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THE NATIONAL AIR POLLUTION CONTROL PROGRAMME IN POLAND – SELECTED LEGAL ISSUES

*Ewa Radecka**

ABSTRACT

This article focuses on Poland's obligations arising from Article 6 of Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC[1]. The objective of the article is to present legal solutions adopted in the National Air Pollution Control Programme (further referred to as the NAPCP) in Poland. This is preceded by an analysis of this document in the context of other legal instruments for environmental protection, and an evaluation of its effectiveness. The author also refers to the legal nature of this document and indicates the consequences of late and incorrect implementation of the Directive.

The paper uses the formal and dogmatic method, based on the examination of the texts of legal acts and views expressed by legal academics and commentators as well as judicial decisions. The aim of its use was mainly to make a review of the provisions concerning the examined issue and their interpretation.

Key words: air, air protection, NEC Directive

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[1] OJ L 344, 17.12.2016, pp. 1–31; further: the NEC Directive. Pursuant to Article 22 thereof, the Directive entered into force on 31 December 2016, with member states being obliged to draw up and provide their first national air pollution control programmes to the Commission by 1 April 2019.

1. INTRODUCTION

The subject matter of this article appears exceptionally interesting not just from the research perspective. The importance of air protection, in Poland in particular, is beyond obvious. The issue attracts considerable attention of the media and citizens, whose awareness of air protection is increasing, also thanks to reports presented by the World Health Organisation (further: the WHO)[2], European Commission[3] or the Supreme Audit Office[4]. Moreover, one cannot help but feel that the issue of air protection is receiving considerable attention not just in the case-law of the CJEU[5],

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2 The latest ones show the scale of the problem facing Poland. The list of Europe's 50 most polluted cities, according to the WHO data, is topped by two Bulgarian cities (Vidin and Dimitrovgad), however as many as 36 out of 50 cities ranked are located in Poland (November 5, 2019, https://unearthed.greenpeace.org/2018/05/02/air-pollution-cities-worst-global-data-world-health-organisation/).

3 As the "Environmental Implementation Review 2019. Country Report – Poland" shows, "there has been no progress on improving air quality. Limit values for particulate matter, benzo(a)pirene and nitrogene oxides continue to be exceeded" [emphasis added: Ewa Radecka] (November 5, 2019, https://ec.europa.eu/environment/eir/pdf/report_pl_en.pdf).

4 Environmental protection against pollution. 2014–2017 (First half). Supreme Audit Office, Warsaw, September 2018 (November 6, 2019, https://www.nik.gov.pl/kontrole/P/17/078/): "high level and large scale of air pollution are indicative, in particular, of a lack of effectiveness in the fulfilment of duties of public authorities, arising from Article 68(4) and Article 74(2) of the Constitution of the Republic of Poland, as well as of the failure to accomplish the environmental protection goals set in Article 85 of the Environmental Protection Law. According to the Supreme Audit Office, with only a few exceptions, this resulted from insufficient activity on the part of public entities at each level of operation (national, regional, local), as well as from inadequate coordination and, what follows, failure to ensure coherence of actions carried out within the elaborate structure of the air protection system. Such conditions are not conducive to an effective expenditure of public funds for air protection. According to NIK, such omissions and improper actions – on the central, voivodship and communal levels – bear a serious risk of not achieving results leading to achieving air quality standards applicable in the EU. Therefore, the probability of approaching the concentrations of some substances in the air in Poland to a significantly more restrictive levels resulting from WHO recommendations decreases even more, whereas this is the actual objective arising from general assumptions of EU policy in the area of environment protection and provisions of national strategy (NPAP)".

5 Examples include judgment of the Court of 5 April 2017 in Case C488/15, Commission v Bulgaria (EU: C:2017:267).

but also in the work of the Commission[6], and that it constitutes an important element of EU's policy[7]. Furthermore, one cannot overlook the fact that Poland is becoming a disgraceful favourite of the Court also, or perhaps most of all, in cases involving the natural environment[8].

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[6] The Commission launched proceedings against Belgium, the Czech Republic, Germany, Greece, Spain, France, Hungary, Italy, Latvia, Portugal, Romania, Sweden, Slovakia and Slovenia (for breaches of obligations related to PM10). Furthermore, there are 13 ongoing proceedings due to nitrogen dioxide exceedances (Austria, Belgium, the Czech Republic, Germany, Denmark, France, Spain, Hungary, Italy, Luxembourg, Poland, Portugal, the United Kingdom).

The Commission has made the decision to refer France, Germany, Hungary, Italy, Romania and the United Kingdom to the Court of Justice of the EU for failing to respect agreed air quality limit values and for failing to take appropriate measures to keep exceedance periods as short as possible.

Data quoted after a press release of the European Commission of 17 May 2018: "Air quality: Commission takes action to protect citizens from air pollution" (November 5, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3450).

[7] As a side note, it should be noted that EU legislation in the area of environmental protection is quite copious and includes e.g. directives:

1. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ L 152, 11.6.2008, pp. 1–44);
2. Directive (EU) 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants (OJ L 313, 28.11.2015, pp. 1–19);
3. Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ L 334, 17.12.2010, pp. 17–119);
4. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, pp. 16–62);
5. Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (OJ L 309, 27.11.2001, pp. 22–30);
6. Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants (OJ L 309, 27.11.2001, pp. 1–21).

[8] Some of the recent judgments involve the following cases:

– C-192/18, concerning the failure of a member state to fulfil obligations; establishment of different retirement ages for men and women holding the position of judge of the ordinary Polish courts or of the Sąd Najwyższy (Supreme Court, Poland)

An important element of the context, explaining certain delayed measures of the Republic of Poland in the area of national legislation is Poland's complaint against the European Parliament and the European Commission on the NEC directive, filed on 10 March 2017 based e.g. a statement of the Poland's Ministry of the Environment that the reduction of ammonia emissions, as provided for in the NEC directive "will essentially boil down to imposing further burdens on Poland's small-scale agriculture, which the Ministry opposes". The case closed with a CJEU judgment of 13 March 2019[9], in which the Court did not uphold the arguments of the applicant and dismissed the action in its entirety.

For the purposes of this article, I have made references to the key instruments of air protection[10], crucial from the perspective of the topic discussed herein[11].

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or that of public prosecutor in Poland (Judgment of the CJEU of 5 November 2019; ECLI:EU:C:2019:924);

– C-127/17, in which Poland is accused of violating the EU directive establishing the limit values for weights and dimensions for certain road vehicles (Judgment of the CJEU of 21 March 2019; ECLI:EU:C:2019:236);

– C-336/16, connected with air protection in Poland (judgment of the CJEU of 22 February 2018; ECLI:EU:C:2018:94);

– C-441/17, concerning felling of trees in "Puszcza Białowieska" Natura 2000 site (judgment of the CJEU of 17 April 2018; ECLI:EU:C:2018:255);

– C-526/16, concerning assessment of the effects on the environment of drilling to locate or search for shale gas (judgment of the CJEU of 31 May 2018; ECLI:EU:C:2018:356).

[9] Judgment of the CJEU in Case C-128/17 (ECLI:EU:C:2019:194), concerning action for annulment under Article 263 TFEU of the NEC Directive (the applicant was the Republic of Poland, supported by Hungary and Romania). Some of the applicant's arguments were as follows:

a) claim that "the Parliament and the Council infringed the principles of sincere cooperation, transparency and openness" e.g. through negotiations on the national emission reduction commitments that, in Poland's view, were discriminatory and opaque;

b) complaint against the infringement of the proportionality principle, manifested in the contested directive imposing a heavier burden on Poland than on the other Member States.

[10] I have omitted international agreements concerning the issue under discussion, namely so-called emission law, noise protection, ozone layer protection, electromagnetic radiation protection, as well as emission trading, or the issue or renewable energy sources. All these could jointly be labelled as "air protection".

[11] See more broadly: Marek Górski, ed., Prawo ochrony środowiska, Warsaw: Wolters Kluwer, 2018; Ewa Radecka, Filip Nawrot, ed., Prawne instrumenty ochrony powietrza.

The directive imposed a number of obligations on Member States, including Poland. Among those obligations are:

a) the requirement to draw up, adopt and implement a variety of instruments to reduce air pollution (particularly important in this regard is the national air pollution control programme) and monitor anthropogenic emissions[12];
b) the requirement to prepare and annually update national emission inventories and national emission projections (which must be transparent, consistent, comparable, complete, and accurate), as well as informative inventory reports (IIR)[13];
c) the requirement to limit anthropogenic emissions of sulphur dioxide (SO2), nitrogen oxides (NOX), non-methane volatile organic compounds (NMLZO), ammonia (NH3) and fine particulate matter (PM2,5).

Given the thematic scope of this article, the next part focuses predominantly on Article 6 of the NEC Directive, pursuant to which each Member State shall draw up, adopt and implement their respective national air pollution control programmes in order to fulfil their commitments to limit emissions, and contribute to achieving the objectives concerning air quality. The programme shall be updated periodically. The document is intended to coordinate and manage actions and measures carried out in accordance with other documents, and to establish foundations to create further policies and strategies involving enhanced efforts to accomplish the emission reduction objectives. An important element of the NAPCP is

Wybrane zagadnienia, Katowice: Grupa Infomax, 2018; Bartosz Rakoczy, ed., Prawne aspekty ochrony powietrza, Toruń: Polskie Zrzeszenie Inżynierów i Techników Sanitarnych, 2018; Janina Ciechanowicz-McLean, Prawo ochrony klimatu, Warsaw: Powszechne Wydawnictwo Prawnicze, 2016; Marcin Popkiewicz, Aleksandra Kardaś, Szymon Malinowski, Nauka o klimacie, Warsaw: Sonia Draga sp. z o.o., 2018.

[12] Member States shall ensure the monitoring of negative impacts of air pollution upon ecosystems based on a network of monitoring sites that is representative of their freshwater, natural and semi-natural habitats and forest ecosystem types, taking a cost-effective and risk-based approach.

[13] See more broadly: Article 8 of the NEC Directive.

coherence and synergy with other plans, programmes, and policies, which will help to implement actions and measures in a cost-effective manner.

The Directive imposes on Member States the obligation to ensure dissemination to the public of the information on national air pollution control programmes and any updates. What is important, Member States should make these programmes and updates subject to consultation with the public and competent authorities at all levels. The document should be drawn up based on, among other things, knowledge on the projected changes in emissions, which will enable the best possible adjustment of the measures and strategies envisaged in the programme and intended to reduce emissions. The minimum content of NAPCP is laid down in Annex III part I to the Directive. Furthermore, in accordance with the NEC Directive, the European Commission shall specify, by means of implementing acts, the format of the national air pollution control programmes[14].

As pointed out in the NEC Directive, the objectives, i.e. the fulfilment of national commitments regarding limiting emissions, should be realized through limiting air pollution at its source, which will result in an effective and permanent reduction in air pollutions. The scope of emission reductions covers two periods, which encompass the following years: 2020 to 2029, and from 2030 onwards. Emission reduction commitments are determined by reference to emissions in the reference year 2005. These commitments have been set for Poland for the periods referred to above at: for SO2 – by 59% and 70%, respectively; for NOX – by 30% and 39%; for NMLZO – by 25% and 26%; for NH3 – by 1% and 17%; and for PM2,5 – by 16% and 58%.

By the way, it is worth noting that Member States have, to varying degrees, complied with their obligation to submit to the Commission

[14] The format of the national air pollution control programme was specified in the Commission Implementing Decision (EU) 2018/1522 of 11 October 2018 laying down a common format for national air pollution control programmes under Directive (EU) 2016/2284 of the European Parliament and of the Council on the reduction of national emissions of certain atmospheric pollutants (OJ L 2018.256/87). Also important in this context are the guidelines on the elaboration of national air pollution control programmes under the Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants (OJ C 77, 1.3.2019, pp. 1–33).

the first national air pollution reduction programs. This obligation under Article 10(1) of the NEC Directive had to be fulfilled by Member States by 1 April 2019. However, according to data on the Commission's official website, only 6 countries met this deadline. It is significant that there are also countries which have not submitted the relevant documents proving the fulfilment of the reporting obligation under the Directive.

An interesting issue, which may be the subject of a separate and extensive analysis, is the issue of comparing the legislation of other countries in this area. This, however, goes beyond the framework of this study and is significantly hampered by the fact that the detailed results of the Commission's analysis of national air pollution reduction programs will be available by 1 April 2020 (in accordance with Article 11 of the NEC Directive).

3. THE NATIONAL AIR POLLUTION CONTROL PROGRAMME IN LIGHT OF NATIONAL AIR PROTECTION MEASURES OF A PLANNING NATURE[15] ARISING FROM ENVIRONMENTAL PROTECTION LAW

The key legislation that has to be invoked here is the Environmental Protection Law, which provides for two instruments of a planning/programmatic nature. These are as follows:

1) the national air protection programme (further: NAPP);
2) short-term action plan[16].

[15] The classification of air protection instruments into economic, organizational and regulatory, follow e.g. from a publication by Grzegorz Dobrowolski, Ochrona powietrza: zagadnienia administracyjnoprawne, Kraków: Zakamycze, 2000, where the author in organizational instruments includes those arising from the Planning and Spatial Management Act.

It is worth noting that pursuant to Article 8 of the Act of 27 April 2001 – Environmental Protection Law (uniform text JL of 2019, item 1396, as amended, further: EPL), policies, strategies, plans or programmes relating in particular to industry, energy, transport, telecommunications, water management, waste management, land-use planning, forestry, agriculture, fisheries, tourism and land use shall take into account the principles of environmental protection and sustainable development. What is important, the above list of disciplines is not exhaustive and merely offers examples.

[16] See e.g. resolution of the Assembly of Silesian Voivodship of 18 December 2017 (No. V/47/5/2017111) on the adoption of the Air Protection Programme for Silesian

The national air protection programme may be developed when the maximum levels permitted or the target levels of substances in ambient air are exceeded in a large part of the country, and the measures undertaken by local government authorities and bodies do not result in reducing pollutant emissions to the air. The minister responsible for the environment may draw up the national air protection programme, which is a strategic document laying down the goals and lines of action that should be pursued in air protection programmes.

The programme is announced in the Official Journal of the Republic of Poland (Monitor Polski) together with a communication specifying the address of the web page on which the programme was posted and the date on which it becomes effective (Article 91c of the EPL)[17].

It should be noted at this point that elaboration of the NAPP is not mandatory, as shown by the use of the word "may" in the wording of the provision. Secondly, what is symptomatic, this is merely a strategic document, and does not belong to any category of legal act[18].

The other instrument – the short-term action plan[19] – is a type of a restorative programme put into force when the alert levels, maximum

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Voivodship, designed to achieve the thresholds for air-borne substances and to establish the exposure concentration obligation.

[17] A communication of the Minister of the Environment of 17 September 2015 was published in Monitor Polski, stating that the programme in question had been developed ("National Air Protection Programme until 2020, with a perspective until 2030") and would become applicable as of 1 October 2015 (November 5, 2019, http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20150000905). The key objective laid down in the NAPP "is improving the quality of air across Poland. This applies in particular to areas with the highest concentration of air pollutants, as well as largely populated areas. Air quality should improve at least to a level where it does not pose a threat to human health, in compliance with the requirements of the European Union legislation transposed into the Polish legal system, and in the 2030 perspective – to thresholds set by the World Health Organisation".

[18] On 24 October 2018, a Deputies' Bill on Amendment of the Environmental Protection Law was submitted at the Sejm of the Republic of Poland (Sejm papers No. 2986, http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?id=31D75194FA3C9099C125833E004EDAEA). The proposed amendment concerns Article 91c of the EPL and changing the status of the NAPP from optional to mandatory.

[19] See more broadly: Anna Dubowska, Plan działań krótkoterminowych jako prawny instrument ochronypowietrza, Przegląd Prawa Ochrony Środowiska 2(2015): 95–110; Ryszard Mikosz, Bezczynność sejmiku województwa w sprawie planu działań krótkotermi-

levels permitted or target levels of substances in ambient air are exceeded in a specific area (Article 92(1) of the EPL). When this is the case, the province (voivodship) government, within 12 months from the receipt of information on this risk from the Chief Environmental Protection Inspector, draws up and submits for opinion of relevant commune heads, town or city mayors, as well as poviat (county) starosta draft resolution on a short-term action plan. The provincial assembly, within 15 months following the receipt of information from the Chief Environmental Protection Officer, lays down, by way or a resolution, a short-term action plan.

The short-term action plan should in particular encompass:

1) a list of entities using the environment, obliged to reduce or stop releasing into the air gas and dust from installations;
2) the organization and restriction or prohibition of the movement of vehicles and other internal combustion engine-driven devices;
3) manner of proceeding for authorities, institutions, and entities using the environment, as well as behaviour of citizens in the event of exceedances;
4) the mode and manner of announcement of exceedances.

It is also worth mentioning, although to a limited extent, that on 14 June 2019 the Regulation of the Minister for the Environment on air protection programs and short-term action plans[20] was issued, which extends the content of air protection programs in relation to the previously binding implementing act. This legal act defines:

1) specific requirements to be met by air quality programs and short-term action plans;
2) the form in which air quality programs and short-term action plans as well as necessary components thereof shall be drawn up;
3) the range of issues to be identified and assessed in the air quality programs and action plans.

The Regulation significantly emphasizes the information obligations of authorities, which is underlined both in the text of the implementing act itself (e.g. § 3(5) of the Regulation or point 4 of the Annex to the Reg-

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nowych, In: Prawne instrumenty ochrony powietrza. Wybrane zagadnienia, Ewa Radecka, Filip Nawrot, ed., Katowice: Grupa Infomax, 2019: 52–64.

[20] JL of 2019, item 1159.

ulation, which indicates the obligation to inform the public about the risk of exceeding the alert, limit or target levels of substances in the air and about the occurrence of such exceedances).

The Appendix to the abovementioned legal act sets out examples of possible short-term actions and constraints resulting from the short-term action plan. These activities are divided, according to the reduction of emissions, as follows:

a) surface emission (e.g. a temporary ban on smoking in fireplaces if they are not the only source of heating for the dwelling during the heating period);
b) linear emission (e.g. transfer of heavy traffic to alternative sections designated by road managers in the area) and
c) point emission (temporary reduction of production in installations having a negative impact on air quality, as indicated in the plan, excluding large combustion installations for the supply of electricity and heat).

4. NATIONAL PROGRAMME FOR AIR POLLUTION CONTROL ADOPTED IN POLAND[21]

With reference to the general principles governing the validity of secondary legislation in the national legal order, it is legitimate to stress that the Directive imposes on Member States the obligation to fully incorporate the EU's requirements into their respective legal and administrative systems, but allows them discretion in selecting the means for the fulfilment

[21] It should be stressed how very quickly the legislative works on the adoption of this programme proceeded. The draft version was submitted for interministerial consultations on 1 February 2019, followed by – put very briefly – social consultations, proceedings at the Committee for European Affairs, Standing Committee of the Council of Ministers, and was finally submitted to the Council of Ministers, where it was adopted on 29 April 2019 (November 5, 2019, https://bip.kprm.gov.pl/kpr/wykaz/r1118957287,Projekt-uchwaly-Rady-Ministrow-w-sprawie-przyjecia-Krajowego-programu-ograniczan.html; https://bip.mos.gov.pl/pl/prawo/inne-projekty/krajowy-program-ograniczania-zanieczyszczenia-powietrza-projekt/).

of this obligation[22]. Pursuant to Article 20 of the NEC directive, "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 July 2018". In Poland, this transposition was effected by amendment of the act on greenhouse gas emission trading and some other acts[23], which – as should be particularly stressed – only took place as late as the summer of 2019. Such proceedings may result in the implementation of a procedure to hold a Member State liable for infringements of its obligations under Articles 258 and 260 of the Treaty on the Functioning of the European Union[24].

Article 10 of the NEC Directive imposed on Member States the obligation to provide their first national air pollution control programmes to the Commission by 1 April 2019[25]. Poland failed to deliver this on time[26],

[22] Marek Górski, Magdalena Michalak, In: Prawo ochrony środowiska, Marek Górski, ed., Warsaw: Wolters Kluwer, 2018: 46; Aleksander Gubrynowicz, Ochrona powietrza w świetle prawa międzynarodowego, Warsaw: Liber, 2005 (in particular the notes from Chapter IX. Airprotection in the light of European Union standards); Marek Górski, Prawna ochrona jakości środowiska jako element działań na rzecz rozwoju zrównoważonego (na przykładzie przepisów o ochronie jakości powietrza), In: Międzynarodowe prawo ochrony środowiska XXI wieku, Aleksander Gubrynowicz, Zdzisław Galicki, ed., Warszawa: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, 2013, 233–255.

[23] Introduction of Article 16b to the Act of 17 July 2009 on the management of greenhouse gases and other substances (further: AMGHG) through Article 12 point 13 of the Act of 4 July 2019 amending the greenhouse gas emission trading act and some other acts (JoL of 2019, item 1501; the amendments entered into force on 24 August 2019).

[24] JoL of 2004, No. 9, item 864/2 as amended. See more details: Nina Półtorak, In: Traktat o funkcjonowaniu Unii Europejskiej, komentarz do art. 260 Traktatu o Funkcjonowaniu Unii Europejskiej, Andrzej Wróbel, Dagmara Kornobis-Romanowska, Justyna Łacny, ed., LEX; Ewa Radecka, Wyrok Trybunału Sprawiedliwości Unii Europejskiej z dnia 22 lutego 2018 r. w sprawie C336/16 Komisja Europejska vs. Rzeczpospolita Polska – konsekwencje prawne, In: Prawne instrumenty ochrony powietrza. Wybrane zagadnienia, Filip Nawrot, Ewa Radecka, ed., Katowice: Grupa Infomax, 2018, 97–108.

