals.

The framework document is evaluated every five years in terms of the effectiveness of the agencies' work and implementation of government goals. It may also be considered whether the agency's goals should be changed or whether its service is needed at all. As a consequence, a decision may be issued on reorganizing the agency or terminating its existence.

[26] "A guide for departments", Agencies and Public Bodies Team, Cabinet Office, 2006.

The above-mentioned decisions are influenced by political and ideological preferences of currently ruling political factions.

For a long time, the United Kingdom used *quasi*-autonomous bodies, usually executive agencies, which were not part of public administration. The increase in the number of agencies in the late 1980s and 1990s was a breakthrough. At the end of the 1990s, the number of agencies and autonomous forms of public administration began to decrease. The core of the executive agency system seems to have been intact, though it is subject to continuous changes. The British model of the agency has been transferred to other legal systems in countries such as Canada, Korea, and Japan. In addition, the activity of agencies in the UK contributed to the increased transparency of the services provided by the government administration. As a consequence, attention was drawn to those services themselves and the agencies could act as enterprises oriented towards results and economic effects. Still, neither the final balance of total profits gained by all the agencies nor the costs of their activities as a whole has been fully assessed[27].

3.4. Polish government agencies

Government agencies are a group of public administration entities characterized by special features which make it possible to distinguish them from typical entities. As it has been said, government agencies have legal personality, which is the basic feature distinguishing them from public administration entities. Owing to legal personality, government agencies can participate in civil law transactions. They have been conferred legal personality so that they can perform public functions with the help of their own business activity. Having legal personality means also the capacity to act in law and legal capacity granted by civil law. State agencies may, therefore, hold rights and obligations as well as be a party to obligation relationships. At the same time, the fact that government agencies are established by way of an act, perform public tasks and are authorized to use administrative power leads to the conclusion that they are both public

[27] Cf. Oliver James, The Executive Agency revolution in Whitehall, Basingstoke: Palgrave Mcmillan, 2003, 2–7 and 41–55.

and administrative law entities, and that they can act as a[28] party to administrative[29] proceedings.

First of all, it should be emphasized that government agencies are created and act on the basis of statutory regulations. The legislator decides about the organizational structure, organs, tasks and financial management of government agencies. Nevertheless, the regulations serve only as a framework which is then complemented and specified by the statutes (rules and regulations) of particular agencies. When it comes to the organizational structure, it is centralized. The agency's president is authorized to determine the internal organization of its particular organizational units based on the internal regulations. They also manage the agency and represent it outside. The president performs a considerably wide range of tasks, which means they have an influence on the work of the agency in general. The centralized system of the agency consists of the central office with the president, at the lower level there are regional branches headed by directors, and then poviat offices (local offices) headed by managers. The organs of these organizational units are subordinate to the president of the agency, however, they have a separate list of tasks and competences to be performed in their areas.

Second of all, state agencies are characterized by hierarchical dependency (subordination) on government administration bodies. At this point, it should be clarified that it is permissible to use the terms "dependency" or "subordination" to refer to the supreme bodies of state administration. Pursuant to the statutory provisions on establishing a given government

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[28] Cf. Józef Filipek, "Podmiotowość w prawie administracyjnym", In: Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z konferencji jubileuszowej Profesora Eugeniusza Ochendowskiego, Toruń: TNOiK, 2005, 184–185; Jacek Supeł, "W sprawie podmiotowości administracyjnoprawnej", In: Prawo do dobrej administracji. Materiały ze Zjazdu Katedr Prawa i Postępowania Administracyjnego, ed. Zygmunt Niewiadomski, Zbigniew Cieślak, Warsaw: Uniwersytet Kardynała Stefana Wyszyńskiego, 2003, 590–591.

[29] Cf. Grzegorz Łaszczyca, Czesław Martysz, Andrzej Matan, Postępowanie administracyjne ogólne, Warsaw: C.H. Beck, 2003, 292; Janusz Niczyporuk, "Podmiotowość administracyjnoprawna a zdolność administracyjnoprawna-delimitacja pojęć", In: Współczesne zagadnienia prawa i procedury administracyjnej, ed. Marek Wierzbowski, M.; Jacek Jagielski, Aleksandra Wiktorowska, Ewa Stefańska, Warsaw: Wolters Kluwer, 2009, 182–185.

agency, this entity is subordinate to and supervised by the competent minister. In nearly all cases the relation of supremacy and subordination between the government agency and the competent minister takes the form of management. However, if the competent minister establishes the statute of an administrative agency by way of an ordinance, then it is organizational subordination. This subordination means that the superior body is authorized to issue legal acts that bind those entities and stipulate their general structure, tasks, competencies, procedures, etc.

Third of all, the public tasks performed by government agencies concern the specific scope of matters. Most of the government agencies provide financial support to farmers, producers of healthy and organic food, private entities conducting an innovative activity, and entities implementing programs specified by the agency. Under the current law, each administrative agency implements its tasks using civil law agreements based on specific provisions regulating the establishment and work of such entities. The analyses of the legal forms used by the government agencies show that the private law form of operation is prevalent.