[25] Information on how other Member States fulfilled this obligation can be found here: https://cdr.eionet.europa.eu/ReportekEngine/searchdataflow?dataflow_uris=http%3A%2F%2Frod.eionet.europa.eu%2Fobligations%2F753&years%3Aint%3Aignore_empty=&partofyear=&reportingdate_start%3Adate%3Aignore_empty=&reportingdate_end%3Adate%3Aignore_empty=&country=&release_status=released&sort_on=reportingdate&sort_order=reverse&batch_size=.

[26] This could have been due to awaiting the issuance of the CJEU judgment declaring invalidity of the NEC Directive in Case C-128/17 (ECLI:EU:C:2019:194) or – more like-

as the NAPCP was adopted by Resolution No. 34 of the Council of Ministers of 29 April 2019[27], and only entered into force on 22 June 2019. The aforementioned resolution did not specify any legal grounds for the issuance of this act. This gives rise to the general observation that the NAPCP was issued first (April 2019), and the legal framework for these types of measures was only created in the national legal system afterwards (2019), including the clarification that these programmes are adopted by way of a resolution of the Council of Ministers[28].

The minimum content of the NAPCP is laid down in detail in Article 16b(3) of the AMGHG[29]. The process of elaboration of the NAPCP must include participation of the public under the conditions and according to the procedure laid down in the Act of 3 October 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments[30] (which constitutes fulfilment of the obligation imposed by Article 6 point 5 of the NEC Directive). Pursuant to the applicable provisions of Polish law, the programme ought to be revised and updated at least every 4 years (which is in line with the provisions of Article 6 point 3 of the NEC Directive).

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ly – awaiting the issuance of guidelines on the elaboration of national air pollution control programmes (these were published on 1 March 2019).

[27] Official Journal of the Republic of Poland (Monitor Polski), item 572.

[28] See Article 16b(8) of the AMGHG.

[29] The NAPCP shall at least cover:

1) the national air quality and pollution policy framework in which context the programme has been developed, including;

2) the policy options considered to comply with the emission reduction commitments for the period between 2020 and 2029 and for 2030 onwards and the intermediate emission levels determined for 2025 and to contribute to further improve the air quality, and their analysis, including the method of analysis; where available, the individual or combined impacts of the policies and measures on emission reductions, air quality and the environment and the associated uncertainties;

3) the emissions reduction trajectory determined as the indicative emissions reduction levels and national emission reduction commitments referred to in Article 16a;

4) the measures and policies selected for adoption, including a timetable for their adoption, implementation and review and the competent authorities responsible.

[30] Uniform text JoL of 2018, item 2081, as amended.

As for the content and wording of the Polish NAPCP, it puts a strong emphasis on links with other documents, especially with the **draft** [highlight added: Ewa Radecka] energy policy for Poland until 2040[31] (EPP2040)[32]. The very fact that this link is made so prominent raises doubts due to the highly optimistic and ambitious plans laid down in the EPP2040. The draft provides for reaching 21% of renewable energy sources in final energy consumption by 2030, accompanied by a simultaneous decrease in the use of on-shore wind farms and increase in the use of off-shore wind power. According to the EPP2040 draft, by 2040, the majority of renewable energy will come from photovoltaics and off-shore wind turbines[33]. The projections for energy sources in 2040 are as follows: 32% coal, 34% renewable energy sources and waste, 16% gas, and as much as 18% (sic!) atomic energy[34].

Achieving these levels does not seem realistic, if only in the context of Poland failing to achieve at least 15% of renewable energy in gross final energy consumption by 2020[35], including at least 10% share of renewable

[31] November 5, 2019, https://www.gov.pl/web/energia/polityka-energetyczna-polski- do-2040-r-zapraszamy-do-konsultacji1.

[32] See p. 11 of the NAPCP, where the EPP2040 was referred to as the **key** [highlight added: Ewa Radecka] document taken into consideration for determination of lines of intervention in the area of reduction of air pollution.

[33] Rightly so, as producing energy from a renewable source like wind energy has been, due to the complexity of legal regulations, almost impossible in Poland. See e.g. M. Makowski, Ustawa o inwestycjach w zakresie elektrowni wiatrowych. Komentarz, Wprowadzenie, legal status as of 20 September 2018, LEX; EwaRadecka, Filip Nawrot, The Implementation of the Paris Agreement in Poland. Theory and Practice, Review of European and Comparative Law 2019, 36(1): 27–42, https://doi.org/10.31743/recl.4737.

[34] November 7, 2019, https://wysokienapiecie.pl/14959-polityka-energetyczna-2040-pobozne-zyczenia-w-sprawie-wegla-atomu/.

[35] According to a Supreme Audit Office report: "Achieving the adopted target of 15% of renewable energy sources in total gross energy consumption in 2020 may be at risk. In 2016, the share only marginally exceeded 11% and was at its lowest since 2013". The Supreme Audit Office points out that the development of the renewable energy industry in Poland has been adversely affected by e.g. absence of the state's consistent policy towards renewable energy sources, delays in the issuance of implementing acts and absence of a stable and friendly legal environment that would ensure safety and predictability of renewable energy investments, especially in the electric energy sector" (November 5, 2019,

energy used in transportation[36]. Putting so much faith in atomic energy does not appear justifiable, either, if only due to the lengthy procedures and ever-changing date of the launch of Poland's first nuclear power plant[37].

It is also difficult to confirm in the applicable provisions of Polish law implementation of Article 18 of the NEC Directive, which states that, "Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

Turning to detailed analyses, it is worth referring to at least some of the contents of NAPCP. The five-chapter document contains a wide range of considerations concerning, among others:

– national air quality and air pollution policy frameworks;
– progress made under current policies and measures to reduce emissions and improve air quality and the extent to which national and EU commitments are being met compared to 2005;
– policy options considered to comply with the emission reduction commitments set for 2020 and 2030 and the medium-term emission levels set for 2025;
– the projected combined effects of policies and measures (scenario with additional measures) on emission reductions, air quality at home and in neighboring Member States, the environment and related uncertainties.

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https://www.nik.gov.pl/najnowsze-informacje-o-wynikach-kontroli/zielona-energia-dostala-zadyszki.html).

[36] See Article 3 of the Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, pp. 16–62).

[37] According to the Polish Nuclear Power Programme (adopted by Resolution No. 15/2014 of the Council of Ministers of 28 January 2014 on a multiannual programme entitled "Polish Nuclear Power Programme"; Official Journal of the Republic of Poland (Monitor Polski), item 502), the construction of Poland's first nuclear power plant was supposed to be completed on 31 December 2020 (around 6000 MW by 2020 and another 6000 MW by 2030).

The document notes that exceeding of PM10 and PM2.5 particulate matter and benzo(a)pyrene in winter and too high concentrations of tropospheric ozone in summer remain an important problem. As far as the winter season is concerned, a significant contribution to poor air quality is attributed mainly to the domestic and municipal sector, i.e. the problem of the so-called low emissions[38].

5. CONCLUSIONS

To conclude, one should speak disapprovingly of the manner of legislation that was presented in the case discussed here and that is an example of utmost ignorance on the part of the legislature.

Secondly, the NAPCP does not constitute a generally applicable law and, given the form in which it is adopted, cannot be grounds for specific solutions conferring rights or imposing obligations. Indeed, government's resolutions, as internal law acts, cannot be grounds for the issuance of administrative decisions or court judgments involving citizens or legal persons. Pursuant to Article 93(1) of the Constitution of the Republic of Poland, resolutions of the Council of Ministers and orders of the Prime Minister and ministers shall be of an internal character and shall bind only those organizational units subordinate to the organ which issues such act[39]. This leads to the conclusion that the legislature did not learn from the prevailing criticism of the form in which the National Air Protection Programme is adopted.

Thirdly, such a strong link between the NAPCP and the overly optimistic draft of Poland's energy policy until 2040 must be considered a step leading to overestimation of faith put in the NAPCP.

Fourthly, late transposition may lead to appropriate legal results with financial consequences for Poland. Moreover, the correctness of this trans-

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[38] The issue of lowemissions was the subject of consideration, e.g. Ilona Przybojewska, Problem niskiej emisji i dostępne rozwiązania prawne, Europejski Przegląd Sądowy 7(2017): 39–49.

[39] See Article 111 of the Nature Conservation Act of 16 April 2004 (uniform text JoL of 2018, item 1614, as amended) and the programme for the conservation and sustainable use of biodiversity (adopted by a resolution of the Council of Ministers).

position will also be assessed. Both of these situations may result in the implementation of procedure under Article 258 of the Treaty on the Functioning of the European Union and, in the thelonger term, Article 260, as well as the imposition of a periodic penalty payment and/or a lump sum payment[40].

All of the above triggers the overall pessimistic reflection that the NAP-CP is yet another extensive instrument, programmatic and internal in nature, that does not make an actual and effective contribution to the fight for clean (or cleaner) air.

REFERENCES

Ciechanowicz-McLean, Janina. 2016. Prawo ochrony klimatu, Warsaw: Powszechne Wydawnictwo Prawnicze.

Dobrowolski, Grzegorz. 2000. Ochrona powietrza: zagadnienia administracyjnoprawne, Kraków: Zakamycze.

Dubowska, Anna. 2015. Plan działań krótkoterminowych jako prawny instrument ochrony powietrza, Przegląd Prawa Ochrony Środowiska 2: 95–110.

Górski, Marek, ed. 2018. Prawo ochrony środowiska, Warsaw: Wolters Kluwer.

Górski, Marek. 2013. Prawna ochrona jakości środowiska jako element działań na rzecz rozwoju zrównoważonego (na przykładzie przepisów o ochronie jakości powietrza), In: Międzynarodowe prawo ochrony środowiska XXI wieku, Aleksander Gubrynowicz, Zdzisław Galicki, ed., 233–255, Warszawa: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego.

Gubrynowicz, Aleksander. 2005. Ochrona powietrza w świetle prawa międzynarodowego, Warsaw: Liber.

Makowski, Marcin. 2018. Ustawa o inwestycjach w zakresie elektrowni wiatrowych. Komentarz, Wprowadzenie, legal status as of 20 September 2018, LEX.

Przybojewska, Ilona. 2017. Problem niskiej emisji i dostępne rozwiązania prawne, Europejski Przegląd Sądowy 7 (2017): 39–49.

Radecka, Ewa, Nawrot, Filip, ed. 2019. Prawne instrumenty ochrony powietrza. Wybrane zagadnienia, Katowice: Grupa Infomax.

[40] See judgment of the Court of 15 October 2015 in Case C-167/14 Commission v. Greece (ECLI:EU:C:2015:684).

Radecka, Ewa, Nawrot, Filip. 2019. The Implementation of the Paris Agreement in Poland. Theory and Practice, Review of European and Comparative Law 36(1): 27–42, https://doi.org/10.31743/recl.4737.
Radecka, Ewa. Wyrok Trybunału Sprawiedliwości Unii Europejskiej z dnia 22 lutego 2018 r. w sprawie C336/16 Komisja Europejska vs. Rzeczpospolita Polska – konsekwencje prawne, In: Prawne instrumenty ochrony powietrza. Wybrane zagadnienia, Ewa Radecka, Filip Nawrot, ed., 97–108, Katowice: Grupa Infomax, 2018.
Rakoczy, Bartosz, ed. 2018. Prawne aspekty ochrony powietrza, Toruń: Polskie Zrzeszenie Inżynierów i Techników Sanitarnych.
Popkiewicz, Marcin, Kardaś, Aleksandra, Malinowski, Szymon. 2018. Nauka o klimacie, Warsaw: Sonia Draga sp. z o.o.
Półtorak, Nina. 2012. In: Traktat o funkcjonowaniu Unii Europejskiej, komentarz do art. 260 Traktatu o Funkcjonowaniu Unii Europejskiej, Andrzej Wróbel, Dagmara Kornobis-Romanowska, Justyna Łacny, ed., LEX.
Mikosz, Ryszard. 2019. Bezczynność sejmiku województwa w sprawie planu działań krótkoterminowych, In: Prawne instrumenty ochrony powietrza. Wybrane zagadnienia, Ewa Radecka, Filip Nawrot, ed., 52–64. Katowice: Grupa Infomax.

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THE REFORMATION OF TURKISH COMMERCIAL LAW WITHIN THE PROCESS OF EUROPEAN UNION CANDIDACY

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ABSTRACT

The relationship between Turkey and the European Union began in 1959 with Turkey's application for membership. This relationship has survived to this day and in this process negotiations for membership have been frozen. This process contributed directly to Turkish law. This contribution has become more significant, especially since 1999. Turkish Code of Commerce (TCC) entered into force in 2012, is recognized as a result of Turkey's EU process. By this Code, it is aimed to ensure harmonization between Turkish Commercial Law and EU legislation. For this reason, regulations in the sense of reform were included in the TCC. However, the Code has been amended for a total of eighteen times. Sixteen times after coming into force, and two times even before coming into force. More than three hundred articles have been directly affected by these changes. The principles foreseen in the Code have been abandoned because of adopting a populist approach. This situation is accepted as both a failure and disappointment for the TCC codification experience.

Key words: commercial law, process of European Union candidacy

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1. INTRODUCTION

The dream of Turkey's membership of the European Union dates back to the 1950s. This dream causes a melancholic one-sided love story between Turkey and EU. Turkey has candidate country status for a long time and full membership negotiations are officially continuing despite any obstacles. On the other hand, the goal of full membership has been frozen because of the initiatives of the European Union institutions, and especially Greece and the Greek Cypriot Administration. However, from the perspective of membership, this pessimistic picture in the political situation is not in question about the modernization or harmonization of Turkish Law with the EU. Indeed, with the 1999 Helsinki Summit of the acquisition of the status of candidate country, Turkey undertook to harmonize its legal system with EU law. The political will saw this as an opportunity, started the codification efforts for renewal in all major codifications in private and public law. In this period, the TCC numbered 6102[1] has an important place. Corporate governance, transparency, accountability, competitiveness, professionalism and compliance with technology are the pillars of the new TCC's philosophy. In the first version of the TCC published in the Official Gazette, this philosophy had been followed faithfully. On the other hand, the Code has been amended sixteen times after it entered into force and it had been amended two times even before it came into force. Due to the populist approach of political will, it has changed eighteen times in seven years. For this reason, the final version of the Code is far from the philosophy that inspired the codification efforts at the beginning. This codification experience is unfortunately considered as a failure and a huge disappointment despite all good faith efforts.

2. A BRIEF HISTORY OF TURKEY AND EUROPEAN UNION RELATIONS

The subject of this presentation is "Institutional Transformation of Turkish Commercial Law as a result of European Union Candidacy". In order to examine the topic, first of all, there should be a focus on the his-

[1] Official Gazette, Date: 14.02.2011, No: 27846.

torical development of the affairs between Turkey and the European Union. I underline the word "history" because it is really difficult to estimate an exact date when it will finish or whether it really ends in the future. Because, it has been almost 60 years since the first intention of being an EU member for Turkey. The first step of Turkey's relation with European Union was the Ankara Agreement which was signed with the European Economic Community in 1963. This agreement entered into force in 1964. However, before this Agreement, the first contact of Turkey to European Union was the application for membership. This application was made in 1959. Ankara Agreement formed the basic legal source which was also the framework of possible partnership status of Turkey. According to the Ankara Agreement, there were three stages for the integration of Turkey to the European Union[2]. These stages were:

1) Preparational stage,
2) Transitional stage,
3) Final stage.

In the Agreement, it was also planned to complete the Customs Union with its all institutions at the end of the transitional stage.

The preparational stage was successfully completed by an Additional Protocol. The Additional Protocol was signed in 1970 and came into force in 1973. The provisions of the transitional stage and the obligations of both parties were determined in the Additional Protocol[3].

At the end of the transitional stage, one of the most significant milestones, the Customs Union, which can be characterized as a revolution in Turkey–EU relations, entered into force in 1996. The level of integration between parties reached the advanced point by the Customs Union. After this point, the final stage was left: Turkey's full membership which was already determined in Ankara Agreement Article 28.

Another corner Stone of Turkey–EU relations was the Helsinki Summit. After this summit, a new period began in relations because Turkey got the "candidate country status" in the Helsinki Summit in 1999. It was so clear that the candidateship was determined for full membership. In other

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2 Bozkurt, E., Köktaş, A., Avrupa Birliği Hukuku, 7. Baskı, Ankara, 2018, 400.

3 Bozkurt, Köktaş, 401.

words, it was registered that the target at the end of this long journey was only full membership of Turkey[4].

The Brussels Summit which was held in 2004 was another significant cornerstone because, in that summit, the EU Council took note that Turkey sufficiently fulfilled the political criteria and obligations. In addition to that, the EU Council decided to open accession of negotiations with Turkey. By this decision, the candidateship for full membership was reaffirmed.

3. TURKEY'S EU CANDIDACY AND ITS EFFECTS ON TURKISH LAW SYSTEM IN GENERAL

The date of the Helsinki Summit had a significant impact on the Turkish Legal System and Turkish Private Law in particular. The concept of harmonizing Turkish Private Law to the European Union Law, which was expected from European Union institutions, required reforms on the legislation of Turkey. I want to pay attention not to use the word "modernizing" instead of harmonizing. Because if there was a need for reforms to get the possible membership of Turkey, it was not because the Turkish Law system was just nonmodern, it was because of the lack of harmony between the EU and Turkish Legal systems. In order to provide harmony in private law legislation in both parties, from the beginning of the new Millennium up to now Turkish lawyers have been facing the efforts for codifications.

The first basic codification was the new Turkish Civil Code[5] which was enacted in 2001 and came into force in 2002. After new Turkish Civil Code reform, it was turned for the other main private law codifications, such as the new Turkish Obligation Code[6] and the new Code of Civil Procedure[7] and finally the new Turkish Code of Commerce.

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[4] Bozkurt, Köktaş, 427.

[5] Official Gazette, Date: 08.12.2001, No: 24607.

[6] Official Gazette, Date: 04.02.2011, No: 27836.

[7] Official Gazette, Date: 04.02.2011, No: 27836.

The new Civil Procedure Code was enacted and came into force in 2011. However,the new Turkish Obligation Code and new Turkish Code of Commerce was enacted in this same period, the legislative body delayed the date of effectiveness for these Codes until July 1st, 2012. In short, the subject of this presentation (new Turkish Code of Commerce) can be evaluated as "new". However, the idea for a new Turkish Code of Commerce emerged for the first time soon after Turkey had got the status of candidateship for membership. That is why if we accept the year 1999 as the beginning of efforts for new commercial law codification, it is better to inform you about a brief history of this codification work before starting to explain the provisions which constitute this reform.

4. THE NEW TURKISH CODE OF COMMERCE AS A RESULT OF HARMONIZATION EFFORTS WITH THE EU LEGAL SYSTEM

4.1. Codification Efforts in Turkish Commercial Law

The new Turkish Code of Commerce is the 4th commercial code of Turkey considering modern codes. The first Turkish Code of Commerce was codified in 1850 even before the Turkish Republic was founded in 1923. (Kanunname-iTicaret) That code was fully inspired by Code de Commerce (1807) of France. Since the Ottoman Empire had very close relations with France, it is easy to notice that there were significant reflections of Code de Commerce on Kanunname-iTicaret. The historians of law characterize this code as an only simple translation of Code de Commerce. After the Turkish Republic was founded in 1923 with the leadership of Mustafa Kemal Atatürk, Turkey and the Turkish Nation experienced a great number of reforms in many fields of social life. Of course, the legal system was an inseparable part of this social life.

The second commercial code of Turkey came into force because of the requirements for having a contemporary law system in 1926. That code was numbered 865 and was a part of new Turkish private law legislation which was based on secularism. That commercial code was repealed in 1957 by the third commercial law code of Turkey. That new code was

numbered 6762[8]. Although that code had a date of entry into force as 1957, the review works of commission for the previous code had started in 1937 by the encouragement of Mustafa Kemal Atatürk. Turkish Code of Commerce numbered 6762 was influenced by Swiss Obligation Code. That is why that code's institutions had been regulated according to commercial enterprise concept. Comparing to previous code, 6762 Numbered Code was very close to perfect. However, because the developments occurred in commercial life around the world and new concepts and need to regulate complicated business world relations, the thought for codifying a completely new Code of Commerce was preferred instead of reviewing the recent Code. Another reason for choosing the possibility of a completely new regulation was the requirement for EU membership. Because of the lack of harmony between the Turkish Commercial Law system and the EU Commercial Law directives required the necessity for a completely new Code with new institutions and new understandings[9].

The start of the new Turkish Code of Commerce was given by the Minister of Justice in a meeting that was held in 2000. The commission was formed by academicians and practitioners. The head of the commission was Prof. Dr. ÜnalTekinalp who was the former head of Commercial Law Department of İstanbul University Faculty of Law. The commission had worked since the early months of 2000 and it took at least 5 years to finish the draft text of the code. In 2005 the draft text of the Code was published.

After the publication of the draft text of the Code, there were discussions in various academic platforms about it. However, it took just 9 months for the Government to sign the draft and let the Prime Ministry send the draft to the parliament which is the legislative body of Turkey (Türkiye Büyük Millet Meclisi: Grand National Assembly of Turkey). While evaluating the length of the 9 month period, it can be said that the Government could have waited for more before deciding that the draft sent to parliament was the final one. We have to admit that the discussions on the draft text of Code were not noticed by the Government as much as they should have been.

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8 İmregün, O., Kara Ticaret Hukuku Dersleri, 11. Baskı, İstanbul, 1996,4.

9 Şener, O.H., Ticari İşletme Hukuku, Ankara, 2016,1, 2.

The Draft of the New Turkish Code of Commerce had to wait for being discussed in the parliament for more than 5 years. During this period another commission for reviewing was appointed to update the draft according to discussions and comments done after the publication of the draft. After the second review commission finally finished the task, the final draft was enacted as the Turkish Code of Commerce Numbered 6102 by the legislative body on January 13th 2011. However, the date for entering into force was identified as of July 1st, 2012. It can be said that the reason for this delay was not related to academic purposes only, but also for the attempt of gaining time for the practitioners in commercial life. Before it entered into force, especially the dynamics of commercial life such as The Union of Chambers and Commodity Exchanges of Turkey had raised their voice because of the restrictions and sanctions regulated in the Code. Unfortunately, the Government approached in a populist way by taking notice of the critics of practitioners so it changed more than 90 articles in some way by updating Codes. Those updating codes were numbered 6273 and 6335. Thus, the New Turkish Code of Commerce had been changed two times even before it came into force. At last, on July 1st, 2012 the new Turkish Code of Commerce came into force[10]. However, there were some specific articles of the new Code that would be applicable later than the date July the 1st, 2012. These regulations and the dates for entering into force can be listed like this:

- Regulations of Turkish Accounting Standards: January 1st, 2013.
- The Provisions regulating the auditing of the capital companies (public limited companies, private limited companies): January 1st, 2013.
- The provisions regulating the liability of companies for activating their own web sites: July 1st, 2013.
- The provision regulating the necessity of the merchants for updating the commercial documents by adding the information of the merchant's registration number, trade name, registered office's and official web site's addresses: January 1st, 2014.

[10] Kendigelen, A., Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler, 3. Baskı, İstanbul, 2016, 2, 3.

4.2. The Analysis of the Turkish Code of Commerce's Systematic

New Turkish Code of Commerce consists of 1535 Articles. The First 10 Articles are named as "Preliminary Provisions", and the last 15 Articles are categorized as "final provisions". The rest of the articles are divided into six main chapters. Each chapter is related to a specific commercial law branch.

The preliminary provisions include the articles which regulate the definitions of commercial provisions, commercial customs, commercial business, commercial cases, the evidences that can be used, limitation periods and commercial interests. On the other hand the final provisions include the articles which regulate the procedural norms of commercial companies' cases, the categorizing of enterprises and companies regarding the scales, electronic transactions in commercial life, obligation to set up a web page, the principles of corporate governance and prohibited transactions[11].

The first chapter regulates commercial enterprise law (Articles between and including 11 and 123: 113 Articles).

The second chapter regulates commercial company law (Articles between and including 124–644: 521 Articles).

The third chapter regulates negotiable instruments law (Articles between and including 645–761: 117 Articles).

The fourth chapter regulates transportation law (Articles between and including 762–815: 54 Articles).

The fifth chapter regulates maritime law (Articles between and including 816–1262: 447 Articles).

The sixth chapter regulates insurance law (Articles between and including 1263–1520: 258 Articles).

Although the new Turkish Code of Commerce has 6 chapters related to 6 different commercial law branches, 6 commercial law branches are categorized into 2 groups by Turkish Commercial Law doctrine. The first group, which include commercial enterprise law, company law and negotiable instruments law, are called commercial law on overland. On the other hand, transportation law, maritime commerce law and insurance law

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[11] Ayhan, R., Çağlar, H., Özdamar, M., Ticari İşletme Hukuku, 12. Bası, Ankara, 2019,54; Çeker, M., Ticaret Hukuku, 6. Baskı, Adana, 2013, 13.

constitute the second group which can't be called as a specific term. In this presentation, we will only focus on the specific provisions and institutions of the first three chapters. In other words, there will be explanations only about the branches of commercial law on overland, plus the beginning and final provisions.

5. THE NEW TURKISH CODE OF COMMERCE'S ROLE ON THE REFORMATION OF COMMERCIAL LAW IN TURKEY

In the preamble of the new Turkish Code of Commerce, it was made clear that the investment climate of the European Union was taken as the basis for the preparation of the Code. The ratio legis of the Code was to capture a commercial law system that is highly competitive in comparative law. In order to achieve this goal, corporate governance principles have been adopted by the legislator[12]. Necessary measures were taken for professional management especially for stock corporations. In principle, independent audit has been accepted for stock corporations. The principles of independent audit are determined as professionalism, impartiality, necessity, integrity and continuity. For accounting, commercial companies are subject to Turkish Accounting Standards which have adopted the principles of International Financial Reporting Standards. Corporate governance principles have become valid not only for companies traded on the stock exchange but also for closed type capital companies. Internal control, audit committee, internal audit, early detection and management of risk and executive private audit are specially regulated in capital companies and especially in public limited companies. It has become possible to include binding provisions for the resolution of legal disputes arising from company relations in company contracts. In order to fulfil certain works and transactions in accordance with TCC Article 366 and 375, the com-

[12] Tekinalp, Ü., Tasarının Takdimi, Türk Ticaret Kanunu Tasarısı, Konferans, Ankara Üniversitesi Banka ve Ticaret Hukuku Araştırma Enstitüsü, 13–14 Mayıs 2005, Ankara, 2005,9; Türk, H.S., Tasarı Hakkında Genel Değerlendirme, Türk Ticaret Kanunu Tasarısı, Konferans, Ankara Üniversitesi Banka ve Ticaret Hukuku Araştırma Enstitüsü, 13–14 Mayıs 2005, Ankara, 2005, 20.

mittees and commissions with members of the management have been validated.

Transparency and auditability were aimed to dominate over the new company law system. In principle, all capital companies are subject to an independent audit and are required to set up a web page. With the principle of transparency, it is aimed to create disclosure policies regarding the public disclosure interest and to inform the shareholders regularly and to explain the possible effects of the decisions taken with financial statements and reports on business results. In order to realise the transparency, electronic transactions and information society services have been regulated. All companies subject to independent audit should set a website and disclose information such as financial reports, structural changes, court decisions and general assembly resolution on this site. Another principle dominating the TCC is the utilization of technological developments in commercial law. As a matter of fact, it was accepted to keep and store commercial books in electronic databases. In addition, it was also made possible to hold general assembly meetings online in public limited companies[13].

5.1. The Regulations as Reform in Commercial Enterprise Law

A clear definition of the concept of commercial enterprise has been made for the first time in the TCC. This innovation is the result of the adoption of the modern system in the TCC and the adoption of commercial enterprise as the central concept[14]. The transfer of commercial enterprise has also been issued for the first time in the TCC[15]. In the period in which the former commercial code was valid, the transfer of commercial enterprise was issued only in the Turkish Code of Obligations (TCO)[16]. The distinction

[13] Tekinalp, 10; Türk, 25.

[14] Sertoğlu, B., Ticari İşletme Devri, Ankara, 2019, 15, 16; Aydın, A., Ticari İşletme Kavramı, Unsurları ve Hukuki İşlemlere Konu Olması, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 9.

[15] Bozer, A., Göle, C., Ticari İşletme Hukuku, 5. Baskı, Ankara, 2018, 20; Çeker, 34; Şener, Ticari İşletme, 3; Sertoğlu, 16; Ayhan, Çağlar, Özdamar, 115.

[16] Arıcı, M.F., Ticari İşletmenin Aktif ve Pasifi ile Devri, İstanbul, 2008, 25; Ayhan, Çağlar, Özdamar, 135; Sertoğlu, 28; Aydın, 18.

between traders and non-traders has also been adopted in the new Code[17]. One consequence of this distinction is the requirement as to form which the warnings and notices between traders are subject to[18]. In the new TCC, these requirements as to form are no longer validity form requirements. They have been considered as the only condition required for proof[19].

The trader assistant types regulated in the TCC have been reduced to two. Mercantile brokers haven't been included in the new TCC[20]. Agencies and transport forwarders are trader assistants regulated in the TCC. The legislator regulated the agency by utilizing the EU acquis and directives. It has adopted the principle of regulating in favor of the agencies and it has securedthe agencies' rights and interests against trader clients[21]. Agencies' equalizing compensation requests have been regulated for the first time. Thus, for the first time, the demand regarded as a customer portfolio was clearly regulated by the TCC. Another regulation envisaged for the agency with the TCC is about the non-competition agreement[22]. The non-competition agreement is accepted as an institution that becomes effective after the agency relationship ends between the agency and its client traderand restricts the activities of the agency even after the relationship ends[23].

Another prominent regulation in the commercial enterprise law by the new TCC is about the commercial registry. Commercial registry organization has been regulated with more institutional and professional priorities[24]. The State and the relevant chamber of commerce and indus-

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[17] Yıldız, Ş., Gerçek Kişilerde Tacir Sıfatının Kazanılması, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 21.

[18] Şener, Ticari İşletme, 199.

[19] Ayhan, Çağlar, Özdamar, 230; Çeker, 75.

[20] Ayoğlu, T., Bağlı ve Bağımsız Tacir Yardımcıları, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 49.

[21] Şener, Ticari İşletme, 349; Ayoğlu, 49; Bozer, Göle, Ticari İşletme, 117.

[22] Kaya, A., Acentelik ile İlgili Yenilikler, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 55.

[23] Şener, Ticari İşletme, 388; Kaya, 65; Bozer, Göle, Ticari İşletme, 158.

[24] Yanlı, V., Ticaret Sicili, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25,

try have been accepted as jointly and severally liable for damages arising from the maintenance of the commercial registry. This responsibility is not based on defects. In the commercial registry, the principle of trust in appearance has been adopted. Therefore, the content of the announcement is deemed to be valid when the published content of the announcement is different from the registered content[25].

Commercial books have been further diversified by the new TCC. The board of directors' decision books, books of shares, general assembly negotiation and meeting books are also considered as commercial books. These new commercial books are those that are not related to the accounting of the business[26].

Another issue regulated by the TCC and the commercial enterprise law is unfair competition. The unfair competition institution has also been regulated with a new approach in the new TCC. The legislation has been inspired by both EU law and Swiss law[27]. For an action to be deemed as unfair competition, the principle of honesty is adopted as the main criterion[28]. For the first time, the fact that the general terms and standards are contrary to the honesty rule has been described as unfair competition[29]. Among the possible defendants as a result of unfair competition internet service providers have also been underlined and unfair competition cases against internet service providers have been regulated under a special title[30].

The latest amendment to the TCC concerns commercial cases. According to Article 5A added to the TCC with the Code No. 7155, if the subject of a commercial case is compensation or receivable, it is necessary to apply

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26 Kasım 2011, İstanbul, 2012, 89; Bilge, M.E., Ticaret Sicili, İstanbul, 1999, 9; İmregün, 49.

25 Çeker, 109; Yanlı, 95; Bilge, 25.

26 Altay, S.S., Ticari Kayıtlar ve Defterlerin Tutulmasına İlişkin Hukuki Esaslar ve İsbat Sorunu, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 104, 105; Çeker, 170.

27 Yasaman, H., Haksız Rekabet, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 33.

28 Yasaman, 37; Bozer, Göle, Ticari İşletme, 214.

29 Şener, Ticari İşletme, 605; Yasaman, 40.

30 Çeker, 150.

to the mediation institution before the lawsuit is filed. This is a litigation requirement. The reason for predicting such a case is that the commercial disputes are resolved peacefully and the courts' workload is reduced.

5.2. The Regulations as Reform in Company Law

Company law is the branch of commercial law that has been the most amended by the new TCC. The legislator tried to create a new company law regime. In this regime, a world of companies that are transparent, auditable, in line with the legislation of the European Union, highly competitive and parallel to the technological developments arethe goal[31].

One of the most important changes for the above-mentioned objectives is the adoption of independent audits for public and private limited companies. However, with Code No. 6335 and subsequent sub-regulations, unfortunately, significant returns have been made in the independent audit regime[32]. As a result of these returns, the independent audit principle has been valid for only one percent of the total public and private companies as of today. A similar provision is seen in obligations to set up a webpage. Accordingly, as a rule, all limited public and private limited companies are required to establish a web site, to make announcements on the web site and to include information about the company on the web site. However, by Code No. 6335 and the sub-regulations, the obligation to establish a web site was required for only the public and private limited companies subject to the independent audit. As a requirement of the corporate governance principle, the obligation to employ lawyers for public and private limited companies has been regulated. However, this innovation was completely abolished by Code No. 6335, too.

A change in the quality of the reform by the new TCC is about the ultra vires principle. The principle of ultra vires was abolished by TCC Article 125. Accordingly, commercial companies can qualify and assume debts outside of their business too. On the other hand, according to the scattered

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31 Çeker, 215.

32 Şener, O.H., Limited Ortaklıklar, Ankara, 2017, 812; Yıldız, Ş., Limited Şirketler Hukuku, İstanbul, 2007, 268; Bahtiyar, M., Ortaklıklar Hukuku, 13. Bası, İstanbul, 2019, 248.

provisions in the TCC, it is seen that the ultra vires principle hasn't been completely abolished and only has changed its shape. For example, it is obligatory to express field of operation in the trade names of stock corporationss and the authority to representin stock corporationsis limited to fields of operation[33].

Both public and private companies have been allowed to be established with a single partner. As a reflection of European Union law, now it is possible to establish public and private limited companies with a single partner from the beginning. In accordance with the same provision, it is also possible that the number of partners of public and limited companies previously established with multiple partners to be single after the establishment[34]. The single partner can have all the powers of the general assembly, as long as the decisions are made in written form. In addition to public and private limited companies with a single partner, it has been made possible for the board of directors in public limited companies and managers in private limited companies to be composed of one member. It has also been possible that the members of the board of directors of public limited companies and the managers of private limited companies can be selected from among legal persons[35].

In order to ensure corporate governance and transparency principles in the capital companies, the declaration of founders has been accepted as a requirement in the establishment of the companies. Unfortunately, in this provision, the legislator abolished the obligation of the statement of founders as first for public limited companies and later for private limited companies. In other words, the legislator has abandoned the requirements of transparency, corporate governance and auditability because of the populist approaches[36].

The protection of capital is one of the priorities taken into consideration by the new TCC. In the first version of the Code, the prohibition on borrowing to the company was regulated with strict measures in both

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[33] Şener, Limited Ortaklıklar, 681; Yıldız, Limited Şirketler, 260; Bahtiyar, Ortaklıklar, 234.

[34] Şener, Limited Ortaklıklar, 23.

[35] Çeker, 217.

[36] Yıldız, Limited Şirketler, 99.

public and private limited companies. On the other hand, the effect and scope of this prohibition were narrowed by Code No. 6335. For this reason, it was caused to turn back from the expectations of the legislator in foreseeing the ban on borrowing to the company.

Another requirement of the principle of capital protection is the obligation to pay all of the cash capital share commitments before the establishment in the commercial companies. In the first version of the Code, all of the cash capital commitments had to be paid, and as a result of the changes made over time, it has become possible to establish the company without paying any cash capital commitments. In other words, a 180-degree turn was made in the system adopted for the fulfilment of cash capital commitments for private limited companies. Innovations related to the real capital elements for the establishment of the capital companies are also included in TCC. Accordingly, the establishment of companies will not take place legally without fulfilling the real capital commitments[37]. In addition, it is regulated as a prerequisite that in the case of public and private limited companies that if the real capital is committed, the right of foreclosure, precautionary measure and pledge on the assets are not allowed[38].

Criminal and administrative sanctions have also been needed to achieve the objectives adopted by the TCC. Crimes and administrative sanctions were accepted in terms of deterrence.

5.3. The Regulations as Reform in Negotiable Instruments Law

Negotiable instruments law is regulated in the third chapter of the TCC. The amendments made in this chapter by TCC No. 6102 are very limited. In unjust enrichment in negotiable instruments institution, the statute of limitations is clearly determined as one year. In this way, the uncertainty on this issue was cleared[39]. The question marks regarding the application of unjust enrichment lawsuit on promissory notes have been eliminated. Apart from these, the amendments made on negotiable instruments by the TCC consist of the correction of translation errors and efforts

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[37] Şener, Limited Ortaklıklar, 107; Yıldız, Limited Şirketler, 104.

[38] Bahtiyar, Ortaklıklar, 139.

[39] Bahtiyar, M., Kıymetli Evrak Hukuku, 11. Bası, İstanbul, 2013, 105.

to simplify the language even if it is inaccurate[40]. As in comparative law in the field of negotiable instruments law, the legislator preferred to adhere to the system of the Uniform Rules of Geneva and not to change this system[41].

6. THE EVALUATION OF TCC'S EFFECTS ON THE TURKISH COMMERCIAL LAW SYSTEM

There is no doubt that the process of European Union candidacy in Turkish law brings positive contributions. These contributions are obvious in the Turkish Code of Commerce Code, as well as in commercial law. The Turkish legislator has fulfilled the obligations of the European Union candidate status on its own and at least has done well. First of all, we must accept that this effort is a revolution. Considering the ignoring and discouraging approaches of the European Union institutions and European Union member states which plead the Turkey's possible membership as a threat, Turkey's effort for modernization and harmonization of legislation should be appreciated. However, the benefit of the process of candidate country status can be considered as contribution to the formation of an investment climate by harmonizing Turkish commercial law with EU legislation.

On the other hand, the TCC is considered as a failed codification movement. The reason for this is that the TCC has a completely different content than the original version published in the Official Gazette. The Code wasamended two times before it came into force and has been amended sixteen times after it came into force, in other words totally eighteen times in seven years. These changes caused the elimination of fundamental principles of the TCC and deviating from the targets of the legislator[42]. The legislator responded to the demands of the actors of commercial life with populist approaches. Therefore, the result can be summarized asfailure, disappointment and frustration.

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[40] Bozer, A., Göle, C., Kıymetli Evrak Hukuku, 8. Baskı, Ankara, 2018, 3.

[41] Çeker, 453; Bozer, Göle, Kıymetli Evrak, 8.

[42] Moroğlu, E., 6102 sayılı Türk Ticaret Kanunu, Değerlendirmeler ve Öneriler, 7. Baskı, İstanbul, 2012, 5; Kendigelen, 11.

7. CONCLUSION

Turkish Commercial Law is bound to the continental European legal system both before and after the Republic of Turkey was founded. Because of this commitment, it is directly affected by developments in continental European law. This effect was evident in both commercial codes of 1926 and 1957. European Union candidacy process of Turkey which has been a long time is also forming the final chain of this effect. Currently Turkey's membership application process is frozen. In fact, Turkey–EU relations havereached abreaking point. Interventions from both sides have caused this negative and pessimistic situation in Turkey–EU relations. However, Turkey's EU membership motivation was evaluated as a new opportunity to make Turkey's legal system compliant again with the EU legislation. The Turkish legislator made good use of this opportunity. Since the beginning of the 2000s, all major codes have been renovated. Of these studies, the experiences of the Turkish Penal Code and the Turkish Code of Commerce failed. The reason for this failure was that the codes that came into force have been amended many times in a short period. TCC has been amended eighteen times in seven years. For this reason, good efforts with motivation for EU membership have been hampered by the populist approaches of political will. This situation has been described as a disappointment, frustration and failure in terms of commercial law codification experience.

REFERENCES

Altay, S.S., Ticari Kayıtlar ve Defterlerin Tutulmasına İlişkin Hukuki Esaslar ve İsbat Sorunu, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 100–111.

Arıcı, M.F., 2008, Ticari İşletmenin Aktif ve Pasifi ile Devri, Vedat Kitapçılık, İstanbul.

Aydın, A., Ticari İşletme Kavramı, Unsurları ve Hukuki İşlemlere Konu Olması, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 9–21.

Ayhan, R., Çağlar, H., Özdamar, M., 2019, Ticari İşletme Hukuku, Yetkin Yayınevi, 12. Bası, Ankara.

Ayoğlu, T., Bağlı ve Bağımsız Tacir Yardımcıları, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 46–53.

Bahtiyar, M., 2013, Kıymetli Evrak Hukuku, Beta Yayınevi, 11. Bası, İstanbul.

Bahtiyar, M., 2019, Ortaklıklar Hukuku, Beta Yayınevi, 13. Bası, İstanbul.

Bilge, M.E., 1999, Ticaret Sicili, Beta Yayınevi, İstanbul.

Bozer, A., Göle, C., 2018, Kıymetli Evrak Hukuku, Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayınları, 8. Baskı, Ankara.

Bozer, A., Göle, C., 2018, Ticari İşletme Hukuku, Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayınları, 5. Baskı, Ankara.

Bozkurt, E., Köktaş, A., 2018, Avrupa Birliği Hukuku, Legem Yayıncılık, 7. Baskı, Ankara.

Çeker, M., 2013, Ticaret Hukuku, Karahan Kitapevi, 6. Edition, Adana.

İmregün, O., 1996, Kara Ticaret Hukuku Dersleri, Filiz Kitapevi, 11. Baskı, İstanbul.

Kaya, A., Acentelik ile İlgili Yenilikler, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 53–71.

Kendigelen, A., 2016, Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler, Oniki Levha Yayınları, 3. Baskı, İstanbul.

Moroğlu, E., 2012, 6102 sayılı Türk Ticaret Kanunu, Değerlendirmeler ve Öneriler, Oniki levha Yayınları, 7. Baskı, İstanbul.

Sertoğlu, B., 2019, Ticari İşletme Devri, Seçkin Yayınevi, Ankara.

Şener, O.H., 2016, Ticari İşletme Hukuku, Seçkin Yayınevi, Ankara.

Şener, O.H., 2017, Limited Ortaklıklar, Seçkin Yayınevi, Ankara.

Tekinalp, Ü., Tasarının Takdimi, Türk Ticaret Kanunu Tasarısı, Konferans, Ankara Üniversitesi Banka ve Ticaret Hukuku Araştırma Enstitüsü, 13–14 Mayıs 2005, Ankara, 2005, 7–17.

Türk, H.S., Tasarı Hakkında Genel Değerlendirme, Türk Ticaret Kanunu Tasarısı, Konferans, Ankara Üniversitesi Banka ve Ticaret Hukuku Araştırma Enstitüsü, 13–14 Mayıs 2005, Ankara, 2005, 17–41.

Yanlı, V., Ticaret Sicili, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 89–100.

Yasaman, H., Haksız Rekabet, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 33–46.

Yıldız, Ş., Gerçek Kişilerde Tacir Sıfatının Kazanılması, Yeni Türk Ticaret Kanunu'nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, Kadir Has Üniversitesi Hukuk Fakültesi, 25, 26 Kasım 2011, İstanbul, 2012, 21–33.
Yıldız, Ş., 2007, Limited Şirketler Hukuku, Arıkan Kitapevi, İstanbul.