Unfortunately, the Polish legislator does not always act rationally. When analyzing the parliamentary stenographic records, one can discover that the Polish legislator imitates or intends to imitate the legal solutions that already exist in other legal systems. An interesting example is the merger of the Military Property Agency and the Military Housing Agency into one government agency, the Military Property Agency, which took place in 2015. Even the first articles of the Act on Military Property Agency[30] raise many doubts and questions as to its legal status and classification among the proper group of entities. In Article 5 of the above-mentioned Act, the legislator states that the Military Property Agency is an executive agency. In my opinion, this provision shows not only the legislator's inconsistency in using the proper nomenclature but also the lack of logic in their actions.

Taking into account the content of the stenographic records regarding the bill on Military Property Agency, it must be stated that this agency has been established first of all because the European and global arms

[30] The Act of 10 July 2015 on Military Property Agency (Journal of Laws of 2015, item 1322).

markets have changed so much that a large number of countries do not want to talk about the purchase of arms with potential suppliers, i.e. entrepreneurs who produce such arms, and that is why this task has been delegated, in a specified scope, to the Military Property Agency; second of all, the hitherto prevailing practice in other countries shows that their method is to establish a government agency which, on behalf of the minister of national defence, can trade in military property and offer it to other countries under agreements between governments. According to the position of the Director of the Armament Policy Department of the Ministry of National Defense, General Włodzimierz Nowak, the adoption of the above-mentioned solution aims to ensure that "the Military Property Agency is an executive agency of the Minister of National Defence. This is provided in detail in Article 57 of the Act on Military Property Agency, which stipulates that, on the basis of a decision issued by the minister in connection with the conclusion of an agreement between governments, the Military Property Agency may be a government agency performing tasks that arise from this agreement"[31].

The above-quoted statement of General Włodzimierz Nowak substantiates my opinion that there is a lack of consistency in using the terms government agency and executive agency. Furthermore, as the stenographic record shows, the establishment of Military Property Agency as a new untypical entity within public administration was motivated by the fact that a similar model had already existed in other legal systems. Therefore, believing in its success, the legislator decided to transfer that model to the Polish law. In my view, the legislator's reasoning and approach to creating legal solutions raise certain doubts, as well as it does not necessarily correspond to the needs of the society.

3.5. Is the Polish state agency a copy of the German model?

There is no doubt that the above-described German agencies resemble, in most areas, the Polish government agencies. The model of Polish government agencies is an example of the so-called legal transplants in admin-

[31] http://orka.sejm.gov.pl/Zapisy7.nsf/wgskrnr/OBN-128, Bulletin No. 4731/VII, (access date: 31.08.2019)

istrative law[32]. However, it is impossible to compare it with the French or the British models (especially with the latter). Above all, this is because these agencies are autonomous entities, which is the opposite of the Polish agencies. Admittedly, if one tries hard, they can find some similarities to the British model, such as the cooperation of the agency's director with the minister, or the scope of matters dealt by the agency. Nonetheless, the structure and legal nature of the British agency is different from the Polish one, which means that the latter can not have been based on the former.

The similarities should be sought between the Polish and the German models. Firstly, in both cases, the legal basis for establishing an agency is a normative act of statutory rank. The normative act stipulates about the agency's tasks, the agency's body's tasks, the financial management, and the supervision over the agency. Secondly, both agencies are headed and managed by presidents. The president is responsible for the agency's work and represents it outside. Thirdly, the scope of activities undertaken by the Polish and the German agencies is similar in areas such as the army, property management, and support of agricultural production. Fourthly, the activity of both the Polish and the German state agencies is financed from the state budgets. Fifthly, the relationship between the minister and the agency is of hierarchical nature in both countries. This subordination allows the minister to issue additional orders or internally binding acts imposing additional tasks on the agency.

The transfer of the German model of the agency to the Polish legal system should arouse certain hesitancy in its correct and proper functioning. Because German agencies operate under federal law, which cannot be referred to Poland. Of course, legal transplants, as in the great examples in administrative law, were applied in full without the Polish legislator distinguishing between German direct and indirect agencies. Hence, the Polish agency model has the characteristics of these two German agencies.

[32] Cf. Paulina Bieś-Srokosz, "The Transformation of Administrative Law Through Legal Transfers: the Case of Government Agencies in Post-1989 Poland", Wroclaw Review of Law, Administration & Economics 2(2016): 151–162; Jonathan Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process", The American Journal of Comparative Law 51(2003): 845–868.

4. CONCLUSIONS

It seems justified to say that the idea behind establishing the government agencies was (and is) not to satisfy the social needs and carry out specific tasks but to transfer foreign agency models to the Polish system. This could (can) stem from the fact that at a given moment the legislator was (is) not able to create a completely new entity model that would fully "fit in" the Polish legal system. One can get the impression that the legislator often (as in this case) seeks ready-made legal solutions that have proved to work properly in other countries, for example in Germany.

Government agencies function not only in Europe but also in the United States of America, which is considered to be the precursor in that field. The American legal solutions have become a model that is being adopted by other countries. The concept of *quangos*[33] adopted in the United Kingdom of Great Britain and Northern Ireland, as well as the concept of administrative authorities in France, are derived from the model of American agency[34].

It is also worth to mention the agencies functioning within the European Union. However, they are so diverse in terms of establishment procedure, operation and autonomy that it is difficult to identify their common reference point, like in the case of Polish agencies and their equivalents from France, the UK, and the EU. It is the German model of agency that finds reflection in Polish agencies, which is an effect of legal transplantation performed by the Polish legislator.