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LOCAL CITIZEN INITIATIVES IN POLAND: THE DISPARITY IN SIGNATURE REQUIREMENTS

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ABSTRACT

In legal doctrine, attention is drawn to the relationship between instruments of direct democracy and the signature requirement, because the latter may block the activity ofcitizens. Therefore, this paper focuses on signature requirements of local citizen' initiatives (LCI), which is also analyzed from the perspective of the principle of equality. We identify: thelegal threshold of support (LTS) and the actual threshold of support (ATS). The legal threshold is construed as the statutory requirement of support (quantified or specified as a percentage), whereas the actual threshold of support is the quotient of the number of signatures required and the total number of residents in a given district. With respect to the LCI, a district is an area of a municipality, poviat and voivodship. The ATS is an indicator used by us to study the principle of equality.

Key words: direct democracy, local citizens' initiatives, signature requirements, the legal threshold of support, the actual threshold of support

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1. INTRODUCTION

The purpose of this paper is to present the local citizens' initiative (LCI) in Poland, in particular the so-called signature requirements. The concept and value of local self-government as well as participation of citizens in exercising power and making decisions have been the subject of numerous scholarly publications. They mainly presented examples of local residents' activity, changing the countenance of a city or a region[1], yet also the absence of their broader involvement[2]. The problems of local participatory democracy have been studied from the point of view of economy, law and management, as well as sociology. One must agree withthe view that: "Democracy is a dynamic, protean concept and a constantly developing reality. Since the 1990s, many democracies have moved in one way or another towards more participatory citizens' involvement and a common trend towards increasing citizen engagement can be observed […]. The introduction of democratic innovations that increase and deepen citizen participation in political will-formation and decision making is now a common policy of democratic governments"[3]. Admittedly, "the constitutionalization of the concept of direct democracy makes it possible to appeal to all known institutions of this form of democracy, but only if their nature and procedures are specified in the provisions of the Constitution and extended at the statutory level"[4]. The task of public authorities is to open up the decision-making process to the stakeholders at the local

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[1] Kees Koonings, Strengthening Citizenship in Brazil's Democracy: Local Participatory Governance in Porto Alegre, Biulletin of Latin American Research 23 (2004): 79–99.

[2] Gema Sanches Medero, Gema y Pastor Albaladejo, The Quality of Participatory Processes in the Urban Redevelopment Policy of Madrid City Council, Lex Localis 16 (2018): 864. DOI: http://10.4335/16.4.841–872.

[3] Brigitte Geissel, Ank Michels, Participatory Developments in Majoritarian and Consensus Democracies, Representation 54 (2018): 129. DOI: http://10.1080/00344893.2018.1495663.

[4] Monika Giżyńska, The Shortcoming of a Nationwide Referendum. Reflecting upon the Possibility of Introducing an Abrogative Referendum into the Polish Legal System, Toruńskie Studia Polsko-Włoskie XIV (2018): 85. DOI: http://dx.doi.org/10.12775/TSP-W.2018.006.

level[5]. On the one hand, accomplishing that task consists in involving not only citizens of the state, but also residents (which is of particular importance in the era of migration problems), while on the other hand, in introducing new instruments of direct and indirect democracy. The local citizens' initiative is one such instruments[6]. The LCI seems to be attractive for young citizens who do not engage in state policy, but do engage in local affairs[7].

We do not intend to carry out a comprehensive analysis of the institution in question since it was regulated by the Act of 11 January, 2018 on the amendment of certain laws to increase the participation of citizens in the process of selecting, functioning and controlling certain public bodies (hereinafter: the Act of 2018[8]). In turn, the regulations regarding the LCI entered into force on November 26, 2018. In our opinion, it is therefore too early to fully assess it. The Act of 2018 removed inequality before the law, as the LCI was present in Poland, however it was not of a universal nature. The right to submit a draft resolution to self-government bodies was guaranteed only by certain municipalities (in Polish: *gmina*), poviats and voivodships. That right arose under their local statutes, under which the so-called signature requirements (SR) varied. It is suggested in legal science that more attention should be paid to both the SR and the procedure for collecting signatures[9] because they may block the application of direct

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5 John Dryzek, Democratization as Deliberative Capacity Building, Comparative Political Studies 42 (2009): 1379–1402. DOI: https://doi.org/10.1177/0010414009332129.

6 Piotr Ziętarski, Aspekty aksjologiczne partycypacji społecznej a obywatelska inicjatywa uchwałodawcza, In: Obywatelska inicjatywa uchwałodawcza w procesie stanowienia aktów prawa miejscowego, Piotr Zientarski, Elżbieta Mreńca, ed., Warszawa: Kancelaria Senatu, 2018, 25.

7 Henrik Serup Christensen, Maija Jäske, Maija Setälä, Elias Laitinen, The Finnish Citizens' Initiative: Towards Inclusive Agenda-Setting?, Scandinavian Political Studies 40 (2017): 411–433. DOI: 10.1111/1467–9477.12096.

Young residents of one of the cities in Poland actively engaged in the project of organizing a Hip-Hop festival. Using social media, they promoted the project among young people who voted for it under the citizens' budget procedure. It was eventually included in the city budget, and the concert was financed out of public funds.

8 Journal of Laws, item 130.

9 Richard Ellis, Signature Gathering in the Initiative Process: How Democratic Is It?, Montana Law Review 64 (2003): 35–64. December 4, 2018, https://scholarship.law.

democracy instruments. Therefore, signature requirements are the focus of this paper.

For the purposes of the paper we identify: a) the legal threshold of support (LTS) and b) the actual threshold of support (ATS). The legal threshold is construed as the statutory requirement of support (quantified or specified as a percentage). In turn, the actual threshold of support is the quotient of the number of signatures required and the total number of residents of a given district. With respect to the LCI, a district is an area of a municipality, poviat and voivodship. The above mentioned goals require a normative analysis of the legal status quo laid down by statutory provisions and local laws (dogmatic method). We also employ the quantitative method, setting the ATS (the actual threshold of support). Therefore, we examine the percentage ratio of the legal signature requirement to the number of inhabitants of a local government unit. The subject of quantitative research is limited to the least and most populated communes, poviats, as well as cities with poviat rights. The number of inhabitants is based on statistical data published by Statistics Poland in 2019 (current as at December 31, 2018). We also refer to legal frameworks in force in the EU and selected EU member states. However, we employ the comparative legal method only to the extent necessary to outline the background of the title phenomenon.

2. LEGAL BACKGROUND

At the outset of our analysis let us note that not less than one million citizens of the European Union (EU) who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties[10]. That institution was intended to strengthen representative and participatory democracy

umt.edu/mlr/vol64/iss1/4. Tomoya Tajika, Signature Requirements for Initiatives, Journal of Theoretical Politics 30 (2018): 451–476. DOI: 10.1177/0951629818791035.

[10] Art. 11(4) of the Treaty on European Union.

in the Union, being the only "true democratic innovation" of the Lisbon Treaty[11]. At the national level, the Constitution of the Republic of Poland of April 2, 1997 granted citizens the right to submit a draft law to parliament. Article 118 sec. 2 of the Constitution provides that the legislative initiative is also vested in a group of at least 100,000 citizens who have the right to vote in elections to the Sejm. The procedure in this case is set forth by the Act of June 24, 1999 on the exercise of the legislative initiative by citizens[12]. However, the Constitution does not guarantee citizens the right to submit a draft law to local self-government bodies, although the functioning thereof is regulated under Chapter VII. Yet, it provides citizens with the right to participate in local elections, the right to participate ina local referendum and the right to petitions[13].

The right to submit a draft resolution is, as granted by the Act of 2018, of a collective nature, vested in a group of residents of a municipality, poviat and voivodship, who have the right to vote in elections to a legislative body (municipal council, poviat council and voivodship parliament (in Polish: *sejmik województwa*)[14]. In turn, the legislative body is obliged to examine the draft at the first session, but no later than 3 months afterits submission. The Act does not provide for an obligation to adopt it. This means that citizens are only entitled to a claim to initiate theproceedings regarding a resolution and submit an initiative for consideration by the legislative body. Therefore, the LCI may not be regarded as an instrument of direct democracy *sensu stricto*. It is of a mixed nature "as it is based on a proposal (draft) put forward by the residents of a municipality

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[11] Bruno Kaufmann, ed., Podręcznik europejskiej inicjatywy obywatelskiej. Przewodnik po zasadach pierwszego ponadnarodowego narzędzia demokracji bezpośredniej na świecie, Luxembourg: Green European Foundation, 2010, 5.

[12] Journal of Laws of 1999, No. 62, item 688, as amended.

[13] Agnieszka Turska-Kawa, Waldemar Wojtasik, Direct Democracy in Poland. Between Democratic Centralism and Civic Localism, Journal of Comparative Politics 11 (2018): 18–29.

[14] Hubert Izdebski, Prawne podstawy obywatelskiej inicjatywy uchwałodawczej, In: Obywatelska inicjatywa uchwałodawcza w procesie stanowienia aktów prawa miejscowego, Piotr Zientarski, Elżbieta Mreńca, ed., Warszawa: Kancelaria Senatu, 2018, 12; Dorota Lis-Staranowicz, La proposta di deliberazione (a livello locale) di iniziativa popolare in Polonia, In: La democrazia diretta in Italia, Polonia e Unione europea, Gian Candido De Martin, Andrzej Szmyt, Piero Gambale e Maciej Serowaniec, ed., Roma: Luiss University Press, 2020, 541.

(an element of directness), while the final decision regarding approval (rejection) of a specific initiative (draft) is taken by the [...] decision-making municipal body [...]"[15]. This state of affairs allows us to regard the LCI asan instrument of semi-direct democracy[16].

3. INEQUALITY BEFORE THE LAW

Under the legal framework preceding the entry into force of the Act of 2018, the right was guaranteed, as referred to above, by the statutes of local government units. Therefore, it was not universalsince not all local governments introduced the LCI reinforcingcivic participation. The absence of statutory regulation was not negatively assessed as local governments developed their own original solutions meeting the needs ofresidents[17]. On the other hand, the absence of statutory regulation created inequality of residents of local government units. The first one resulted from the absence of regulation as such, blocking the citizens' way of submitting their own draft resolutions to the council. The other inequality was the consequence of a diversified threshold of support for citizens' resolution-makinginitiatives (signature requirements). Based on the regulations applicable in large cities (we limited to the cities and townsthat are the seat of voivodship authorities or voivodship parliament), it can be observed that the SR was established either as a percentage or quantifiedas follows[18]:

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[15] Dawid Ziółkowski, Obywatelska inicjatywa uchwałodawcza jako instrument partycypacji społecznej, Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM 8 (2018): 335. December 3, 2018, http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-12fe50bc-d98e-4660-b2bb-8bc0b2934c6e.

[16] Piotr Uziębło, Demokracja Partycypacyjna, Gdańsk: Centrum Badań Społecznych, 2009, 42.

[17] Grzegorz Makowski, Obywatelska inicjatywa uchwałodawcza – prawo i praktyka, In: Dyktat czy uczestnictwo? Diagnoza partycypacji publicznej w Polsce, Anna Olech, ed., Warszawa: Instytut Spraw Publicznych, 2012, 288–304.

[18] All data and indicators [as cited in:] Piotr Jać, Obywatelska inicjatywa uchwałodawcza, In: Partycypacja obywatelska-decyzje bliższe ludziom, Agnieszka Maszkowska, Katarzyna Sztop-Rutkowska, ed., Białystok: Fundacja Laboratorium Badań i Działań Społecznych "SocLab", 2013, 156.

1) Białystok: 2000 eligible residents (hereinafter: persons) with the right to vote in electionsto city authorities, were able to submit a draft resolution (which constituted 0.87% of all city residents – the actual threshold of support);
2) Bydgoszcz: 1000 persons (actual threshold of support of 0.35% ATS);
3) Gdańsk: 2000 persons (0.56% ATS);
4) Katowice: 500 persons (0.20% ATS);
5) Kielce: 2000 persons (1.23% ATS);
6) Kraków: 4000 persons (0.68% ATS);
7) Lublin: 1000 persons (0.37% ATS);
8) Łódź: 6000 persons (1.03% ATS);
9) Olsztyn: 150 persons (0.11% ATS);
10) Poznań: 5000 persons (1.18% ATS);
11) Rzeszów: 500 persons (0.36% ATS);
12) Szczecin: 400 persons (0.13% ATS);
13) Toruń: 150 persons (0.09% ATS);
14) Opole: 500 persons (0.52% ATS);
15) Warszawa: 15.000 persons (1.12% ATS);
16) Wrocław: a group of at least 1% of residents with the right to vote and registered in the permanent register of voterswas able to submit a draft resolution;
17) Zielona Góra: 400 persons (0,43% ATS)[19];
18) Bytom: at least 10% of eligible residents (it is not the seat of the voivodshipauthorities, but it has a high threshold of support)[20];

[19] All data and indicators [as cited in:] Piotr Jać, Obywatelska inicjatywa uchwałodawcza, In: Partycypacja obywatelska-decyzje bliższe ludziom, Agnieszka Maszkowska, Katarzyna Sztop-Rutkowska, ed., Białystok: Fundacja Laboratorium Badań i Działań Społecznych "SocLab", 2013, 156–157.

[20] Resolution No. XVII/255/03 of the City Council in Bytom dated December 17, 2003 regarding the adoption of the Statute of the City of Bytom (i.e. Journal of Laws of the Silesian Voivodship of 2013, item 1958).

The above data, collected in cities and large towns[21], indicates that the threshold of support for a residents' draftranged from very low, e.g. 0.09% (Toruń) and 0.11% (Olsztyn) to very high, e.g. 10% of eligible residents (Bytom). In this context, it must be assumed that high thresholds of support could discourage residents from submitting draft resolutions, obstructing the activity of the local community. In the period between 2014 and 2018, the residents most willing to resort to it were those of Toruń (16 draft resolutions), Lublin (14 draft resolutions), Łódź (13 draft resolutions). In other large cities, several drafts were submitted, for example in Katowice (4 drafts), Gdańsk/Białystok/Olsztyn (3 drafts), Wrocław and Zielona Góra (2 drafts), Warsaw and Kraków (1 draft). The effectiveness of the citizens' resolution-making initiative in large cities was low, e.g. in Łódź one resolution was adopted at the initiative of the citizens, and three in Toruń[22]. The subject matter of citizens' resolution-making initiatives in 2014–2018 concerned[23]: local taxes, changing street names, building a monument, building a kindergarten, building a nursery, building a gymnasium, building street traffic lights, building bicycle paths, building a water supply system, fees for using municipal transport, financing infertility treatment by IVF method, sale of municipal property, combining cultural centres, sale of alcohol, cleanliness of air, free school meals, market fee, prohibition to allow circuses with animals in a city[24].

[21] There is no comprehensive LCI research in Poland. Although that institution has been discussed in numerous scholarly publications, there are no detailed studies in Poland in terms of its usefulness and effectiveness.

[22] Information obtained from the Office of the Lublin City Council, Office of the Toruń City Council, Office of the Lódź City Council, Office of the Katowice City Council, Office of the Bialystok City Council, Office of the Olsztyn City Council, based on citizens' activity in 2014–18.

[23] Data refers only to cities that are the seat of voivodship authorities.

[24] Information obtained from: the Office of the Lublin City Council, Office of the Toruń City Council, Office of the Łódź City Council, Office of the Katowice City Council Office, Office of the Bialystok City Council, Office of the Olsztyn City Council, Office of the Rzeszów City Council, Office of the Kielce City Council, based on citizens' activity in 2014–2018; see more Dorota Lis-Staranowicz, La proposta di deliberazione (a livello locale) di iniziativa popolare in Polonia, 546.

The local citizens' initiative was of marginal importance for the development of participatory democracy in Poland[25]. "This refers to both their normative basis and the practice of applying them in public life. There are also no premises which would allow an evaluation of the progressive or regressive nature of the way these very different forms of citizens' participation function in the decision-making process at the local level"[26]. In our opinion, the marginal importance resulted from the lack of awareness of the LCI. It was not well known to Polish citizens, which could have hampered its effectiveness and usefulness[27]. Moreover, only 20% of municipalities in Poland guaranteed a group of citizens the right to submit a draft resolution. The LCI was almost absent in voivodship self-governments (only one voivodship self-government resolved to introduce it), and also rare in poviats (1.5% of poviats)[28]. That instrument was not, as the examples of large cities show, often applied by residents, and its effectiveness was negligible. However, a number of spectacular LCI achievements in smaller municipalities should be noted, e.g. constructing a hospital in one of Warsaw's districts or introducing a participatory budget at the initiative ofthe residents.

4. UNEQUAL TREATMENT

The situation changed with the entry into force of the Act of 2018. First of all, the LCI is the right of residents eligible to vote in elections to territorial self-government bodies. In turn, the right to vote is vested in a Polishcitizen and a citizen of the European Union (who is not a Polish citizen) aged 18 or over and who resides in the area of a mu-

[25] Andrzej Piasecki, Twenty Years of Polish Direct Democracy at the Local Level, In: Local Direct Democracy in Europe, Theo Schiller, ed., Wiesbaden: GWV Fachverlage GmbH, 2011, 135.

[26] Ibidem.

[27] Mirko Pečarič, Some Initiatives for Modernization of Local Democracy, Lex Localis 11 (2013): 275. DOI: https://doi.org/10.4335/11.3.271–291(2013).

[28] Anna Ścisłowska, Waldemar Duczmal, Obywatele piszą lokalne prawo? Dlaczego nie!. December 29, 2019, http://serwis.mamprawowiedziec.pl/2016/11/Obywatele-pisza-lokalne-prawo.html.

nicipality, poviat and voivodship[29]. In addition, the Act of 2018 amended three local government acts, introducing the citizens' resolution-making initiative to them, i.e. Article 41a of the Act of March 8, 1990 on municipal self-government[30]; Article 42a of the Act of June 5, 1998 on poviat self-government[31]; Article 89a of the Act of June 5, 1998 onvoivodship self-government[32]. Moreover, local government laws contain very general provisions on the said institution. They specify the number of eligible residents to submit a draft resolution. Then they stipulate that a draft resolution submitted by residents shall be addressed by the municipal council, poviat council or voivodship parliament at the next session after submitting the draft, however not later than after 3 months of its submission. A committee of the resolution-making initiative that has the right to indicate persons authorized to represent the committee in the proceedings of the municipal council, poviat council or voivodship parliamentacts on behalf of citizens. Most importantly, the municipal council, poviat council and voivodship parliament lays down, by way of a resolution, detailed rules for the implementation of a citizens' initiative: appointing committees for resolution-making initiatives, promoting citizens' resolution-making initiatives, requirements that submitted drafts must meet. As a result, the LCI is provided for in two ways, i.e. in an act of the parliament and a resolution of the local government. What the legislatordefinitively provided forwere only the SR, specifying them in terms of numbers, as well as theobligation to examine the LCI within a given period of time. In turn, a resolution of the local government unit sets out a detailed procedure for the implementation of the citizens' legislative initiative. In this respect, the legislator left a wide margin of regulatory discretion to the local government. Moreover, it did not specify the time limit for adopting resolutions by the local government, whichwe believe to be a mistake. It must be noted that unless such resolutions are adopted, residents are unable toexercise their right (in Poland, there were

[29] The Act of January 5, 2011 – the Electoral Code (consolidated text: Journal of Laws of 2018, item 754, as amended).

[30] Consolidated text: Journal of Laws of 2018, item 944, as amended.

[31] Consolidated text: Journal of Laws of 2018, item 995, as amended.

[32] Consolidated text: Journal of Laws of 2018, item 913, as amended.

16 self-government voivodships, 314 poviats, 66 towns with administrative rights of a poviat and 2477 municipalities[33], and not all territorial self-government units performed the obligation incumbent thereon, e.g. on January 1, 2019, only 3 out of 16 voivodship local governments adopted resolutions specifying a detailed procedure for the implementation of the citizens' initiative).

4.1. Voivodship (16 voivodships)

A group of at least 1,000 residents of a voivodship eligible to vote in elections to alegislative body may submit a draft resolution to the voivodship parliament (Article 89a of the Act on voivodship self-government).

Table 1. Minimum numbers of residents forming the committee and residents entitled to submit a draft in voivodships

Voivodship	Number of residents (thousands[34])	Minimum number of residents entitled to submit a draft	Number of residents forming the committee (minimum)	Time limit for collecting signatures for a draft
Mazowieckie Voivodship	5403.4	1000 LTS[35] (0.0185% ATS[36])	5 residents	undetermined
Silesian Voivodship	4533.6	as above (0.022%)	5 residents	undetermined
Wielkopolskie Voivodship	3484.975	as above (0,0287%)	lack of regulation	lack of regulation
Małopolskie Voivodship	3400.6	as above (0.0294%)	5 residents	undetermined

[33] Legal framework as of January 1, 2019.

[34] Population. Statistical Vademecum of Regional Civil Servant as of December 31, 2018, Central Statistical Office 2019.

[35] Legal Threshold of Support.

[36] Actual Threshold of Support.

Voivodship	Number of residents (thousands[34])	Minimum number of residents entitled to submit a draft	Number of residents forming the committee (minimum)	Time limit for collecting signatures for a draft
Dolnośląskie Voivodship	2902,365	as above (0,0345%)	lack of regulation	lack of regulation
Łódzkie Voivodship	2466.3	as above (0.0403%)	10 residents	undetermined
Pomorskie Voivodship	2333.5	as above (0.0428%)	10 residents	3 months
Podkarpackie Voivodship	2129.0	as above (0.0469%)	5 residents	undetermined
Lubelskie Voivodship	2117.6	as above (0.0472%)	7 residents	undetermined
Kujawsko--pomorskie Voivodship	2082,935	as above (0,0480%)	lack of regulation	lack of regulation
Zachodnio--pomorskie Voivodship	1701.0	as above (0.0587%)	10 residents	90 days
Warmiń-sko-mazurskie Voivodship	1429.0	as above (0.0699%)	15 residents	90 days
Świętokrzyskie Voivodship	1241.5	as above (0.0805%)	5 residents	undetermined
Podlaskie Voivodship	1181.5	as above (0.0846%)	65 residents	3 months
Lubuskie Voivodship	1014.5	as above (0.0985%)	7 residents	undetermined
Opolskie Voivodship	991,161	as above (0.1008)	lack of regulation	lack of regulation

Source: Author's study, the legal status as of April 2020.

The table above indicates that, first and foremost, so far only three voivodship parliaments (out of the total of 16) have adopted relevant resolutions regarding the detailed procedure for the implementation of the legislative initiative. Secondly, the legislator stipulated a rigid number of persons entitled to submit a draft, i.e. 1000 persons (statutory threshold of support). Thirdly, the diversification of voivodships in terms of the number of residents translates into the ability of residents to submit a draft: i.e. from 0.0185% of the Mazowieckie Voivodship residents to 0.1013% of the Opolskie Voivodship residents (actual threshold of support). The highest actual threshold of support is more than 5 times higher than the lowest one, which demonstrates the actual inequality of individual residents and regions. In other words, the statutory regulation maintains formal equality as the residents of each voivodship are able to submit a draft resolution to the voivodship parliament, and the number regarding support for a draft by residents is the same in every voivodship. However, the Act does not guarantee equality in material sense because the extent of support for a draft varies.

4.2. Municipality (66 cities with poviat rights and 2,477 municipalities)

The right to submit a draft resolution is vested in residents eligible to vote in elections to a legislative body (municipal council, city council) in a municipality: a) up to 5000 residents – at least 100 persons; b) up to 20000 residents – at least 200 persons; c) over 20000 residents – at least 300 persons (Article 41a of the Act on municipal government).

Table 2. Minimum number of residents forming the committee and residents entitled to submit a draft in municipalities

Municipality	Number of residents[37]	Minimum number of residents entitled to submit a draft	Number of residents forming the committee (minimum)	Time limit for collecting signatures for the draft
The smallest municipalities				
Powidz	2319	100LTS[38] (4.31 % residents ATS[39])	5 (0.22% residents)	45 days
Krynica Morska	1303	100 (7.67%)	lack of regulation	lack of regulation
The biggest municipalities				
Inowrocław	73114	300 (0.41 %)	3 persons	undetermined
Piaseczno	83792	300 (0.36%)	5 persons	3 months
City/town with poviat rights, to which the provisions of the Act on municipal self-government apply				
Warsaw	1777972	300 (0.0168%)	5 residents	undetermined
Kraków	771069	300 (0.0391 %)	5 residents	undetermined
Łódź	682679	300 (0.0439%)	5 residents	30 days
Wrocław	640648	300 (0.0468%)	7 residents	undetermined
Ostołęka	52262	300 (0.5740%)	10 residents	60 days
Sopot	36046	300 (0.8322%)	5 residents	50 days

Source: Autor's study, the legal status as of April 2020.

[37] Population. Statistical Vademecum of Regional Civil Servant as of December 31, 2018, Central Statistical Office 2019.

[38] Legal Threshold of Support.

[39] Actual Threshold of Support.

The legislator introduced three statutory thresholds of support for citizens' legislative initiatives: 100 persons, 200 persons and 300 persons. They are of a progressive nature. Such a solution was intended to reduce disparities between municipalities (towns/cities) due to population. In fact, this specific goal has not been fully accomplished. In Warsaw, a city of 1.7 million residents, adraft maybe submitted by at least 300 eligible persons, in the small town of Sopot (approx. 37 thousand) – also by 300 persons, while in Krynica Morska – the smallest municipality (approx. 1.3 thousand) – by 100 persons. This leads to significant differentiation as the actual LCI support threshold varies from 7.67% in Krynica Morska (high actual threshold of support) to 0.0168% in Warsaw (low actual threshold of support). The lowest threshold of support is 400 times lower than the highest one. As a result, it can be expected that, first of all: a) the larger the city/municipality, b) the lower the actual threshold of support and c) the greater the activity of residents; secondly: a) the smaller thecity/municipality, b) the higher the actual threshold of support and c) the lower the activity of residents[40]. However, the Act does not guarantee equality in a material sense because the extent of support for a draft varies.

4.3. Poviat (314 poviats)

The right to submit a draft resolution is vested in residents eligible to vote in elections to a legislative body (poviat council) in a poviat: up to 100000 residents - at least 300 persons; 2) in a poviat of over 100000 residents – at least 500 persons (Article 42a of the Act on poviat self-government).

[40] We have not conducted research on the activity of citizens and the frequency of submissions of draft resolutions, since – based on the analyzed statutory provisions – citizens are allowed to submit draft resolutions to the decision-making bodies elected in the elections on October 21, 2018. This period is too short to allow research on the activity of residents.

Table 3. Disparities between poviats due to population and the minimum number of residents entitled to submit a draft in the poviats

Poviat	Number of residents[41]	Minimum number of residents entitled to submit a draft	Number of residents forming the committee (minimum)	Time limit for collecting signatures for a draft
The smallest poviat				
Sejneński	20092	300 LTS (1.4391% residents, ATS)	5 persons	undetermined
The largest poviat				
Poznański	390308	500 (0.1281%)	5 persons	60 days

Source: Autor's study, the legal status as of April 2020.

The above indicates that the legislator introduced two thresholds of support for citizens' legislative initiatives in a Poviat: 300 persons and 500 persons. As in the case of municipalities, they were intended to reduce disparities between poviats due to population. The comparison of the smallest and the largest poviat shows that the disparities were not avoided, e.g. in the Poznański poviat (390,308 residents), a draft may be submitted by at least 500 eligible citizens, while in the Sejneński poviat (20,092 residents), the statutory threshold of support amounts to at least 300 citizens. Social support for a draft varies from 1.439% (the highest actual threshold of support) to 0.1281% of eligible residents (the lowest actual threshold of support). Thus, the highest actual threshold of support is 11 times higher than the lowest threshold. However, the Act does not guarantee equality in material sense because the extent of support for a draft varies.

[41] Population. Population. Statistical Vademecum of Regional Civil Servant as of December 31, 2018, Central Statistical Office 2019.

4.4. How does the UECI provided for in the EU Treaty and the citizens' legislative initiative, the normative source of which is the Constitution of the Republic of Poland compare?

The legal threshold of support of an initiative at the EU level is 1 million residents. In turn, the actual threshold, assuming that there are 512 million residents in the EU, amounts to 0.1950%. With respect to a citizens' legislative initiative, the legal threshold of support equals 100,000. It may not be considered high as the actual threshold of support, with 38411,1 thousand residents of Poland, is at the level of 0.26%. It is not too high in comparison to other countries, e.g. "The number of citizens required for a legislative initiative varies between 1000 citizens (Liechtenstein), 5000 voters (Slovenia), 10 000 voters (FYROM[42]), 20.000 electors (Albania), 30.000 (Georgia), 50.000 citizens (as in Lithuania, Italy, Hungary), 100.000 as in Poland or Romania and 500.000 in Spain. In Latvia or Andorra one-tenth of the electorate is required"[43]. The example of Lithuania, Hungary and Italy, where the legal threshold of support is 50000, while the actual one is 1.789% in Lithuania and 0.512% in Hungary, and also 0.828% in Italy[44] is noteworthy.

[42] Former Yugoslav Republic of Macedonia.

[43] Sergia Bartole, Angelika Nussbeger, Murielle Mauguin Helgeson, Report on legislative initiative, CDL-AD(2008)035-e, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12–13 December 2008). November 20, 2019, https://www.venice.coe.int/webforms/documents/CDL-AD(2008)035.aspx.

[44] The number of residents as of 1 January, 2019 amounted to: Lithuania – 2794.2 thousand, Italy – 60359.5 thousand. Hungary – 9 772.8 thousand, Eurostat data. 2019.

Table 4. Citizens' initiative at the EU, national and local level (Poland)

Area	Legal threshold of support	Actual threshold of support
UE	1 million EU citizens	0.1950%.
Poland	100,000 Polish citizens who have the right to vote	0.2603%
Voivodship (largest)	1000 citizens who have the right to vote	0.0185%
Voivodship (smallest)	1000	0.1013%
Poviat (largest)	500	0.1281%
Poviat (smallest)	300	1.4391%
Municipality (largest)	300	0.36%
Municipality (smallest)	100	7.67%
City/town with poviat rights (largest)	300	0.0168%
City/town with poviat rights (smallest)	300	0.8322%

Source: Author's study.

The conclusions of the analysis are as follows: first, it is "easier" for EU citizens to implement an initiative than it is for Polish citizens to submit a draft law to parliament.

Second, the lowest actual threshold of LCI support is applicable in Warsaw (0.0168%) and the largest voivodship (0.0185%), while the highest – in the smallest municipality (7.67%) and the smallest poviat (1.4391%). Submitting a draft resolution is most difficult in small municipalities. The actual threshold of support in a small municipality is 38 times higher than the threshold of support for a citizens' initiative in the EU and 28 times higher than the threshold of support for a nationwide initiative in Poland.

Third, signature requirements of the CI in the EU are low compared to small municipalities in Poland. Nonetheless, the EU CI is not particularly popular in comparison to petitions. "Initial enthusiasm about the ECI waned when it became apparent that the threshold for success was very high indeed. Since its introduction, just four initiatives have reached the required levels of support. The topics covered were water rights, protection of the human embryo, animal rights and a ban on glyphosate herbicides. In 2017, a review of the process was initiated"[45]. This last conclusion provokes sad reflections. Since the actual threshold of support of 0.1950% may be one of the factors that inhibit the development of the UECI, the more so the 7% threshold, which in our view could have a freezing effect in small municipalities. It seems that the LCI could not achieve the assumed goal of activating citizens and increasing their participation in decision making at the local level. It also seems that the LCI could be an important instrument of participatory democracy in small municipalities, which rely on strong and close ties of residents. The smaller the municipality, the stronger the ties because they have been formed over generations, which is particularly evident in rural areas. In such homogeneous environments, the SR should be minimal. The above view is

[45] Theresa Reidy, Paper of Dr. Theresa Reidy University College Cork Delivered to The Citizens' Assembly on 13 January, 2018. December 5, 2019, https://www.citizensassembly.ie/en/Meetings/Theresa-Reidy-Paper.pdf.

supported by research conducted on the SR, yet at the level of national institutions: "It may suggest that the optimal requirement should be low for countries (or issues) in which the distribution of citizens' preferences tend to be homogeneous. In this case, citizens' opinions almost coincide and thus, the ratio of supporters becomes extreme. On the contrary, a high requirement is optimal in countries (or issues) where citizens have various opinions, in which case, for many laws, opinions are often divided. The intuition is as follows. If the distribution of supporters is extreme, there is a wide gap in collected signatures between good and bad laws. On the other hand, if the distribution is moderate, the gap is narrow. Therefore, in such cases, screening warrants a higher requirement"[46].

Fourth, the above assertion concerning minimal SR for small communities (small rural municipalities) gains validity when juxtaposed with the subject matter of the LCI, e.g. changing a street name, building a water supply, bicycle path, building a kindergarten, etc. A question whether adraft resolution on changing a street name requires as many as 100 signatures ofresidents of a rural municipality is a legitimate one. On the other hand, one can reasonably ask whether the requirement of 300 signatures to change the name of a major thoroughfarein Warsaw, is not too low? Will such alow threshold not result in inflation of the LCI in Warsaw? Answers are yet to come since not all local government units have adopted resolutions setting out the rules and procedures for launching an LCI. And most importantly, there is no empirical data to assess how the institution in question functions in Poland.

REFERENCES

Bartole, Sergia, Angelika, Nussbeger, Murielle, Mauguin, Helgeson. 2008. Report on legislative initiative, CDL-AD(2008)035-e, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12–13 December 2008). November 20, 2018, https://www.venice.coe.int/webforms/documents/CDL-AD(2008)035.aspx.

[46] Tomoya Tajika, (2018), Signature Requirements for Initiatives, Journal of Theoretical Politics 30 (2018): 451–476.

Christensen, Henrik, Serup, Maija Jäske, Maija Setälä, Elias Laitinen. 2017. The Finnish Citizens' Initiative: Towards Inclusive Agenda-setting?. Scandinavian Political Studies, 40: 411–433. DOI: 10.1111/1467–9477.12096.

Dryzek, John. 2009. Democratization as Deliberative Capacity Building, Comparative Political Studies, 42: 1379–1402. DOI: https://doi.org/10.1177/0010414009332129.

Ellis, Richard. 2003. Signature Gathering in the Initiative Process: How Democratic Is It?. Montana Law Review, 64: 35–64. December 4, 2018, https://scholarship.law.umt.edu/mlr/vol64/iss1/4.

Geissel, Brigitte, Michels, Ank. 2018. Participatory Developments in Majoritarian and Consensus Democracies, Representation, 54: 129–146. DOI: http://10.1080/00344893.2018.1495663.

Gema, Sanches, Medero, Albaladejo, Gema y Pastor. 2018. The Quality of Participatory Processes in the Urban Redevelopment Policy of Madrid City Council. Lex Localis, 16: 841–872. DOI: http://10.4335/16.4.841–872.

Giżyńska, Monika. 2018. The Shortcoming of a Nationwide Referendum. Reflecting upon the Possibility of Introducing an Abrogative Referendum into the Polish Legal System, Toruńskie Studia Polsko-Włoskie XIV: 83–89. DOI: http://dx.doi.org/10.12775/TSP-W.2018.006.

Izdebski, Hubert. 2018. Prawne podstawy obywatelskiej inicjatywy uchwałodawczej. In: Obywatelska inicjatywa uchwałodawcza w procesie stanowienia aktów prawa miejscowego, Piotr Zientarski, Elżbieta Mreńca, ed., 13–22. Warszawa: Kancelaria Senatu.

Jać, Piotr. 2013. Obywatelska inicjatywa uchwałodawcza. In: Partycypacja obywatelska-decyzje bliższe ludziom, Agnieszka Maszkowska, Katarzyna Sztop-Rutkowska, ed., 141–148. Białystok: Fundacja Laboratorium Badań i Działań Społecznych "SocLab".

Kaufmann, Bruno, ed. 2010. Podręcznik europejskiej inicjatywy obywatelskiej. Przewodnik po zasadach pierwszego ponadnarodowego narzędzia demokracji bezpośredniej na świecie. Luxembourg: Green European Foundation.

Kees, Koonings. 2004. Strengthening Citizenship in Brazil's Democracy: Local Participatory Governance in Porto Alegre. Biulletin of Latin American Research, 23: 79–99.

Lis-Staranowicz, Dorota. 2020. La proposta di deliberazione (a livello locale) di iniziativa popolare in Polonia. In: La democrazia diretta in Italia, Polonia e Unione europea, Gian Candido De Martin, Andrzej Szmyt, Piero Gambale e Maciej Serowaniec, ed., 541. Roma: Luiss University Press.

Makowski, Grzegorz. 2012. Obywatelska inicjatywa uchwałodawcza – prawo i praktyka. In: Dyktat czy uczestnictwo? Diagnoza partycypacji publicznej w Polsce, Anna Olech, ed., 288–304. Warszawa: Instytut Spraw Publicznych.
Pečarič, Mirko. 2013. Some Initiatives for Modernization of Local Democracy. Lex Localis, 11: 271–291. DOI: https://doi.org/10.4335/11.3.271–291(2013).
Piasecki, Andrzej. 2011. Twenty Years of Polish Direct Democracy at the local level. In: Local Direct Democracy in Europe, Theo Schiller, ed., 126–138. Wiesbaden: GWV Fachverlage GmbH.
Reidy, Theresa. 2018. Paper of Dr. Theresa Reidy University College Cork Delivered to The Citizens' Assembly on 13 January 2018. December 5, 2018, https://www.citizensassembly.ie/en/Meetings/Theresa-Reidy-Paper.pdf.
Ścisłowska, Anna, Waldemar, Duczmal. 2016. Obywatele piszą lokalne prawo? Dlaczego nie! December 29, 2019, http://serwis.mamprawowiedziec.pl/2016/11/Obywatele-pisza-lokalne-prawo.html.
Tajika, Tomoya. 2018. Signature Requirements for Initiatives. Journal of Theoretical Politics, 30: 451–476. DOI: 10.1177/0951629818791035.
Turska-Kawa, Agnieszka, Waldemar, Wojtasik. 2018. Direct Democracy in Poland. Between Democratic Centralism and Civic Localism. Journal of Comparative Politics, 11: 18–29.
Uziębło, Piotr. 2009. Demokracja Partycypacyjna. Gdańsk: Centrum Badań Społecznych.
Ziętarski, Piotr. 2018. Aspekty aksjologiczne partycypacji społecznej a obywatelska inicjatywa uchwałodawcza. In: Obywatelska inicjatywa uchwałodawcza w procesie stanowienia aktów prawa miejscowego, Piotr Zientarski, Elżbieta Mreńca, ed., 23–37. Warszawa: Kancelaria Senatu.
Ziółkowski, Dawid. 2018. Obywatelska inicjatywa uchwałodawcza jako instrument partycypacji społecznej. Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM, 8: 331–344. December 3, 2018, http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-12fe50bc-d98e-4660--b2bb-8bc0b2934c6e.

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THE EUROPEAN CITIZENS' INITIATIVE REFORM: DOES IT MATTER?

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ABSTRACT

The article aims to analyse the reform of the European Citizens' Initiative, which entered into force at the beginning of 2020. More specifically, the article focuses on the question whether a possible impact of the changes might be that of an increase in the number of legislative proposals, as so far, out of the seventy registered ECIs, only two resulted in legislative outcomes. *De lege lata* changes intend to popularize and to give effect to the ECI, especially through the strengthening of the position of this tool as an instrument of e-democracy and through the reinforcing of the principle of subsidiarity and the model of multi-level governance. The reform is a step in the right direction. However, it is rather unlikely that it could boost the ECI as an instrument of indirect legislative initiative, which so far has had little impact. Such a situation results from the fact that the ECI is treated as a subsidiary tool to the instruments of representative democracy, generally accepted as the basis of the system. This is also the effect of the way the quasi-monopoly of the European Commission in the area of legislative initiative is interpreted. In consequence, the effectiveness of the ECI is currently perceived through the prism of collecting over one million signatures and conducting noncommittal dialogue. Nevertheless, in the light of the above, it should be remembered that the most effective form of encouraging civil society to participate in political activity is to reinforce its agency. *De lege ferenda*, increasing the impact of the ECI on decision-making processes is not dependent on potential changes in primary or secondary law. The change of attitude will suffice. Indeed, an increased number

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of legislative proposals stemming from the ECIs might be the result of a change in EU political culture and a greater respect for democratic rules.

Key words: European Citizens' Initiative, direct democracy

1. INTRODUCTION

The European Citizens' Initiative (ECI) is the most important instrument of participatory democracy[1] in the EU and the only instrument of direct democracy at the supranational level. When applied, a group of at least one million citizens of the Member States of the EU may invite the European Commission to submit a proposal of a legal act. Introduced under the Treaty of Lisbon, the ECI constitutes an extension of the catalogue of political rights resulting from EU citizenship. It is a non-binding instrument and its consequences are dependent on the decisions of the European Commission, which enjoys a quasi-monopoly over legislative initiative.

The reform of the European Citizens' Initiative, which fully entered into force in early 2020, aims to improve the use of this instrument. In accordance with EU policy lines, the changes should considerably improve the effectiveness of the instrument, including a decrease in the number of registration rejections and an increase in the number of ECIs which would receive the required number of signatures. The reform also aims at reinforcing the principle of subsidiarity and multi-level governance by involving a broader groups of EU bodies or national parliaments in the evaluation of the ECIs. However, a question arises whether the reform aimed

[1] In primary law, the basis of participatory democracy is laid down under Art. 11 TEU. Apart from the ECI, it also enumerates dialogue with representative associations and civil society and consultations with parties concerned. However, there are two fundamental differences between the ECI and the two above-mentioned forms. The first difference consists in the fact that the ECI is a bottom-up process, contrary to the above forms which are initiated and moderated by the Union's institutions (top-down approach). The second difference lies in the fact that the above instruments are merely tools for exchanging views, as opposed to the ECI, which may lead to a formal proposal of a legal act, after: Natassa Athanasiadou, The European Citizens' Initiative: Lost in Admissibility?, Maastricht Journal of European and Comparative Law 2(2019), 252.

at improving the popularity and availability of the ECI will strengthen its impact on EU decision-making processes. As it seems, the most effective way to encourage the participation of the civil society in political activity is to increase the sense of people's agency.

The present effectiveness of the ECI as an instrument of indirect legislative initiative is, in fact, rather low. From among the over seventy ECIs, only five initiatives passed the required threshold of the number of signatures. What is more, those five ECIs ran up against very divergent attitudes. With regards to one of them, the European Commission refused to take any follow-up action. Another initiative was subject to merely soft actions, where the most visible result was the organization of a scientific conference. Only two ECIs resulted in the preparation and bringing forward of legislative proposals. However, they included only a selection of the requests put forward in the ECI's proposals. The fifth of the above-mentioned ECIs is currently awaiting a public hearing.

2. THE EUROPEAN CITIZENS' INITIATIVE IN PRIMARY LAW

EU citizenship, established under the Treaty of Maastricht in the 1990s was aimed at strengthening the position of individuals in the EU system. It was to be achieved through the granting of political rights to each citizen, including the right to address EU institutions in writing. Those rights were initially restricted to petitions addressed to the European Parliament and complaints addressed to the European Ombudsman. At present, they include a wide catalogue of EU institutions and bodies and they are reinforced by the right to good administration, as laid down in the Charter of Fundamental Rights. The Treaty of Lisbon supplemented the list of political rights with the European Citizens' Initiative[2]. From the very beginning, it became one of the major and most widely discussed projects, an expression of the intention to bring the EU closer to its citizens, which was viewed as a significant tool of reinforcing the democratic legitimacy of

[2] On historical development of the ECI and EU's attitude, see: Oana-Mariuca Petrescu, The European Citizens' Initiative: A Useful Instrument for Society and for Citizens?, Revista Chilena de Derecho 3(2014), 966.

the Union and empowering its citizens[3]. *De facto,* it constitutes the only true innovation the Lisbon Treaty stipulates in the area of participatory democracy[4]. Simultaneously, it is the first instrument of direct democracy at the supranational level[5]. Apart from the referendum procedure, as foreseen in the legal systems of some Member States, the ECI provides EU citizens with an opportunity to have a direct impact on the decision-making processes in the Union (bottom-up approach). In a similar way to other political rights, it should contribute to a decrease in the democratic deficit and increase the participation of civil society in the governance of the Union.