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[33] *Quasi-autonomous non-governmental organizations.*

[34] Hubert Izdebski, Michał Kulesza, Administracja Publiczna. Zagadnienia ogólne, Warsaw: Liber, 1999, 156 et seq.

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SOCIAL AND LIVING CONDITIONS IN POLISH PRISONS IN THE CONTEXT OF INTERNATIONAL LEGAL REGULATIONS – SELECTED ISSUES

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ABSTRACT

The aim of the study is to determine the current position of a Polish prisoner against the international background, basedon the description of hygiene and sanitation conditions as a part of social and living conditions which are the closest to penitentiary everyday life. The study presents main acts of the international law and analyzes selected case-law of the European Court of Human Rights[1] in determining standards for dealing with persons deprived of freedom, as well as the activities of international and national preventive mechanisms, in particular the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[2] and the Ombudsman.

Key words: convict, social conditions in prison, standards for executing punishments

1. INTRODUCTION

Penitentiary confinement is undoubtedly an abnormal life situation for people experiencing it and causes a number of traumatizing and de-

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[1] Hereinafter referred to as: ECtHR or Tribunal.

[2] Hereinafter referred to as: CPT.

pressing factors. Its effects are felt not only by the convict himself, but also by his family and people in the immediate environment. The need to abandon their current lifestyle with all its consequences, the inability to meet basic spiritual and physical needs, as well as separation from loved ones, all of them meanthat detention in the conditions of penitentiary units becomes a particularly painful ailment for convicts.

In view of the above, it is common ground that the penalty of deprivation of freedomof liberty is an indispensable tool for combating crime. Over the years, it has been noticed that detention in itself, is a huge inconvenience that cannot constitute the only purpose. Deprivation of one's freedom must aim at higher, socially useful goals which are primarily to enable compensation for the evil caused and to restore the prisoner to society as a result of the reintegration process. The supranational community, seeing the issue of prisoner detention, decided to regulate it in detail, which contributed to the development of international standards for the execution of imprisonment guaranteeing minimum penitentiary standards necessary for the proper implementation of the basic purpose of the detention penalty.

2. INTERNATIONAL STANDARDS FOR EXECUTING PUNISHMENTS

The acts of international laws on human rights began to emerge especially after World War II. The rights of the human being are protected all over the world, in all spheres of life[3]. International documents containing generally formulated rules on the implementation of penalties primarily constitute ratified: treaties, pacts and conventions. Recommendations and resolutions, which are characterized by reduced formalism, contain additional details of the principles they refer to[4]. European countries pay

[3] Teodor Szymanowski, „Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności", In: PWP, Międzynarodowe standardy wykonywania kar, ed. Teodor Szymanowski, Warsaw: Centralnego Zarządu Służby Więziennej Ministerstwa Sprawiedliwości, 2011, 19.

[4] Teodor Szymanowski, „Wstęp", In: PWP, Międzynarodowe standardy wykonywania kar, ed. Teodor Szymanowski, Warsaw: Wydawnictwo Centralnego Zarządu Służby Więziennej Ministerstwa Sprawiedliwości, 2011, 9-11.

considerable importance to compliance with set and accepted standards. Regulations adopted as so-called *soft law*, often after the implementation period, are adopted in the form of *hard law* becoming mandatory standards.

The most important documents protecting human rights on the international stage include the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in Paris on 10 December 1948. It is from the natural law that all people have universally derived the axiology of the Declaration. It constituted the basis for many conventions and documents to be drawn up later[5]. The declaration clearly supports humanism and lawful punishment. Since its adoption, cooperation in the international field has clearly brought better and better results in the form of institutions and documents[6].

Another global act is the International Covenant on Civil and Political Rights (ICCPR)[7] adopted by the UN General Assembly on December 16, 1966. It was ratified by Poland on March 13, 1977. Its preamble refers to the United Nations Charter and the Universal Declaration of Human Rights. The remaining parts form a catalogue of the most important rights arising from inherent human dignity[8]. For persons serving a sentence art. 7 and art. 10 of the Covenant are significant because they relate to basic guarantees, i.e. the prohibition of torture and the principle of humanitarianism. Convicts also enjoy many other rights contained in the Covenant, such as the law of religious freedom, compensation in the event of unlawful detention or arrest, the obligation to separate juvenile offenders from adults, or a ban on discrimination. The Covenant also contains general principles related to the conduct of persons serving a sentence, such as

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[5] Todor Szymanowski, „Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności", In: PWP, Międzynarodowe standardy wykonywania kar, ed. Teodor Szymanowski, Warsaw: Wydawnictwo Centralnego Zarządu Służby Więziennej Ministerstwa Sprawiedliwości, 2011, 20.

[6] Jerzy Migdał, Teodor Szymanowski, Prawo karne wykonawcze i polityka penitencjarna, Warsaw: Wolters Kluwer, 2014, 47.

[7] The International Covenant on Civil and Political Rights of December 19, 1966, ratified by Poland 1977, Journal of Laws 1977, no. 38, item 167.

[8] Teodor Szymanowski, Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności, 21.

a prohibition of inhuman and degrading treatment or punishment, the obligation to treat persons deprived of freedom in a humane manner, with respect for human dignity, as well as the assumption that the main purpose of the penitentiary system is correction and social rehabilitation of prisoners[9].