In accordance with primary law[6], EU citizens in the number of no less than one million, representinga significant number of the Member States[7], may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on mat-

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[3] Jan Barcz, Inicjatywa obywatelska – aspekty prawne i instytucjonalne, Europejski Przegląd Sądowy 10(2011), 25.

[4] Joana Mendes, Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU, Common Market Law Review 6(2011), 1849.

[5] James Organ, Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals, European Constitutional Law Review 10(2014), 422. The supranational character predisposes the ECI mechanism to having features distinct from those of a national level. Some authors indicate that the ECI is different from the national legislative initiatives in that it is not directed to a legislator but to the entity which merely has legislative initiative, which also points out to the originality of this instrument (Paweł Głogowski, Andreas Maurer, The European Citizens' Initiative – Chances, Constraints and Limits, Political Science Series, Institute for Advanced Studies, Vienna 2013, 8). It seems that submitting the ECI to the EC results primarily from the specificity of the principle of institutional balance and its reflection in the decision-making process.

[6] Art. 11(4) Treaty on the European Union (O.J. C 202, 7.06.2016, p. 13, consolidated version); hereinafter referred to as TEU.

[7] Taking into account the condition of minimal representation of particular Member States, which is estimated in a correlation to the number of representatives of a given Member State in the European Parliament (principle of degressive proportionality). The final minimal number of votes from a given Member State equals a product of the number 751 (maximum number of the members of the European Parliament) and the figure determining the number of mandates for a given Member State. See: Art. 3 Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative (O.J. L 130, 17.05.2019, p. 55), hereinafter referred to as regulation 2019/788.

ters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties[8]. In 2011, the European Parliament and the Council, at the request of the European Commission, adopted the first regulation[9], which determined the rules and procedures of the application of the ECI. In entered into force a year later providing an opportunity to initiate the very first ECIs. Next, the legal frameworks with regard to the European Citizens' Initiative were complemented by an implementing regulation[10]. The legal acts enumerated above laid down a periodical procedure of reviewing and reporting[11] on the functioning of the ECI, which resulted in the reform of the initiative[12]. The new regulation entered fully into force in January 2020.

In accordance with the Preamble to Regulation 2019/788[13], in order to achieve the objectives of the citizens' initiative, the procedures and conditions required for the European Citizens' Initiative should be effective, transparent, clear, simple, user-friendly, accessible for persons with disabilities and proportionate to the nature of this instrument. The very same Preamble points out, on the grounds of primary law[14], that the European citizens' initiative should be considered in the context of other means by which citizens may bring certain issues to the attention of institutions of the Union and which consist notably of dialogue with representative associations and civil society, consultations with parties concerned, petitions

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[8] The European Commission rejects initiatives or partially rejects them if they manifestly fall outside the framework of the Commission's powers, if the initiative is manifestly abusive, frivolous or vexatious or if the initiative is manifestly contrary to the values of the Union, Art. 6(3) regulation 2019/788.

[9] Regulation (EU) no 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (O.J. L 65, 11.03.2011, p. 1), hereinafter referred to as regulation 211/2011.

[10] Commission Implementing Regulation (EU) no 1179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) no 211/2011 of the European Parliament and of the Council on the citizens' initiative (O.J. L 301, 18.11.2011, p. 3).

[11] Art. 22 regulation 211/2011.

[12] Regulation 2019/788.

[13] Preamble recital (6) regulation 2019/788.

[14] Art. 11 TEU and art. 24 TFEU.

and applications to the Ombudsman. Further, it states[15] that the new solutions should strike a judicious balance between rights and obligations and should ensure that valid initiatives receive an appropriate examination and response by the Commission. However, what is meant by the "judicious balance between rights and obligations" has not been clarified.

3. THE CURRENT APPLICATION OF THE INSTRUMENT OF THE EUROPEAN CITIZENS' INITIATIVE

To date, 71 initiatives were registered, whereas 23 applications were rejected (a decisive majority in the period between April 2012 and March 2015)[16]. As of now, around 9 million signatures have been collected. Within the same time frame, eight citizens committees initiated procedure before the General Court against the decisions of the Commission[17]. Most of the cases concerned rejection to register the initiative; however, there were also cases regarding dissatisfaction as to the course of action followed by the Commission in the case of the already registered ECIs. Four appeals were brought against the judgments of the General Court to the Court of Justice (CJEU)[18]. In the majority of cases both courts sup-

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15 Preamble recital (6) regulation 2019/788.

16 https://europa.eu/citizens-initiative/home_pl [date of access: 12.01.2020].

17 Cases: Michael Efler et al. v. European Commission, case T-754/14, ECLI: EU: T: 2017: 323; HB et al. European Commission, case T-361/14, ECLI: EU: T: 2017: 252; Bruno Costantini et al. v. European Commission, case T-44/14, ECLI: EU: T: 2016: 223; Balázs-ÁrpádIzsák and Attila Dabis v. European Commission, case T-529/13, ECLI: EU: T: 2016: 282; Alexios Anagnostakis v. European Commission, case T-450/12, ECLI: EU: T: 2015: 739; Bürgerausschussfür die Bürgerinitiative Minority SafePack – one million signatures for diversity in Europe v. European Commission, case T-646/13, ECLI: EU: T: 2017: 59; Romania v. European Commission, case T391/17, ECLI: EU: T: 2019: 672; European Citizens' Initiative One of Us et al. v. European Commission, case T-561/14, ECLI: EU: T: 2018: 210.

18 Cases: Alexios Anagnostakis v. European Commission, case C-589/15, ECLI: EU: C: 2017: 663; Balázs-ÁrpádIzsák and Attila Dabis v. European Commission, case C-420/16, ECLI: EU: C: 2019: 177; Patrick Grégor Puppinck et al. v. European Commission, case C-418/18 P, ECLI: EU: C: 2019: 1113; Romania v. Commission, case C-899/19 P (ongoing).

ported the stance of the European Commission[19]. From among all the initiatives only five met the condition of the required number of signatories, which in the opinion of the Commission meant that they were successful. The number of "successful" initiatives shows how exceptionally difficult and tiresome this process is[20].

The first of the initiatives which collected over a million signatures[21] was an initiative "Access to water and sanitation as a human right. Water is a public good, not a commodity" (Right2water). The citizens' committee in the said matter asked the European Commission to propose legislation implementing the human right to water and sanitation, in accordance with the guidelines by the United Nations, and promoting the provision of water and sanitation as essential public services for everyone[22]. Further, the committee indicated that EU law should obligate the governments of particular states to ensure and to provide all citizens with sufficient and clean drinking water and sanitation. The objectives of the initiative consisted in the following: 1. The EU institutions and Member States should be obliged to ensure that all inhabitants enjoy the right to water and sanitation. 2. Water supply and management of water resources should not be subject to 'internal market rules' and that water services are excluded from liberalisation. 3. The EU increases its efforts to achieve universal access to water and sanitation. It was also one of the few ECIs which lived to see the launching of a legislative process as part of the follow-up activities. In 2015 the amendments to the framework directive on drinking water were adopted[23], with a view to better monitoring of drinking water in

[19] The Court twice annulled the decision of the EC on non-registering an initiative, cases T-754/14 and T-646/13. As of now, the CJEU only once questioned the stance of the EC by overruling the decision on non-registering an ECI, case C-420/16. Case C-899/19 P is still pending judgement.

[20] Paweł Głogowski, European Citizens' Initiative in Central and Eastern European Countries – The Bumpy Road of Participatory Democracy in the EU, Studia Europejskie 1(2017), 190.

[21] The initiative obtained 1 659 543 signatures.

[22] https://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/2012/000003 [date of access: 4.01.2020].

[23] Proposal for a directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), COM(2017) 753.

the whole of Europe, which entered into force on 28 October 2015. Three years later another stage of the changes to the above-mentioned directive was initiated. The undertaken actions do not fully meet the postulates of the ECI, but still constitute an important step towards the realization of the proposal by civil society.

The second of the initiatives was the proposal "One of us", which collected the largest number of signatories[24]. It shows that the number of the collected signatures is inherently connected with the subject of the initiative, which is a highly sensitive issue from the ideological perspective. As the subject of the ECI, the citizens' committee indicated the legal protection of human dignity, the right to life and integrity of every human being since conception, within the areas of EU competences. The committee indicated that the EU should end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development and public health. *In concreto*, the initiative proposed that three legal acts be changed in the following areas: financial regulations determining the spending of the EU budget[25], financing of research[26] and cooperation for development[27]. In the communication[28] adopted on 28 may 2014 the Commission explains that it had resolved not to put forward a legislative proposal in that matter, as it had only recently been the subject of debate in the Member States and European Parliament, which determined the course of action. Apart from that, the Commission deemed the existing frameworks of financing as agreed on and considered proper by the Member States and the European Parliament. Such a stance

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[24] 1 721 626 signatures.

[25] Council Regulation (EC, Euratom) no 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (O.J. L 248, 16.09.2002, p. 1).

[26] Proposal for a regulation of the European Parliament and of the Council establishing Horizon 2020 - The Framework Programme for Research and Innovation (2014-2020), COM(2011) 809.

[27] Regulation (EC) no 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (O.J. L 378, 27.12.2006, p. 41).

[28] COM(2014) 355.

resulted in a complaintbrought before the General Court[29]. After it had been rejected, an appeal was directed at the Court of Justice[30]. Both instances supported the stance of the European Commission.

The third of the initiatives "Stop vivisection" concerned a proposal to create European legislative norms aimed at phasing out experiments on animals[31]. The authors of the initiative took as their main aim to apply to the European Commission to abrogate Directive 2010/63/EU on the protection of animals for scientific purposes and to put forward a paradigm shiftthat would prohibit experiments on animals, introducing in its place a compulsory use of data directly relevant to human species in biomedical and toxicological research. In response, the European Commission indicated that the applicability of Directive 2010/63/EU was necessary for maintaining animal welfare and that the Commission would undertake initiatives for appropriate and full implementation of the Directive in the Member States. The Commission pointed out a number of soft measures undertaken for this purpose, whereas still the most prominent one was the organization of a scientific conference[32]. Such approach met with disapproval of the organizers of the initiative who filed a complaint against the actions of the European Commission with the Ombudsman[33] on the, in their opinion, inadequatereaction of the EC regarding the issue in question. In the end, the complaint was rejected.

The fourth initiative concerned the prohibition of the use of glyphosate and protection of people and the environment from toxic pesticides ("Stopglyphosate")[34]. The organizational committee asked the European Commission to propose to the Member States that they consider a ban on the use of glyphosate, reform the pesticide approval procedure and set EU-wide mandatory reduction targets for pesticide use. The citizens'

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[29] Case T561/14.

[30] Case C-418/18.

[31] The initiative collected 1 173 130 signatures.

[32] https://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/follow-up/2012/000007/pl?lg=pl [date of access: 4.01.2020]; https://ec.europa.eu/environment/chemicals/lab_animals/3r/pdf/scientific_conference/non_animal_approaches_conference_report.pdf [date of access: 4.01.2020].

[33] https://www.ombudsman.europa.eu/en/decision/en/78182.

[34] The initiative collected 1 070 865 signatures.

committee identified three particular objectives of the initiative. The first one was to ban glyphosate-based herbicides, exposure to which has been linked to cancer in humans, and has led to ecosystem degradation. The second objective was to ensure that the scientific evaluation of pesticides for EU regulatory approval is based only on published studies, which are commissioned by competent public authorities instead of the pesticide industry. The third aim involved setting EU-wide mandatory reduction targets for pesticide use, with a view to achieving a pesticide-free future. As for the first objective, the Commission in its communication undermined the findings of the organizers, pointing out to the lack of scientific and legal grounds for justifying a ban on the use of glyphosate. By doing so, the Commission stated that it would not put forward a legislative proposal in that regard. Similarly, with regard to the third objective, the Commission determined that the existing regulation in the area of using pesticides was sufficient and stated that it would increase its commitment to implement the Directive on reduction measures in the use of pesticides. On the other hand, in the area of the second objective, the Commission decided to put forward a legislative proposal[35], which resulted in the adoption of a new regulation[36] in June 2019.

The fifth of the initiatives "Minority SafePack, one million signatures for diversity in Europe"[37], calls on the European Union to improve the protection of persons belonging to national and linguistic minorities and to strengthen cultural and linguistic diversity within the Union. The particular aims of the initiative have been further specified by the European Commission[38]. The initiative collected 1 128 385 signatures,thus ex-

[35] Proposal for a Regulation of the European Parliament and of the Council on the transparency and sustainability of EU risk assessment in the food chain (…), COM (2018) 179.

[36] Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain (…), (O.J. L 231, 6.09.2019, p. 1).

[37] https://europa.eu/citizens-initiative/initiatives/details/2017/000004_pl [date of access: 12.01.2020].

[38] Commission Decision (EU) 2017/652 of 29 March 2017 on the proposed citizens' initiative entitled "Minority SafePack — one million signatures for diversity in Europe", (O.J. L 92, 6.04.2017, p. 100).

ceeding the required threshold of one million signatures. At present, it has been submitted to the European Commission and is waiting for the date of the public hearing to be announced[39].

Summing up, as of now only two of the initiatives have been realized in accordance with their potential, i.e. resulted in putting forward legislative proposals. Just to remind, it occurred in the period of 8 years of the functioning of the instrument, with 71 registered initiatives and further 23 rejected by the EC. On the basis of the above statistics, it could be claimed, after one of the authors, that this instrument had hardly any impact on the strengthening of democracy and reducing its deficiency at the level of the EU[40]. However, it was to be expected[41].

4. THE IMPACT OF THE CITIZENS' INITIATIVE ON EU LEGISLATION

Despite the unfavourable statics, the current Regulation follows the previous one in that the ECI contributes to the strengthening of the democratic functioning of the Union through the participation of its citizens in the democratic and political life of the Union. As a tool for promoting debate, its task is to facilitate participation of the largest number of citizens in the democratic decision-making of the Union. In as much as the Preamble does not have a normative value, it still explains the philosophy behind this legal act[42]. As confirmed by the CJEU, the aim of the ECI is to empower the Union's citizens with the right to apply to the European Commission, which is comparable to the right of indirect legislative initiative of the European Parliament and of the Council[43].

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39 https://europa.eu/citizens-initiative/news_pl [date of access: 12.10.2020].

40 Tomasz Kubin, Znaczenie europejskiej inicjatywy obywatelskiej w kontekście deficytu demokracji w Unii Europejskiej, Politeja 54(2018), 117.

41 After: Victor Cuesta-López, "A Preliminary Approach to the Regulation on European Citizens' Initiative from Comparative Constitutional Law", Bruges Political Research Papers / Cahiers de recherche politique de Bruges no 24 / February 2012, 8, https://www.coleurope.eu [date of access: 13.12.2019].

42 See: G. Schwarze v. Einfuhr- und VorratsstellefürGetreide und Futtermittel, case 16/65, ECLI:EU:C:1965:117.

43 Paragraph 61 case C-418/18 P.

On the one hand, The European Commission itself describes the ECI as an instrument reinforcing the democratic mandate in the EU through an increased involvement and participation of citizens, emphasizing it as one of its priorities[44]. Moreover, the Commission also points out that the main objective of the ECI is to promote public debate on European issues, even if a given initiative does not finally fall within the framework of the legal powers of the Commission[45]. It observes that by directly involving citizens and allowing them to put forward their ideas on issues that matter to them, the ECI contributes an additional value to the EU law-making process and contributes to bringing citizens closer to the Union[46]. On the other hand, simultaneously defending its prerogatives, the Commission indicates that the ECI is an agenda-setting initiative. Thus the ECI does not have an impact on the right of the Commission to propose its own initiatives, but it obliges the Commission as a college to give serious consideration to the requests made by citizens' initiatives[47]. The General Court describes the citizens' initiative in the same vein in the ruling with regard to the initiative "One of us", in which it observes that within"exercising its powers of legislative initiative, the Commission must be allowed broad discretion, in so far as, through that exercise, it is called upon (…) to promote the general interest of the Union by carrying out, possibly, the difficult task of reconciling divergent interests. It follows that the Commission must be allowed broad discretion in deciding whether or not to take an action following an ECI"[48].

The CJEU points out that the purpose of the ECI is to "invite" the Commission to submit an appropriate proposal for the purpose of implementing the Treaties, but it does not impose an obligation for this

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[44] Jean-Claude Juncker, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_14_546 [date of access: 12.12.2019].

[45] Proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative, COM(2010)119, hereafter as the 2010 ECI proposal.

[46] Report on the application of Regulation (EU) no 211/2011 on the citizens' initiative, Brussels, 28.03.2018, COM(2018)157, hereinafter as the ECI second report, 16.

[47] 2010 ECI proposal.

[48] Paragraph 169 case T561/14.

institution to undertake specific actions[49]. Further, the CJEU observes that when the Commission receives an ECI, it is to set out the action that it intends to take and the reasons for taking or not taking action, which confirms that the submission by the Commission of a proposal for an EU act in response to an ECI is optional. However, the power of legislative initiative of the Commission expresses the principle of institutional balance, characteristic of the institutional structure of the European Union, which means that each of the institutions must exercise its powers with due regard for the powers of the other institutions[50]. This quasi-monopoly in the area of legislative initiative conferred on the Commission by the Treaties is justified by the function performed by the Commission[51]. The obligation to submit a legislative proposal would be incompatible-with the discretion enjoyed by the Commission in its task of promoting the general interest of the Union and taking appropriate initiatives to that end, and with the general obligation incumbent on the Commission to be completely independent in the exercise of its power of initiative[52].

The Court of Justice observes that the fact that the Commission is not obliged to take action in response to an ECI does not mean that such an initiative lacks effectiveness[53]. The CJEU also emphasizes that an ECI meeting legal requirements imposes on the Commission a certain number of obligations as laid down in secondary law[54]. Under the law which provided grounds for the ruling, they said obligations included publication in the registry of the initiatives. Moreover, if an ECI obtained the required number of signatures, the EC had an obligation to receive the organizers at the most appropriate level and to present its legal and political conclusions in the form of a communication, together with a justification for taking or not taking action. As was emphasized by Advocate General[55] and

[49] Paragraph 57 case C-418/18 P.

[50] Paragraph 60 case C-418/18 P.

[51] Paragraphs 110 and 111 case T-561/14.

[52] Paragraph 62 case C-418/18 P.

[53] Paragraph 64-66 case C-418/18 P.

[54] Regulation 211/2011.

[55] Point 78 Opinion of Advocate General Michał Bobek presented on 29 July 2019, ECLI:EU:C:2019:640.

further supported by the CJEU[56], the particular added value of the ECI mechanism resides not in certainty of outcome, but in the possibilities and opportunities that it creates for Union citizens to initiate debate on policy within the EU institutions without having to wait for the commencement of a legislative procedure.

The Court of Justice also observes that the effectiveness of the initiative is based on the interpretation of the representative democracy and participatory democracy in primary law[57]. Thus, the CJEU points out that primary law[58] lays down that the functioning of the Union is to be based on representative democracy, which gives concrete expression to democracy as a value[59]. On the other hand, the system of representative democracy is complemented by such instruments as the ECI mechanism[60]. The instruments of participatory democracy[61] are therefore subsidiary with regard to the system shaped by the mechanisms of representative democracy.

To sum up, in the opinion of the CJEU and the European Commission, almost all ECIs are effective. Furthermore, on the website of the ECI, the Commission refers to all the initiatives which exceeded the required number of one million signatures as successful ones[62]. Such an approach can also be seen in the documents of the Commission. Indeed, the focus on the very debate initiated by the ECI and not on its real impact on the decision-making processes allows for such a high assessment of the effectiveness of the mechanism in question. However, if the focus is shifted to the actual application of the ECI as an instrument of indirect legislative initiative, the very commencement of a discussion seems to be hardly satisfactory. The experience of over 60 initiatives which had not obtained the required number of signatures confirms the fact that collecting support from voters is a tedious and difficult task. It also points out to the scale of interest that a given citizens' committee should evoke and the amount

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[56] Paragraph 70 case C-418/18 P.

[57] Paragraph 64 case C-418/18 P.

[58] Art. 10(1) TEU.

[59] Art. 2 TEU.

[60] Paragraph 65 case C-418/18 P.

[61] See: Wojciech Sadurski, Democratic Legitimacy of the European Union: A Diagnosis and Some Modest Proposals, XXXII Polish Yearbook of International Law 2012, 33.

[62] https://europa.eu/citizens-initiative/home_pl [date of access: 12.01.2020].

of work that must be put in the signature collection process. Indeed, it is a huge success on the side of the organizers that an initiated public debate and dialogue carried out within civil society gathered such a large group of interested parties. Therefore, if it is an extraordinary event, it would naturally require a special interest from the side of the European Commission. A balance should be struck between full subjugation to the demands expressed in the initiatives and ignoring them completely[63]. It is especially important in the light of the fact that currently what could be observed is a mismatch between, on the one hand, the expectations of EU citizens from the ECI and, on the other hand, the ECI's present capacity to lead to legislative output[64]. It seems that in an organization founded on such a value as democracy and for the sake of respecting the organizers of the ECI and its signatories, a dialogue with civil society should result in relevant outcomes, including precisely legislative proposals. The stance of the European Commission regarding the initiatives which have been completed should at least create an impression that the voice of a million citizens was treated in all seriousness.

Undoubtedly, a serious treatment of the Union's citizens would mean that various ECIs would result in legislative action. Such an outcome would not necessarily have to transpire from the letter of the law, but from the change of the Union's political culture and its values. Indeed, in accordance with primary law[65], one of the Union's values is precisely democracy, and not a representative model of democracy. With regard to the political culture even before the establishment of the ECI, the desire to enhance EU legitimacy has in the past been tempered, often severely, by the desire to get things done without participatory input, or at the very least without any

[63] Anna Śledzińska-Simon, Obywatelstwo Unii Europejskiej jako demos, czyli fiasko demokratycznego telos?, In: Ochrona praw obywatelek i obywateli Unii Europejskiej. 20 lat – osiągnięcia i wyzwania na przyszłość, Adam Bodnar, Grażyna Baranowska, Aleksandra Gliszczyńska-Grabias, ed., Warszawa: Wolters Kluwer, 2015, 66.

[64] Anastasia Karatzia, The European Citizens' Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting EU lawmaking, Common Market Law Review 1(2017), 177.

[65] The above-mentioned Art. 2 TEU.

binding obligation to engage in such process[66]. Perhaps the ECI is the instrument which should not be merely treated by the European Commission as an "invitation" to put forward a proposal of a legal act, but as one that is hard to be refused or at least one that should be seriously considered.

5. THE REFORM OF THE EUROPEAN CITIZENS' INITIATIVE

The current reform was preceded by a number of activities of a non-legislative character. In particular, the Commission[67]: provided free hosting servers for the purposes of the systems established by the organizers for collecting declarations online; intensified counselling and support for (potential) organizers in the area of communicative activities; ensured that the systems for collecting declarations online to be used by the organizers are fully operational and accessible; and took a decision on a partial registration of the initiatives. Especially the activity in the latter area resulted in a significant decrease in the percentage of the initiatives not accepted for registration[68]. However, according to the EC, those improvements are not sufficient to realize the full potential of the ECI[69]. By engaging the instruments facilitating the establishment of a constructive social dialogue, in particular the REFIT platform[70], and by making an *ex post* assessment, the Commission pointed out to three areas requiring legislative actions[71].

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[66] Paul Craig, The Lisbon Treaty. Law, Politics, and Treaty Reform, UOP Oxford 2010, 77.

[67] II Report, 3.

[68] Only 2 initiatives out of the proposed 17 submitted since April 2015 were rejected, in contrast to 20 rejected out of 51 in the period from April 2012 to March 2015.

[69] Proposal for a regulation of the European Parliament and of the Council on the European citizens' initiative, COM(2017)482, 3, hereinafter as the 2017 ECI proposal.

[70] https://ec.europa.eu/info/files/refit-platform-recommendations-european-citizen-initiative_en [date of access: 4.01.2020]. See also: "Campaign for a citizens-friendly European Citizens' Initiative", http://www.citizens-initiative.eu/.

[71] 2017 ECI proposal, 6. The proposal did not take into account the postulates such as the lowering of the number of the Member States, whose citizens support the initiative from seven to five, or the extension of the time for the collection of signatures to 24 months, see: Anna Śledzińska-Simon, Obywatelstwo Unii Europejskiej jako demos, czyli fiasko demokratycznego telos?, 65.

The first area concerned the stage of registration, in particular a high rate of refusals to register the proposed citizens' initiatives. The second area referred to the stage of collecting declarations of support. The European Commission associated the complexity of the process of obtaining declarations with a low rate of initiatives ending in success. Activities undertaken in the third area were directly addressed at the problem of a low number of initiatives which gathered a million signatures and at the limited impact of citizens' initiatives on the legislative procedure. Irrespective of the identified stages, a common denominator indicated by the Commission is the acknowledgement that the existing regulations are complex and constitute a burden for the organizers of the European Citizens' Initiative, signatories and competent bodies of the Member States.

In accordance with the stance of the European Commission, the purpose of the reforms was to improve the functioning of the European Citizens' Initiative by solving the problem of shortcomings identified over the course of the last years[72]. The changes were focused on the following points: firstly, onmaking the European Citizens' Initiative more accessible, less burdensome and easier to operate by both the organizers and the supporters and secondly, on the full realization of the ECI's potential as a tool for promoting debate and participation at the European level, including the participation of young people, and on bringing the Union closer to its citizens.

Finally, among the elements of the applied reform one may distinguish those which: 1) propagate and facilitate the use of the ECI, especially through 2) the strengthening of the position of the ECI as an instrument of e-democracy and 3) broaden the scope of participation of other institutions and bodies, which uphold and ensure respect for the principle of subsidiarity and exercise the model of multi-level governance.

5.1. Promoting best practices and facilitating access to the European Citizens' Initiative

The European Commission has made a few significant changes which should have a positive impact on the organizational process of the initiative. Most importantly, the Commission agreed to consider a legal en-

[72] 2017 ECI proposal, 3.

tity[73] created in accordance with the national law of a Member Stateas the organizers of the initiative. This is intended, among others, to facilitate the possibility of gathering financial means to support particular ECIs and improve the effectiveness of contacts with the national institutions and public bodies.

The rules of registration have also been changed. Currently, a group of organizers has a possibility to make amendments to the initiative if it does not fulfil the criteria laid down in the current regulation and the EC may also register an initiative partially. The EC allows for the process of registration to have two stages[74]. The second stage of registration takes place when, in the opinion of the Commission, the initiative manifestly falls outside the framework of the Commission's powers to submit a proposal for a legal act of the Union[75]. The group of organizers has then two months to either submit amendments to the initiative in order to take into account the Commission's assessment or maintain, or withdraw, the initial initiative. If, after making amendments, the Commission still decides that the initiative falls outside its powers, it may be registered partially. This change in approach, so far applied without a direct legal basis, has already caused a significant decrease in the number of rejected initiatives.

The new solution also puts into practice a number of postulates of the organizers of the initiative with regard to the process of collecting declarations of support. At present, the organizers of the ECI set the start date of the collection period being limited only by the six-month period from the registration of the initiative. Such flexibility, allowing the group of organizers of the initiative ampletime for preparing for the whole process, should have a positive impact on the number of collected signatures.

In order to increase the catalogue of signatories, the minimum age for supporting an initiative was lowered to 16 years. EU institutions will be encouraging the Member States to consider the setting of the proposed minimum age. However, it is still the Member States that decide on the minimum age of the signatories. It seems that the right to participate

[73] Art. 6(7) regulation 2019/788.

[74] Art. 6(4) regulation 2019/788.

[75] Ibidem.

in the ECI will still be connected with the active voting right in the elections to the European Parliament.

Among the remaining changes one should point out the simplification of the requirements in the area of the signatories' data[76]. Moreover, the current regulation clearly points out that the signatories will be counted in their Member State of nationality[77]. The latter of the changes resulted from the occurrence of difficulties with counting signatures of persons living outside their country of nationality.

5.2. European Citizens' Initiative as an instrument of e-democracy

The leading trend in the area of democratization of the European Union is the use of the Internet and electronic means of communication at a distance for promoting debate and maintaining contact with the institutions of the European Union. Already before, the ECI had its own complex website and the primary regulation allowed for distant collection of declarations of support. Nevertheless, in so far as the votes could have been collected online, it was the ECI organizing committee that was responsible for the building of the system. Indeed, the reform actually strengthened the system by imposing on the EC the obligation to build its own central online system facilitating the collection of statements of support[78]. The use of a central online collection system is not compulsory though[79]. The organizers of the initiative retain the right to use other systems, which currently makes it possible to make use of the fast-developing online collection systems providing an opportunity to take part in voting.

In the area of promotion and assistance to the potential organizers of the ECI, the reform strengthened the obligation of the European Commission within the scope of its function to provide information and promotion[80] and it was especially obliged to run an online collaborative

[76] Personal data regarding nationality, place of birth, place of permanent residence is no longer collected; instead a personal identification number or an ID number are required.

[77] Art. 3(2) regulation 2019/788.

[78] Art. 10 regulation 2019/788.

[79] Art. 11 regulation 2019/788.

[80] Art. 4 regulation 2019/788.

platform[81]. Next to the system for "collecting votes" and the collaborative platform, the EC was obliged to make an online register for the European Citizens' Initiative available. The register consists of a publically available internet website providing comprehensive information on the European Citizens' Initiative in general, as well as up-to-date information on individual initiatives, their status and the declared sources of support and funding on the basis of the information submitted by the group of organizers. The general purpose of the register is to raise awareness and ensure transparency on all the initiatives. In the opinion of the EC, the register should allow the groups of organizers to manage their initiative throughout the procedure.

The present Regulation also clarifies and regulates the issue of email addresses for sending current information on the ECI, both by the EC and the group of organizers[82]. The collection of email addresses is optional and requires the explicit consent of the signatories. Email addresses should not be collected as part of the statements of support forms and potential signatories should be informed that their right to support an initiative is not conditional on giving their consent to collecting their email addresses.

6. THE STRENGTHENING OF THE PRINCIPLE OF SUBSIDIARITY AND MULTI-LEVEL GOVERNANCE

Undoubtedly, a significant change is that the assessment of the ECI is carried out by a broader number of institutions and bodies of the Union[83]. At present, the European Commission is obliged to publish without delay a notice to that effect in the register and transmit the initiative to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions, that is, all the institutions which take part in the legislative procedure as legislators or provide advisory opinion. The saidbodies may then take part in the public hearing, which just like before is organized by the European Parliament. The group of

[81] Art. 4(2) regulation 2019/788.

[82] Art. 18 regulation 2019/788.

[83] Art. 14 regulation 2019/788.

institutions and advisory bodies has been extended to include the national parliaments and civil society who all should be given the opportunity to attend the hearing[84]. The current Regulation endows the European Parliament with a special role in acting as a mediator between the organizers of the initiative and the European Commission, ensuring a balanced representation between the public and private interest[85]. Additionally, the EP has been equipped with the competence to assess both the political support for the initiative[86], as well as the follow up actions of the EC[87].

The rule of multi-level governance and indirectly the principle of subsidiarity is strengthened by the lengthening of time for the EC to prepare its response and currently the Commission should do it within six months and not within three months as was laid down in the previous Regulation. The lengthening of the time period for preparing its conclusions is intended to provide the EC with an opportunity to carry out extended consultations during its preparatory work with different institutions and advisory bodies.

7. CONCLUSIONS

The amendments introduced to the European Citizens' Initiative should contribute to the realization of the objectives of the Union's institutions. The matters concerning organizational frameworks should be easier for the groups of organizers and the ECI should receive wider recognition. The reform will have a positive impact on the Union's instruments of e-democracy[88], will strengthen the principle of subsidiarity and will fit in well within the structure of multi-level governance. However, the changes do not directly affect the essence of the ECI as an effective tool for an indirect legislative initiative. The scale of success and effectiveness of the reform might be assessed when the objectives of the ECI are taken

[84] Art. 14(2) regulation 2019/788.

[85] Ibidem.

[86] Art. 14(3) regulation 2019/788.

[87] Art. 16 regulation 2019/788.

[88] See: Eric Longo, The European Citizens' Initiative: Too Much Democracy for EU Policy?, German Law Journal 20(2019), 189.

into consideration. In general, two major objectives could be identified, which are directly connected with each other. Indeed, what is significant is which of the objectives will be considered as superior and which as an instrumental one.

Firstly, the initiative can be viewed as a form of promotion of the Union itself, its aims and values, especially democracy. In such a case, the very signing of the statements of support under particular initiatives might already be considered as success. From such a perspective, what happens further with the initiative is not, indeed, important. If the above objective is given priority, then the reform might be assessed in very positive terms. Yet, the approach in which the promotion of the Union is a superior objective of the ECI may create an impression that the Union's institutions, especially the European Commission, whom the initiative is addressed to, do not treat the organizers of the initiative and its signatories as real partners and co-participants in the decision-making processes. In fact, this is contrary to the democratic principles which lie at the foundation of the Union itself. In the long run, it might discourage citizens from participating in the instrument, as it might create an impression that the EC does not treat this form of dialogue with society seriously.

Secondly, we might treat the citizens' initiative as an effective form of an indirect legislative initiative. The reform does not bring any significant alterations in this respect, even though the strengthening of the principle of subsidiarity and the lengthening of the time period for preparing a response on an ECI should be assessed positively. The latter changes may, but do not have to, contribute to an increase in the number of legislative proposals. It will be dependent on the internal dialogue between the competent entities. The reinforcing of the ECI's position as an indirect form of legislative initiative may be actually achieved without modifications to primary and secondary law. Indeed, it might be assumed that in the face of the EU's high political culture and its deep respect for the democratic principles, the European Commission should present legislative proposals that would realize the postulates of the ECI.

Nevertheless, it is highly probable that the future initiatives exceeding the required one million of statements of support will concern matters that will be ideologically or politically controversial or that will have considerable economic implications. Typically, such ideas have a greater chance to

mobilize larger social groups. In fact, it might be observed that all the past initiatives heard by the Commission fall precisely within such categorization. Due to the weight of the subject matter, not all of them will enjoy the support of the Member States represented in the Council or the support of the majority of the members of the European Parliament. However, the submission of the citizens' initiative under legislative procedures definitively increases the transparency of the decision-making process. The European Commission may justify its refusal to prepare a legislative proposal by arguing that the European Parliament and the Council debated a given issue but the initiative was not received favourably. Still, such an approach is to the detriment of the transparency of the decision-making process. The special quality of the legislative procedure is that it can end in two ways. The submission of a legislative proposal may result in its adoption, but the proposal may also be rejected. However, the very procedure initiated by the ECI undoubtedly reinforces the democratic foundation of the Union.

REFERENCES

Athanasiadou Natassa, The European Citizens' Initiative: Lost in Admissibility?, Maastricht Journal of European and Comparative Law 2(2019), 252.

Barcz Jan, Inicjatywa obywatelska – aspekty prawne i instytucjonalne, Europejski Przegląd Sądowy 10(2011), 25.

Craig Paul, The Lisbon Treaty. Law, Politics, and Treaty Reform, UOP Oxford 2010, 77.

Cuesta-López Victor, A Preliminary Approach to the Regulation on European Citizens' Initiative from Comparative Constitutional Law, Bruges Political Research Papers / Cahiers de recherche politique de Bruges no 24 / February 2012, 8, https://www.coleurope.eu.

Głogowski Paweł, Andreas Maurer, The European Citizens' Initiative – Chances, Constraints and Limits, Political Science Series, Institute for Advanced Studies, Vienna 2013, 8.

Głogowski Paweł, European Citizens' Initiative in Central and Eastern European Countries – The Bumpy Road of Participatory Democracy in the EU, Studia Europejskie 1(2017), 190.

Juncker Jean-Claude, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_14_546.
Karatzia Anastasia, The European Citizens' Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting EU Lawmaking, Common Market Law Review 1(2017), 177.
Kubin Tomasz, Znaczenie europejskiej inicjatywy obywatelskiej w kontekście deficytu demokracji w Unii Europejskiej, Politeja 54(2018), 117.
Longo Eric, The European Citizens' Initiative: Too Much Democracy for EU Policy?, German Law Journal 20(2019), 189.
Mendes Joana, Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU, Common Market Law Review 6(2011), 1849.
Organ James, Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals, European Constitutional Law Review 10(2014), 422.
Petrescu Oana-Mariuca, The European Citizens' Initiative: A Useful Instrument for Society and for Citizens?, Revista Chilena de Derecho 3(2014), 966.
Śledzińska-Simon Anna, Obywatelstwo Unii Europejskiej jako demos, czyli fiasko demokratycznego telos?, In: Ochrona praw obywatelek i obywateli Unii Europejskiej. 20 lat – osiągnięcia i wyzwania na przyszłość, Adam Bodnar, Grażyna Baranowska, Aleksandra Gliszczyńska-Grabias, ed., Warszawa: Wolters Kluwer, 2015, 66.
Sadurski Wojciech, Democratic Legitimacy of the European Union: A Diagnosis and Some Modest Proposals, XXXII Polish Yearbook of International Law 2012, 33.

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SEXUAL ORIENTATION AND GENDER IDENTITY AS PENALIZING CRITERIA OF HATE SPEECH

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ABSTRACT

The article contains arguments raised in Polish discussion on the problem of sexual orientation and gender identity as penalizing criteria of hate speech. The Author points out regulations of Polish criminal law providing conditions of criminal responsibility for hate speech and binding criteria of the penalization, draft amendments in this area presented in recent years, as well as Polish legal doctrine or Supreme Court reviews referred to the issue. The background of the analyzes are provisions of international and European law as well as selected European states.

Key words: hate speech, sexual orientation, gender identity, penalizing criteria, Polish penal law

1. INTRODUCTION[1]

In my opinion the penalization of hate speech should be considered from the perspective of the widest possible axiological platform, that is,

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[1] This article is based in part on expertise prepared for the project "Protection of public order – Justice policy 2018" implemented by the Family Research Center of the Nicolaus Copernicus University in Toruń from the 'Justice Fund' of the Ministry of Justice: Filip Ciepły, "Penalization of Hate Speech – Political and Normative Context", In: *Freedom of Speech: A Comparative Law Perspective*, Grzegorz Blicharz, ed. (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 405–458.

the principle of human dignity. The issue should be recognized in cases when someone is punished for any behavior expressing or inducing hatred against every human being and every natural community. From that point of view the idea of the penalization of hate speech might be found also in such types of offences like: inciting crime, punishable threat, defamation, insult, incitement to crime, incitement to start an aggressive war, public insults to the Nation, State, the Head of the State, state symbols, a monument, corpses, ashes and graves, religious feelings and more.

However, in the criminology of last decades, hate speech has been identified as the so-called hate crime and has been seen as a political instrument used in a multicultural and pluralistic society to provide safety for various minorities and protect them against discrimination based on nationality, race, disability, religion, sexual orientation, gender identity, etc. This instrument has been thought to provide protection from intolerance, anti-Semitism, racism, chauvinism, xenophobia, nationalism, ethnocentrism, sexism, homophobia, transphobia, ageism, adultism, islamophobia, hostility towards minorities, immigrants, people of migrant origin, etc. For example, Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe defines hate speech as any form of speech that disseminates, incites, supports or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.

For the last two decades in Poland some groups of MPs have propounded adding to the Polish Penal Code of 1997 (PC) new – for many controversial – criteria of criminal liability for hate speech, i.e. sexual orientation and gender identity. For now, all draft amendments to the Penal Code in this regard have been rejected during consecutive parliamentary terms. However, analogous drafts will undoubtedly come back in the future.

2. HATE SPEECH IN THE POLISH PENAL CODE

When polish doctrine speaks about crimes classified as hate speech the following types of prohibited acts are primarily referred to: 1) public propagation of totalitarianism or incitement to hatred on the grounds of national, ethnic, racial or religious differences, or because of their lack of religious denomination (Art. 256 § 1 PC), 2) dissemination and other

unlawful use of an object containing content promoting totalitarianism or inciting to hatred (Art. 256 § 2 PC), 3) publicly insulting a group of people or an individual on the grounds of their national, ethnic, racial or religious affiliation or because of their lack of religious denomination (Art. 257 PC), 4) using unlawful threats towards a group of persons or an individual because of their national, ethnic, racial, political or religious affiliation or because of their lack of religious denomination (Art. 119 § 1 PC).

In recent years, some groups of the members of the Polish Parliament have repeatedly submitted draft amendments to penal regulations defining the scope of criminal liability for hate speech. These were, *inter alia*, draft amendments: of 18 April 2011 (print No. 4253), of 7 March 2012 (print No. 340), of 20 April 2012 (print No. 383), of 27 November 2012 (print No. 1078), of 7 March 2014 (print No. 2357), of 4 July 2016 (print No. 878), of 16 February 2018 (print No. 2301). Although they included, among others, a proposal to depenalize the public promotion of fascist or other totalitarian systems of the state, the most frequently proposed amendments concerned the content of Art. 119 § 1, Art. 256 § 1 and Art. 257 PC and were aimed at extending the catalogue of protected categories (groups), and, therefore, the statutory relevant differentiating features being the pre-requisite condition for criminal liability for hate speech. Currently, the categories included in the penal code are: "national, ethnic, racial, religious differences or differences due to lack of religious denomination". Proposals have been submitted to extend this list with the following: "gender", "age", "disability", "sexual orientation", "gender identity", "political affiliation", "social affiliation", "natural or acquired personal characters or beliefs".

Some authors supported those proposals, however, there are criticisms of the concept of broadening the catalogue of categories that differentiate social groups. P. Bachmat emphasizes that without prejudging whether and how far the legislator decides to extend the scope of criminalization of art. 256 § 1 PC, he should certainly refrain from hasty decisions and follow the "ad hoc fashion". In social life, all sorts of examples of discriminatory behaviour can be successfully found. Their indefinite catalogue is indirectly indicated by the same Constitution of the Republic of Poland. This prohibits discrimination against anyone in political, social or economic life for any reason (Art. 31 par. 2 of the Constitution of the Repub-

lic of Poland). With such an abundance of actually and sometimes only potentially existing examples of discrimination, there is a risk of falling into the trap of revising *ad infinitum* the Art. 256 § 1 PC. The point is, however that, in accordance with the *ultima ratio* and proportionality principles, criminal law should only be involved in the most serious discriminatory situations, that is, those that lead to the most flagrant, socially unacceptable behaviours, and, therefore, deserving a criminal-law response on the part of the state. The idea is to avoid inflation of the provisions of Art. 256 § 1 PC[2].