Non-application of the Covenant may result in complaints regarding the rights contained in it. There are two ways of submitting them: - the state party directs the notification to another state party emphasizing that the obligations under the Covenant are not being fulfilled. The party, in turn, has 3 months to provide an explanation and remedy the deficiencies identified. If it does not solve the problem, any State Party may refer the matter to the Human Rights Committee within 6 months of receiving the first notification. The Committee has 12 months to consider the matter, under the so-called good services. If the matter is not resolved in this way, the Committee, with the consent of the States Parties, may appoint a Conciliation Commission. Its purpose within the good services is to bring about a friendly settlement of the matter and to present a report to the chairman of the Committee within 12 months for forwarding to the countries;

- a person who is the victim of the violation directly directs the complaint. An accused state has six months to submit a written explanation to the Committee and to provide remedies[10].

Another important international document regulating the conduct of persons committing a criminal act and the execution of a penalty is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[11]. It was adopted by the UN General Assembly on December 10, 1984. Poland ratified it on October 21, 1989, without recognizing the Committee's powers against torture[12].

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9 Teodor Szymanowski, Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności, 22-23.

10 Ibidem, 23-24.

11 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 Journal of laws 1989, no. 63, item 378.

12 Teodor Szymanowski, Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności, 26-27.

The essential meaning of this Convention is given to it by Article 1, which contains a detailed definition of torture which cannot be found in other documents. They are defined by indicating their most basic goals and also state that torture does not only constitute an interference in the physical sphere, but also in the person's psyche[13].

The Council of Europe adopted a significant institutional position in the process of protecting human rights, however at a regional level. This international organization of 47 members, of mostly European countries, has drawn up many documents that enable the application of uniform rules of conduct for persons deprived of their freedom. This allows to provide convicts with proper conditions of serving the sentence and prepare them properly for their return to the society, but also respects the rights of the victims of crime and obligatory protection of the society. The produced documents have a different scope, apply to many aspects of the execution of a prison sentence, ranging from the most general principles to very detailed guarantees[14].

Article 1 of its Statute[15] states that its main objective " is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress"[16].

The Convention for the Protection of Human Rights and Fundamental Freedoms[17], called the European Convention on Human Rights, is of a great significance in the matter of protecting human rights. It was signed in Rome on November 4, 1950, and entered into force on Septem-

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[13] Ibidem, 28.

[14] Maria Ejchart, Krzysztof Kosowicz, „Wprowadzenie", In: PWP, Międzynarodowe standardy wykonywania kar, ed. Teodor Szymanowski, Warsaw: Wydawnictwo Centralnego Zarządu Służby Więziennej Ministerstwa Sprawiedliwości, 2011, 15-16.

[15] The Statute of the Council of Europe of May 5 1949, Journal of laws 1994, no 118, item 565.

[16] Maria Ejchart, Krzysztof Kosowicz, „Wprowadzenie", In: PWP, Międzynarodowe standardy wykonywania kar, ed. Teodor Szymanowski, Warsaw: Wydawnictwo Centralnego Zarządu Służby Więziennej Ministerstwa Sprawiedliwości, 2011, 15.

[17] Convention for the Protection of Human Rights and Fundamental Freedoms done in Rome on November 4, 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Journal Of Laws 1993, no. 61, item 284, hereinafter referred to as the ECHR.

ber 3, 1953. It was ratified by Poland on January 19, 1993, along with most of its protocols. It is the European equivalent of the Covenant on Civil and Political Rights on a regional scale. The ECHR much more effectively emphasizes the method of challenging violations of rights, while at the same time anticipating their effects, which can be seen by introducing even the functioning of the widely available European Court of Human Rights. The preamble to the ECHR refers to the Universal Declaration of Human Rights, while the remainder is basic human rights and provisions regarding bodies to ensure compliance with the Convention[18].

For persons placed in detention facilities, the following are significant: Article 3 prohibiting torture and inhuman, degrading treatment or punishment[19], Article 5 regarding general imprisonment, and Article 8[20]guaranteeing the right to respect for private and family life. Depriving someone of his freedom in a different way than regulated in that provision is a violation of the ECHR's provisions. Article 19 created the possibility of establishing the ECtHR, which is also important from the point of view of persons deprived of freedom, while Article 33 and further include important regulations relating to a complaint[21]. What is important, it is a subsidiary system to national law. The ECtHR became permeant court thanks to the entry into force of an additional Protocol to the ECHR.

The Council of Europe, especially for places of detention, seeks to protect the rights and dignity of the human person. To achieve this goal, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was created, also called the Europe-

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[18] Teodor Szymanowski, Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności, 25.

[19] Husayn (Abu Zubaydah) v. Poland of 24 July 2014, Former Fourth Section, application no. 7511/13, https://hudoc.echr.coe.int/eng#{%22itemid%22: [%22001-146047%22]}, (access date: 14.08.2019).

[20] See: Agnieszka Wedeł-Domaradzka, „Prawo do kontaktów z rodziną osób aresztowanych oraz odbywających karę pozbawienia wolności - rozważania na tle standardów soft law oraz art. 8 EKPC", Polski Rocznik Praw Człowieka i Prawa Humanitarnego, 7(2016), 301-318.

[21] Teodor Szymanowski, Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności, 26-27.

an Convention for the Prevention of Torture[22]. It was signed on November 26, 1987, and entered into force on February 1, 1989[23]. It is a legal act that has a real impact on national law and the actions of the signatory states. Under Article 1 of the Convention, a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was established[24], it visits countries to examine the treatment of persons deprived of their freedom. The visits result in reports that also contain recommendations for improvement in the protection of persons deprived of their freedom[25]. CPT reports and experience of individual countries resulted in the development of minimum standards for dealing with convicts as well as a single criminal policy was adopted, both in the creation and application of law. The provisions of the Convention may not be changed in any way, but the state has the right to terminate them at any time. The visits of committee members, who are independent experts, provide real protection for the rights of persons serving imprisonment. Although no sanctions are provided for in the document for countries that do not display due cooperation, nevertheless there is a certain pressure exerted in the form of a public statement[26].

The binding effect of international documents also has a dimension of controlling compliance with their rights[27]. Deprivation of freedom of libertyin order to enforce a sentence cannot be the basis for taking away domestic or international methods of protecting rights. Ensuring access to the European Commission of Human Rights and the ECtHR to persons

[22] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and Treatment or Punishment, done in Strasbourg on 26 November 1987 Journal of Laws of 1995 No 46 item 238.

[23] Poland ratified it in 1994, but it came into force on February 1, 1995.

[24] Further referred here as: CPT.

[25] Teodor Szymanowski, Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności, 28-29.

[26] Teodor Szymanowski, Międzynarodowe konwencje o postępowaniu wobec skazanych, zwłaszcza osób pozbawionych wolności, p. 29.

[27] Grażyna Szczygieł, Społeczna readaptacja skazanych w polskim systemie penitencjarnym, Białystok: Temida 2, 2002, 81.

deprived of their freedom is the basic duty of each state which is a party to the ECHR and has recognized the jurisdiction of the bodies above[28].

For the system of international protection of human rights to have any raison d'être, there must be an instrument that will reliably control the level at which prisoners' rights are actually observed[29].

The standard of this law, which is regulated by Article 13 of the ECHR, ensures everyone whose rights or freedoms contained in the Convention have been violated, the right to effectively appeal to the appropriate state body, regardless of whether such violation was made by persons acting in connection with the performance of official functions or not. This right has a very wide scope, since it is assumed that, despite the measure it mentions, it is about a full range of remedies[30].

Under Article 13 of ECHR, the states are obliged to introduce an effective system of remedies. The body dealing with complaints does not have to be a judicial body, but only have the appropriate competence as a state body[31]. However, to meet the requirements of Article 13 of the ECHR, it must the power to decide on the legal consequences of dealing with a given complaint[32].

An imprisoned person has to, in order to use the right to apply a complaint to Strasbourg's bodies, comply with all the formal requirements imposed for a formal complaint[33]. However, complaints submitted by convicts are examined in accordance with general rules[34].

Documents at the international level that contain international standards for dealing with people who have been legally deprived of freedom[35]

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[28] Danuta Gajdus, Bożena Gronowska, Europejskie standardy traktowania więźniów, Toruń: TNOiK, 1998, 190.

[29] Ibidem, 187.

[30] Ibidem, 189.

[31] Article 6 of ECHR.

[32] Danuta Gajdus, Bożena Gronowska, Europejskie standardy traktowania więźniów, 189.

[33] Article 25-27 of ECHR.

[34] Danuta Gajdus, Bożena Gronowska, Europejskie standardy traktowania więźniów, 190.

[35] Maria Niełaczna, Zmiany za murami? Stosowanie standardów postępowania z więźniami w Polsce, Warsaw: Stowarzyszenie Interwencji Prawnej, 2011, 104.

are also the European Prison Rules[36] constituting so-called *soft law*. They were adopted on January 11, 2006 at a 952 meeting of delegates by the Committee of Ministers for member states of the Council of Europe, as a recommendation of Rec (2006). They practically contain a full set of provisions related to the execution of penalties and measures involving detention. All in all, they cannot replace Polish executive criminal law, as they do not exhaustively specify executive procedures and institutions appropriate for individual countries[37].

EPR was preceded by other documents - UN Standard Minimum Rules for the Treatment of Prisoners of 1955, and later also Standard Minimum Rules for the Treatment of Prisoners of 1984. These documents were of great importance in the promotion of modern best practices in dealing with persons deprived of freedom around the world. They were of most importance to the countries which were creating or rebuilding their legal systems at that time. In totalitarian states, they were a counterweight in the fight for the rule of law in dealing with convicts[38].

The main goals and tasks of EPR were defined in their introductory part, as well as in the content of the rules themselves. It may be concluded from these regulations that they are primarily lawful execution of isolation sentences and humane treatment of persons serving isolation sentences, proper preparation for their return to society (the principle of reintegration included in rule 102.1, protection of society against crime and security in penitentiary units). EPR should be applied in various areas of activity of state organs, such as legislation, criminal and penitentiary policies, as well as direct execution of punishments and isolation measures against persons deprived of their freedom. All actions of the state in these catego-

[36] Hereinafter referred to as EPR. They replaced Recommendation R (87) 3 of the Committee of Ministers of Member States on the European Prison Rules adopted by the Committee of Ministers on February 12, 1987 at 404th meeting of deputy ministers.

[37] Teodor Szymanowski, „Rekomendacja Rec (2006) 2 Komitetu Ministrów dla państw członkowskich Europejskie Reguły Więzienne", In: PWP, Międzynarodowe standardy wykonywania kar, ed. Teodor Szymanowski, Warsaw: Wydawnictwo Centralnego Zarządu Służby Więziennej Ministerstwa Sprawiedliwości, 2011, 75.

[38] Ibidem, 75-76.

ries should comply with the rules, as they are a kind of axiology of specific standards already being created in the countries that have adopted them[39].

Failure to comply with EPR by any of the signatory States may have far-reaching consequences. First of all, there might be negative reactions coming from both the public opinion of a given country and other countries - parties to EPR. NGOs and scientists may also express their dissatisfaction in the form of international publications and mass media. Further consequences are also the report prepared by the CPT, if the state agrees to inspections, and the most restrictive of the reactions - a judgment issued by the CPT in response to a complaint of a person deprived of freedom, in which the violation of the applicant's rights will be found[40].

3. COMPLIANCE WITH PENAL STANDARDS IN SOCIAL, LIVING, HYGIENE AND SANITATION CONDITIONS.

Living conditions prevailing in prisons are of fundamental importance for the proper conduct of the prisoners' reintegration process. According to the general directives on respecting the dignity of the human person and humane treatment of convicts in penitentiary units, living conditions should correspond to the living standards adopted in a given society. It should be conducted in such a way that they do not negatively affect the sense of dignity of convicts[41], often forced to stay in penitentiary facilities for a very long time[42].

This position regarding living conditions in prisons was adopted by the ECtHR which emphasized in its case-law that in order to solicit violations of Art. 3 of the ECHR[43], the conditions prevailing in penitentia-

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[39] Ibidem, 78.

[40] Ibidem, 78-79.

[41] Keenan v. The United Kongdom of 3 April 2001, Third Section, application no. 27229/95, https://www.escr-net.org/sites/default/files/Decision_1.pdf (access date: 14.12.2019).

[42] Ewa Dawidziuk, Traktowanie osób pozbawionych wolności we współczesnej Polsce na tle standardów międzynarodowych*,* Warsaw: Wolters Kluwer, 2013, 72.

[43] Convention for the Protection of Human Rights and Fundamental Freedoms done in Rome on November 4, 1950, subsequently amended by Protocols No. 3, 5 and 8 and

ry units have to respect to the maximum extent personal dignity of convicts, while the ways of executing a prison sentence cannot expose them to a threat or barriers exceeding the degree of inconveniences resulting from the very nature of imprisonment[44]. Violation of Art. 3 of the Convention in relation to persons deprived of freedom usually occurs in terms of the conditions in which they are serving an imprisonment penalty, i.e. living and sanitary conditions.

In scope of the former, the most common allegation raised by convicts is insufficient space for residential purposes[45]. According to the Tribunal, too little space available to a prisoner in a residential cell, especially if the prisoner is in such conditions for a long time, constitutes degrading or even inhuman treatment[46]. In its jurisprudence, the Tribunal, in the respect of overcrowding of detention centers and prisons, stated that when assessing the violation of Art. 3 of the Convention, due to insufficient personal space of the prisoner, three elements should be taken into consideration. First, each prisoner should have a single sleeping place. Secondly, the personal space available to every convict cannot be less than 3 square meters. Third, the cell must have a surface that ensures free movement of prisoners. In the absence of any of these elements, the conditions of deprivation of freedom of libertyshould be regarded as no less than degrading[47].

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supplemented by Protocol No. 2, Journal Of Laws 1993, no. 61, item 284, hereinafter referred to as the ECHR.

[44] Michał Zoń, „Orzecznictwo", Forum Penitencjarne, 11(2009), 22

[45] Janusz Wojciechowski v. Poland of 28 June 2016, Fourth Section, application no. 54511/11 https://www.rpo.gov.pl/sites/default/files/Sprawa%20Janusza%20Wojciechowskiego%20vs%20Polska%2C%2028.06.2016%20r.%20-%20wersja%20angielska.pdf(access date: 15.12.2019); Peers v. Greece of 19 April 2001, Second Section, application no. 28524/95, https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-59413%22]} (access date: 14.12.2019).

[46] See. e.g. the Court's decision on Kalashnikov v. Russia, Chamber (Section III), application no. 47095/99, § 96-97; Ostrarov v. Moldova of 13 September 2005, Chamber (Section IV), application no. 35207/03, § 84; Orchowski v. Poland of 22 October 2009, Chamber (Section IV), application no. 17885/04, § 122, quoted from: Marek Antoni Nowicki, Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*,* Warsaw: Wolters Kluwer Polska, 2013, 396.

[47] Annyev and Others v. Russia of 10 January 2012, Chamber (Section I), applicationsno. 42525/07 and 60800/08, § 145 and 148 Judgment.

In Poland, the minimum standard of living space for a convict is 3 square meters. Unfortunately, this standard deviates from the norms in other European countries, as well as the recommendations of the CPT which recommends at least 4 square meters of living space per prisoner for multi-person cells and 6 square meters per prisoner for single cells[48]. In the European Union, the living space is respectively: France from 4.7 to 9 m2, Great Britain from 4.5 to 7 m2, Spain from 9 to 10 m2, Italy from 7 to 9 m2[49]. On July 9-18, 2018, the first visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("SPT") took place. Among the recommendations, attention was drawn to the still-current problem with the low ratio of residential space per prisoner[50]. Providing adequate living space is particularly important because convicts often spend more than 22 hours in cells[51].

The ECtHR in its decisions[52] is guided by the CPT standards. The Tribunal clearly emphasized that exceeding the minimum standard of 3 square meters per prisoner is serious overcrowding which in itself justified the finding of a violation of Art. 3 ECHR.

The Constitutional Tribunal[53] also commented on the issue of excessive density of residential cells stating that such a practice in itself constitutes inhumane treatment, and in the event of exceptional accumulation of various inconveniences, it can even be classified as torture. The efforts of the National Torture Prevention Mechanism[54]so far have not been imple-

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[48] c.f. Living space per prisoner in prison establishments: CPT standards, CPT/Inf (2015)44; Dwudziesty Szósty Raport Generalny CPT, CPT/Inf (2017)5, par. 56 - https://rm.coe.int/16806cc449(access date: 03.10.2019).

[49] Report of the Ombudsman on the activities of the National Torture Prevention Mechanism in Poland in 2018, 135. https://www.rpo.gov.pl/sites/default/files/KMPT%20-%20raport%20za%20rok%202018.pdf, (access date: 17.06.2019).

[50] https://www.rpo.gov.pl/pl/content/delegacja-podkomitetu-ds-prewencji-tortur-onz-po-raz-pierwszy-wizytuje-miejsca-pozbawienia-wolno%C5%9Bci, (access date: 03.10.2019).

[51] Maria Niełaczna, Zmiany za murami? Stosowanie standardów postępowania z więźniami w Polsce, 50.

[52] Lind v. Russia of December 6 2007, case no. 25664/05 LEX no 327271 § 59.

[53] Constitutional Tribunal Judgment 26 May 2008, SK 25/07

[54] Further referred here as NTPM.

mented in reality, because the Ministry of Justice does not change the minimum residential standard[55].

In addition to the Constitutional Tribunal, the problem of the density of residential cells was also dealt with by courts, which considered this issue in the context of the violation of personal rights of persons deprived of their freedom. In its judgment of February 28, 2008[56], the Supreme Court stated that the overcrowding of Polish penitentiary units constitutes the basis for a claim for compensation for degrading and inhuman treatment, and the burden of proof that there was no violation of this prohibition rests with the defendant. In the same case, the Supreme Court stated that ensuring adequate living conditions results from the humane treatment of persons deprived of their freedom and respect for their dignity, which is why the state, when carrying out its tasks in the field of repressive policy, must ensure that their implementation does not constitute a greater ailment for convicts than is due to the very nature of the prison sentence. Failure to comply with the minimum surface standard violates international conventions ratified by Poland.

In turn, the decision of the Poznań Court of Appeal of November 24, 2010[57] stated that the overcrowding of residential cells could not be explained by a large number of crimes or the lack of sufficient places in prisons and detention centers. In this respect, the state is obliged to ensure conditions guaranteeing respect for the dignity of persons deprived of their liberty.

Given the fact that the violation of the minimum surface standard is the subject of jurisprudence of both the Constitutional Tribunal, the Supreme Court and common courts, and that Polish solutions differ significantly from the standards adopted in other European countries, it should be stated that Poland does not comply with the postulate of providing

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[55] Report of the Ombudsman on the activities of the National Torture Prevention Mechanism in Poland in 2018, 134 https://www.rpo.gov.pl/sites/default/files/KMPT%20-%20raport%20za%20rok%202018.pdf(access date: 17.06.2019).

[56] The judgement of the Supreme Court, Civil Chamber, as of 28th February 2007, ref. no. V CSK 431/06, OSNC 2008, no. 1, item. 13.

[57] The judgement of the Poznań Court of Appeal as of 24th November 2010, ref. no. I ACa 881/10, LEX no. 757733.

convicts for residential purposes an area conducive to respect for the dignity and humane treatment of prisoners.

In respect of sanitary conditions, the Tribunal found that, even though the minimum area standard of 3 square meters per prisoner was maintained, it was necessary to ensure adequate ventilation, natural light or air, heating and the possibility of using the toilet in a way that would ensure at least a minimum of privacy. If the sanitary conditions are not met, then it is also a form of inhuman or degrading treatment[58].

The obligation to organize appropriate living conditions in prisons rests with the public authorities. The ECtHR[59] emphasized that regardless of financial or logistical possibilities, the state must create conditions for prisoners to ensure respect for the dignity of prisoners, and in the event that the state is unable to fulfill this obligation, it is necessary to refrain from applying strict criminal policy, thus limiting the number of persons deprived of their liberty or alternative non-custodial punitive measures.

The level of living conditions in Polish prisons is analyzed each time during preventive visits of the NMPT. In 2018, 12 penitentiary units were inspected, i.e. six prisons, two detention centers and four external branches of detention centers and prisons. In general, during the visits the NTPM did not state that the living conditions prevailing in Polish penitentiary units are bad enough to be able to consider in this context the violation of the prohibition of inhuman or degrading treatment. Persons deprived of their freedom paid special attention to the insufficient lighting of residential cells, ventilation problems, lack of access to hot water in cells, as well as damaged residential equipment during the annual conversations with representatives of NTPM[60].

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[58] Babushkin v. Russia judgment of 18 October 2007, Chamber (Section III), application no. 67263/01, § 44.

[59] Orchowski v. Poland Judgment of 22 October 2009 in case 17885/04, LEX No. 523324, § 153.

[60] Report of the Ombudsman on the activities of the National Torture Prevention Mechanism in Poland in 2018, 131 and next.https://www.rpo.gov.pl/sites/default/files/KMPT%20-%20raport%20za%20rok%202018.pdf(access date: 17.06.2019).

Currently, according to the announcement of the Central Board of the Prison Service[61], as of October 4, 2019, the total population of penitentiary units on a national scale was 93.3%, so there is no overcrowding within the meaning of the Regulation of the Minister of Justice[62]. However, in previous years this problem was identified both in the NTPM reports and by international institutions. The effect of "marking" this undesirable phenomenon is achieved through the use of practices that are inappropriate in the opinion of the representatives of NTPM, which are however allowed under current laws. In reports from previous years, the NTPM pointed out that living rooms are adapted to common rooms and other rooms intended for organizing cultural and educational activities, the number of living cells is included and adapted to such needs of sick rooms, the stay of some people in a cell is extended beyond the norm transition, whether there are people who are not dangerous convicts for the purposes of this category of prisoners and for the purposes of disciplinary punishment in the form of imprisonment[63]. This practice of the authorities responsible for executing the penalty of imprisonment undoubtedly contributes to minimizing the phenomenon of overcrowding, but it does not eliminate the problem, but only hides or postpones it.

Another disadvantage of the Polish penitentiary system, which the NTPM noticed during the visit, is the problem of the lack of proper adaptation of penitentiary units to the needs of people with physical and sensory disabilities[64]. During the visit, the Ombudsman found that prisons and detention centers still lack residential cells adapted to the needs

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[61] Announcement of the Central Board of the Prison Service of 4 October 2019 regarding the population of prisons and detention centers https://www.sw.gov.pl/strona/statystyka--biezaca (access date: 06.10.2019).

[62] Regulation of 25 November 2009 on the procedure to be followed by competent authorities in the event that the number of prisoners in prisons or pre-trial detention centers exceeds the overall capacity of these establishments on a national scale (Journal of Laws of 2018, item 946).

[63] Report of the Ombudsman on the activities of the National Torture Prevention Mechanism in Poland in 2012, Biuletyn Rzecznika Praw Obywatelskich, 5(2013), 24-25.

[64] Report of the Ombudsman on the activities of the National Torture Prevention Mechanism in Poland in 2018, 138.https://www.rpo.gov.pl/sites/default/files/KMPT%20-%20raport%20za%20rok%202018.pdf(access date: 17.06.2019).

of persons with disabilities and adequate infrastructure necessary to enable such persons to exercise their rights as persons deprived of liberty. In 2018, in the so-called Detention Custody in Lublin and the Bydgoszcz-Fordon Prison as the result of making re-audits it was found that both units have made significant progress in the process of adapting penitentiary units to the needs of people with disabilities, but there are still areas to be improved which would serve to increase the guarantee of protection of the rights of this group of inmates[65].

As a result of such neglect, disabled people are forced to stay in standard residential cells for other convicts. Such rooms are not adapted for the disabled in every respect, both in terms of sleeping space as well as a sanitary corner. The above problem should undoubtedly be considered in the context of inhumane conditions of serving a sentence, since it raises an additional inconvenience for the disabled significantly exceeding the difficulties arising from the very nature of penitentiary detention.

Also in the context of sanitary and hygienic conditions, the Polish penitentiary system leaves much to be desired. During the audits of Polish penitentiary units, CPT noticed the problem of the poor technical condition of the sanitary stations, which at the same time were not properly separated in a way ensuring care for hygiene with respect for privacy[66]. In turn, the ombudsman report on the NTPM's visit noted the insufficient frequency of bathing for men in penitentiary facilities.

Although the norm of one bath per week guaranteed by law was not found to be violated during the visit, the Ombudsman takes the view that the standard of one bath for men per week cannot be assessed as appropriate for maintaining health, and recommends increasing the frequency of baths at least twice a week. It is also worth noting that the international recommendations also include the postulate that persons deprived of their liberty should be able to take a bath at least twice a week. In this respect, the Polish penitentiary system does not currently implement this standard.

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[65] Ibidem, 139.

[66] Ewa Dawidziuk, Traktowanie osób pozbawionych wolności we współczesnej Polsce na tle standardów międzynarodowych, Warsaw: Wolters Kluwer, 2013, 122.

4. CONCLUSIONS

Polish prisons within last 30 years underwent a very crucial metamorphosis by trying to comply with the requirements and standards incorporated internationallegal acts especially in the European Prison Rules of 2006. This task has not been easy to implement due to the occurrence of many negative factors, especially financial ones which obstruct the development of the Polish prison system and thus its adjustment with Western European countries.

Summing up the issues of living and sanitary and hygienic conditions that directly affect the serving of a prison sentence, it should be stated that, as a rule, the Polish penitentiary system provides conditions sufficient to avoid allegations of inhumane, inhuman or degrading treatment in penitentiary units. Unfortunately, the biggest drawback is still a small living space for a single convict in relation to European standards. In this respect, Poland should undoubtedly follow examples from other countries which are members of the Council of Europe, as this will significantly affect the standard of imprisonment and thus will minimize the number of proceedings before the European Court of Human Rights.

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