In the comments of the Supreme Court (letter SN BSA II-021–114 /14) regarding the draft amendment of 7 March 2014 (Sejm print No. 2357)[3], Lech Paprzycki states that the proposed regulations are intended to achieve a general preventive purpose by shaping certain social attitudes. This cannot be, however, the only or even the main motive of criminalization. Pursuant to the *ultima ratio* principle, criminal law should not perform exclusively or primarily an educational function. Meanwhile, as it stems from the reasoning, the proposed changes are aimed primarily at shaping certain social attitudes. Particularly irrelevant seems to be a legislative measure consisting in extending the catalogue of hallmarks of Art. 119 of the Penal Code with gender, gender identity, age, disability or sexual orientation. This provision is aimed at protecting humanity as a whole, as well as international public order. Placing this type of crime in the first chapter of the Specific Section of the Penal Code ("Crimes against peace, humanity and war crimes") is certainly a clue from the legislator with regard to the importance and nature of legal interests protected in this way. However, through the proposed amendments, the drafter interferes with the axiological coherence of the legal system, introducing arbitrary and

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[2] Paweł Bachmat, Przestępstwo publicznego propagowania faszystowskiego lub innego totalitarnego ustroju państwa lub nawoływania do nienawiści (art. 256 § 1 k.k.), In: Stosowanie prawa. Księga jubileuszowa z okazji XX-lecia Instytutu Wymiaru Sprawiedliwości, Andrzej Siemaszko, ed., Warszawa: LEX, 2011.

[3] Druk nr 2357 Sejmu Rzeczypospolitej Polskiej VII kadencji [Sejm RP print No. 2357], http://orka.sejm.gov.pl/Druki7ka.nsf/0/AF063793536190B7C1257CD100309301/%24File/2357.pdf [date of access: 30.01.2020].

erratic amendments which may even be considered a violation of proper legislation principles[4].

According to Lech Paprzycki, the biggest problem of the proposed criminalization of hate speech is the casuistry of regulation, instead of its abstractness. Adding several important reasons for discrimination to Art. 256 and 257 PC does not cover all possible discriminating hallmarks, while disregarding those similarly important. Among these are: mental illness, AIDS, addiction to alcohol or intoxicants, obesity and homelessness. This type of legislative technique means that the regulations will have to be revised indefinitely, otherwise the regulation will fail to treat all the discriminated groups equally. Instead, the court should rather try to find and apply a determinant of the discriminatory feature that is the smallest common denominator and apply it to avoid dangerous casuistry in an abstract legal norm. If it proves impossible, then while maintaining the intent to criminalize the behaviours described in the draft, the court should list all possible grounds for discrimination[5].

Theoretically ground for the criminal pursuit of discrimination is only limited by imagination. Indeed, it could include: height (statistically, low growth reduces the chances of professional and social advancement), having children (e.g. four or more children), education (e.g. primary), social origin (e.g. rural), colour of skin (e.g. any other than white), diet (e.g. vegetarian or vegan), means of transport used (e.g. bike), hair colour (e.g. red or grey) or lack thereof, property status, occupied living space, distance from home to workplace, visual styling (*image*), possession of tattoos or earrings, etc. Of course, some examples are exaggerated, but nevertheless they point to the essence of the problem.

It should be said that the legal expert opinion concerning the penalization of hate speech shall focus not only on technical issues related to compliance with the rules of correct legislation, but, above all, shall include a substantive assessment of individual revision proposals based on constitutional regulations. Legal assessment must be based on normative, systemic, internal valuation criteria, expressed primarily in axiology and the norms of the Constitution of the Republic of Poland. The output of

4 Ibidem.

5 Ibidem.

any statistical and other empirical studies in the field of sociology, criminology, social psychology, etc. are important only if their conclusions comply with the axiology and norms of the Polish Constitution.

To demonstrate the outline of a correct argumentative model drawn from constitutional principles and norms, it is worth focusing on the relevant features determining criminal liability on the basis of Art. 256 § 1 and 257 PC, i.e. normative references to "national, ethnic, racial, religious differences or differences due to lack of religious denomination." The indicated *de lege lata* features that differentiate groups and persons being representatives of these groups are privileged in terms of their criminal-law protection when compared to other people and social groups. Penalties for committing crimes under Art. 256 § 1 and 257 PC are more severe than penalties for defamation or insult on the basis of Art. 212 and 216 PC. Moreover, different is the prosecution mode: persons from the privileged groups can take advantage of the mode which is more convenient for the victim.

Still, the privilege in terms of criminal-law protection of groups and persons indicated as per the criterion of relevant features on the ground of applicable regulations is constitutionally justified. The provision of Art. 35 par. 1 and 2 of the Constitution of the Republic of Poland guarantees the protection of the cultural identity of national and ethnic minorities, thus, the identity of national and ethnic minorities represents a constitutional value. Paragraph 2 also protects the religious identity of minorities, which in reference to the content of Art. 53, generally allows for the identification of religious identity as a legal value on the ground of the Constitution of the Republic of Poland. The decision of the ordinary legislator, whose task is to implement and refine constitutional values, principles and norms, regarding the specification of "national, ethnic, racial, religious differences or differences due to lack of religious denomination" as deserving of increased criminal law protection finds constitutional reasoning.

Following this argumentation path, one can easily ascertain the necessity of drafting specific amendments on penalizing hate speech. For example, in order to evaluate the proposal to distinguish the criterion of disability as a determinant for the scope of special protection pursuant to Art. 256 § 1 of the Penal Code, this criterion (disability) should be relativized to the decisions of the constitutional legislator expressed in Basic

Law. The provision of Art. 68 par. 3 of the Constitution of the Republic of Poland guarantees special care for people with disabilities, but this applies only to health care. Therefore, there is no specific constitutional foundation so that any such person would be privileged towards the other (non-disabled) persons as regards prosecution in the case of, for example, defamation or insult. There is no obstacle, hence, to the ordinary legislator, within the framework of regulatory freedom, in providing disabled people with special criminal law protection. Still, sociological, psychological, and not normative arguments should decide here. Thus, only the results of empirical and statistical analyses, etc., should generate an answer to the question as to whether a privileged status for disabled persons in terms of criminal-law protection against hate speech is justifiable or is excessive towards other people. Therefore, there is no abstractly determined normative obstacles. It should be emphasized, however, that in general terms, people with disabilities are protected against hate speech, and in exceptional situations, when the public interest so requires, a prosecutor's interference is possible (Art. 60 of the of the Code of Criminal Procedure). This situation solves the problem of singular event situations of hatred.

Different conclusions can be drawn, however, from the constitutional analysis of the proposal of adding a privileging feature (criterion) in the form of "sexual identity". In the draft amendment to the Penal Code of February 22, 2012, submitted by the SLD Deputies' Group, the drafters on the basis of accepted assumptions and definitions, explain that the distinguishing the criterion of "gender identity" is to counteract the phenomenon of transphobia, the counterpart of homophobia, but which is aimed at transgender people. According to the drafters, "gender identity" is "the affiliation to a given sex, or the positioning between sexes, and also the relation of sex and perceived sex to gender. Transsexuality is the most widely known form of transgenderism, i.e. the lack of conformity between sex and perceived sex (the only way to remove non-conformity is to match sex to perceived sex by means of surgical treatment and hormonal therapy). However, the spectrum of transgenderism is much wider. In the broadest sense, the identity of a transgender person does not match the conventional views on the masculine and feminine genders, but combines both genders or moves between them.

In the language of classical anthropology, which treats man's sexual dimorphism as a biological norm stemming from nature, it can be considered that the drafters seek to strengthen the criminal-law protection of men and women with physical anomalies of sexual characteristics or mental disorders of sexual identity. An attempt to include the term "gender identity" into the Penal Code indicates the drafters' willingness to implement specific anthropological assumptions into the criminal law system. The revision of criminal law in the proposed scope would be based (which stems from the argumentation given in reasoning of the draft amendment) on the affirmation of assumption that the number of sexes is infinite, the same sex is only a matter of social role and free choice of individual, and the expression of one's gender identity other than a man and woman is treated by the legislator as equal and even promoted due to having special distinction in terms of criminal law protection. It should be emphasized, however, that because the legal system must be coherent, most of all in terms of the human concept, this proposal should be confronted with constitutional axiology, and, in particular, with the anthropological assumptions of the Polish constitutional legislator.

In the founding rules set out in Chapter I of the Constitution of the Republic of Poland, as part of constitutional principles representing prescriptive expressions of special significance for the whole legal system and which provide framework assumptions in the legislative process (hence, having interpretational meaning for other provisions of the Basic Law), in Art. 18, the constitutional legislator decided that marriage is a relationship between a woman and a man, and that family, motherhood and parenthood are under the protection and care of the Republic of Poland (the supreme constitutional principle). Hence, the legislation provides full protection and legal care of marriage, family, motherhood and parenthood, and such care is not limited to, for example, health-care. In the law-making and law-applying process, the protection and care of public authorities is thus to be focused on specific marriages and families, but also on marriage and family as an institution of social order and legal order.

The constitutional legislator indicated in Art. 18, the anthropological position (assumption) that was taken in terms of gender determination – it is only about a man and a woman. The constitutional legislator has made axiological (anthropological) settlement for the needs of building

a legal system that is of normative significance. It is based on (using operationally the conceptual network of deputies drafters) – “conventional views on the masculine and feminine genders”. In Art. 18, the constitutional legislator has distinguished the division of sex between a woman and a man, and has also placed affirmative human sexual dimorphism directly next to marriage and motherhood. This, on the normative level, implies binding the constitutional understanding of sex with the biological diversity of sex necessary for contracting a marriage and giving birth to offspring. In the assumption of the constitutional legislator, a woman and a man are complementary in relation to each other biologically (reference to the motherhood and the parenthood) and socially (reference to the family).

Therefore, the assumptions underlying the introduction to the Penal Code of the category of “gender identity” as being relevant to criminal liability for hate speech are contradictory to anthropological assumptions expressed in the constitutional principles set out in Art. 18 of the Constitution of the Republic of Poland. Thus, statutory regulation in fact favouring persons with gender identity disorders, has the intended or unintended effect of affirming on the statutory level of an ideology contrary to constitutional axiology. Thus, it must be regarded as contrary to the axiological assumptions of Basic Law.

For analogous reasons, the category of “sexual orientation” should not be introduced into the Penal Code so as to privilege, in terms of criminal law protection, persons of the so-called “non-heteronormative sexual expression”, i.e. persons with homosexual, bisexual, transsexual, etc. inclinations. This is because this would distort the constitutional axiological and normative model of identification of nature and purpose of human sexuality (normative reference of sex to marriage stemming from system analysis – as a relationship between a woman and a man, motherhood and parenthood). It should be clearly emphasised that Polish criminal legislation does not discriminate against persons with homosexual, bisexual, etc. inclinations, as well as persons committing homosexual acts, because these categories are not excluded from the scope of general criminal law protection (e.g. against hate speech pursuant to Art. 212 and 216 of the Penal Code). Persons with these type of inclinations or sexual lifestyles are protected by criminal law norms, just like anyone else, on the basis of univer-

sal principles of protection and the underlying inherent and inalienable dignity of man[6].

It should be clearly emphasized that what is called discrimination from the point of view of a specific, even widespread ideology, is not necessarily discrimination from the point of view of the legal system. The revision consistent with the aforementioned draft, *de facto* would distinguish the category of sexual minorities on the ground of criminal law, and thus would suggest on the normative level the affirmation of non-heteronormative orientations, preferences, sexual inclinations, which does not correspond to constitutional axiology.

3. INTERNATIONAL AND EUROPEAN UNION LAW BACKGROUND

There are some provisions that could be connected with the problem of penalization of hate speech in the Universal Declaration of Human Rights (UDHR)[7], but without indicating neither sexual orientation nor gender identity as the criterion of intolerant behaviour. Article 2 states that all human beings have all the rights and freedoms included therein, regardless of any differences in race, colour of skin, gender, language, religion, political and other views, nationality, social background, property, birth or any other state. Article 7 adds that everyone has the right to equal protection against any discrimination which is a violation of the UDHR and against any exposure to such discrimination.

The European Convention on the protection of human rights and fundamental freedoms (ECHR)[8] in Art. 14, states that the exercise of rights and freedoms listed in this convention should be ensured without discrimination based on gender, race, colour, language, religion, political and other beliefs, national or social origin, affiliation to national minority, property, birth or for any other reason. On the other hand, ECHR's

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[6] See: John M. Finnis, Law, Morality, and Sexual Orientation, Notre Damme Law Review 69 (1994).

[7] Universal Declaration of Human Rights, resolution 217/III A of the General Assembly of the United Nations of December 10, 1948.

[8] Convention for the protection of human rights and fundamental freedoms of November 4, 1950, OJ of 1993, No. 61, item 284 as amended.

Art. 17 provides for a general prohibition of abuse of the Convention's provisions. This cannot, however, be interpreted as granting anyone the right to take actions or to commit a criminal act aimed at annihilating the rights and freedoms or limiting them to a greater extent than the Convention provides for. The content of Art. 17 is invoked basically in two contexts: attempts to replace democratic systems with anti-democratic systems and totalitarian regimes, as well as incitement to hatred and violence on racial, national or religious ground[9].

Within the European convention area, it is also worth paying attention to Art. 3–7 of the Additional Protocol to the Council of Europe Convention on cybercrime regarding the penalization of acts of a racist or xenophobic nature committed with the use of computer systems[10], as well as Art. 5 of the Council of Europe Convention on the prevention of terrorism[11].

As it concerns the soft law of the Council of Europe in this area, the first document adopted by the Committee of Ministers was a resolution 68 (30) of 31 October 1968 on taking legal measures against incitement to hatred on the grounds of race, nationality and religion affiliation.

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[9] See more: Commisioner for Human Rights, Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe (Council of Europe, 2013); Paul Johnson, Homosexuality and the European Court of Human Rights (Routledge, 2013); Paul Johnson, Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights (Oxford University Press, 2016).

[10] Additional Protocol to the Council of Europe Convention on cybercrime regarding the penalization of acts of a racist or xenophobic nature committed with the use of computer systems, drafted in Strasbourg on 28 January 2003, OJ of 2015, item 730. The Republic of Poland stipulated that a prerequisite for criminalizing the act set out in Art. 3 par. 1 is discrimination associated with violence or hatred referred to in par. 2 of this Article, and, therefore, directed against a person or a group of persons, on grounds of race, colour, national or ethnic origin and religion. On the other hand, based on Art. 6 par. 2 letter a of the Protocol, the Republic of Poland stipulated that the prerequisite for criminalizing the act set out in paragraph 1 of this Article is the intention set out in par. 2 letter a of this Article. See: Government Statement of 24 March 2015 on the legal effect of the Additional Protocol to the Council of Europe Convention on cybercrime regarding the penalization of acts of a racist or xenophobic nature committed with the use of computer systems, drafted in Strasbourg on 28 January 2003, OJ C, of 2015, item 731.

[11] Council of Europe Convention on prevention of terrorism, drafted in Warsaw on May 16, 2005, OJ of 2008, No. 161, item 998.

However, the comprehensive legal document regarding the discussed issue is the recommendation R (97) 20 of October 30, 1997 on "hate speech". This recommendation advises the Council of Europe states to take appropriate measures to combat hate speech, as well as to create an adequate policy to combat social, economic, political, cultural and other causes of this phenomenon. Hate speech is understood here as any form of speech that disseminates, encourages, supports or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance in the form of aggressive nationalism or ethnocentrism, discrimination and hostility towards minorities, immigrants or people of immigrant origin.

As for the relationship between European Union law and national criminal law systems, due to the diverse cultural and legal traditions of member states, only partial harmonization of criminal laws is possible and desirable. This also refers to penalization of hate speech and the content of Art. 67 par. 1 and 3 of the Treaty on the Functioning of the European Union[12]. Regarding hate speech penalization, special attention should be paid to the Council Framework Decision 2008/913/JHA, on countering certain forms and expressions of racism and xenophobia by means of criminal law measures[13]. According to Art. 1 par. 1 of the decision, each Member State should apply necessary measures to ensure penalization of the intentionally committed act of public incitement of violence or hatred towards a group of persons who can be defined by race, colour of skin, religion, origin or national affiliation, or against a member of such group. There is no sexual orientation nor gender identity as penalizing criteria of hate speech.

These criteria could be found in certain non-normative acts, *inter alia*: the resolution of the European Parliament of 24 May 2012 on opposing homophobia in Europe (2012/2657(RSP))[14], the resolution of

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[12] Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, U. UE C 326, 2012.10.06, pp. 0001-390.

[13] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and signs of racism and xenophobia by means of criminal law measures, OJ.UE.L.2008.328.55.

[14] OJ EU.C.2013.264E.54.

the European Parliament of 4 February 2014 on the EU plan to counteract homophobia and discrimination based on sexual orientation and gender identity (2013/2183(INI))[15]; the resolution of the European Parliament of 8 September 2015 on the situation of fundamental rights in the European Union (2013–2014) (2014/2254(INI))[16]; the resolution of the European Parliament of 25 November 2015 on preventing radicalization and recruitment of European citizens by terrorist organizations (2015/2063(INI))[17]. The axiology assumed therein does not have full treaty's authorization and is not shared in its entirety in all Member States.

4. COMPARATIVE LAW PERSPECTIVE

In the legal system of the French Republic provisions that penalize hate speech are mainly included in two normative acts, i.e. in the act on press freedom of 29 July 1881 (hereinafter: APF)[18] and the Penal Code of the Republic of France, which entered into force on 1 March 1994 (hereinafter: CCRF)[19]. Criminal liability for hate speech is based on the liability for publicly provoking to a particular behaviour. The French doctrine distinguishes direct provocation (inciting to commit certain types of prohibited acts or material crimes) and indirect provocation (subjective, subject-related), which consists in creating a certain favourable atmosphere for committing prohibited acts (formal crime). It also distinguishes intermediate provocation in a *strict sense* that involves apology and revisionism. Indirect provocation of a *strict sense* is provoking to discrimination, hatred or violence because of origin, affiliation or lack thereof to a specific ethnic group, nation, race or religion, and also because of gender, sexual orientation, gender identity or disability. The provocation in this case is a statement which by its very nature arouses a feeling of hatred. Moreover, the intent of commission is to have a public character, but it does not

[15] OJ EU.C.2017.93.21.

[16] OJ EU.C.2017.316.2.

[17] OJ EU.C.2017.366.101.

[18] Loi du 29 juillet 1881 sur la liberté de la presse, Bulletin LOIS N° 637 p. 125.

[19] Code pénal, Bulletin LOIS N° 92 p. 683 (version consolidée au 9 juin 2018, www.legifrance.gouv.fr/affichCode).

have to bring any effect. The provocation, too, does not have to be direct – that is, it does not have to consist of inciting to commit any specific prohibited act. This leads to practical problems. Courts, in almost every case, must set the limits between an admissible statement and a punishable provocation, somehow non-statutorily clarifying the features of punishable behaviour.

The provision of Art. 29 of APF provides for criminal penalization of defamation, whereas its qualified types are included in Art. 30–35 of APF. These include, respectively: defamation of public authorities and public officers (Art. 3031), defamation of a deceased person (Art. 34), public defamation or by means of mass media, and (essential from the point of view of identification of crime of hate speech) defamation of a person or group of persons because of their origin or affiliation or lack thereof to a specific ethnic group, nation, race or religion, as well as specific defamation of a person or group of persons because of their gender, sexual orientation, gender identity (since 2017) or disability (Art. 32). On the other hand, petty offences related to hate speech include: non-public provocation to discrimination, hatred or violence against a person or group of persons because of origin or affiliation or lack thereof, real or assumed, to ethnic group, nation, race or religion, and also because of gender, sexual orientation, gender identity or disability (Art. R625–7 of CCRF); non-public defamation of a person or a group of persons because of the abovementioned features (Art. R625–8 of CCRF); non-public insult of such a person or group (Art. R625–8-1 of CCRF).

German regulations penalizing hate speech are perceived in the context of confronting the racial prejudices and Nazi ideology. Statement § 130 of the German Criminal Code of May 15, 1871 (*Strafgesetzbuch*, hereinafter: StGB)[20] refers to hate speech. Pursuant to § 130 of StGB par. 1, the individual who induces a disturbance of public peace, incites hatred against a particular national, racial, religious or ethnic group, as well as against a group of persons or individuals because of their affiliation to one of the above-mentioned groups; or calls for the use of violence or compulsory measures against them; or attacks the human dignity of others by insulting, maliciously mud-slinging or defaming a group of persons or individ-

[20] Accessed January 10, 2020, https://www.gesetze-im-internet.de/stgb.

uals because of their affiliation to one of the above-mentioned groups or parts of the population, is subject to imprisonment of 3 months to 5 years. On the other hand, pursuant to § 130 par. 2, a penalty of imprisonment of up to 3 years or a fine is imposed on anyone who attacks the dignity of other people by insulting, or maliciously mud-slinging a specific group or part of the population or individuals because of their affiliation to one of the specified groups or part of the population; or defames a part of the population, by disseminating written material, displaying, publishing, presenting or sharing in any other way. Sexual orientation or gender identity are not being mentioned.

In criminal law of other European states there is sexual orientation as penalising criterion of hate speech for example in legal system of: Austria, Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Spain, Netherlands, Ireland, Lithuania, Hungary. There is also gender identity as penalising criterion of hate speech in legal system of: Belgium, Croatia, Hungary. On the other hand, there is no sexual orientation nor gender identity as penalising criterion of hate speech in legal system of: Czech Republic, Latvia nor Slovakia[21].

5. CONCLUSION

Within Polish substantive criminal law, norms of international law do not constitute a robust and precise instrument for the implementation of international standards in terms of specific law-making decisions. Sparse commitments in this respect are of a general and limited nature, primarily to counter racism and xenophobia. These, current normative regulations in Poland already comply with.

In Polish criminal law, types of crimes determining the conditions of criminal liability for hate speech should be viewed in broad terms. Crimes

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[21] See: Consiliul National Pentru Combaterea Discriminarii, Comparative study on legislation sanctioning hate speech and discrimination in member states of the European Union (Bucharest: 2014), http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf [accessed: January 10, 2020], https://www.legislationline.org/documents/section/criminal-codes.

of hate speech include all types of prohibited acts in which the behaviour by its very nature expresses or may express hatred or induce or constitute a real threat of inducing feeling of hatred against another person or group of persons. Criminal law protection is universal and refers to residual values of the legal order, i.e. the obligation to respect human dignity and to ensure public order and the security of all citizens. Protection against hate speech is very extensive in Polish criminal law. It is universal and basically does not differentiate victims into categories more or less deserving of protection. This is a desirable solution from the axiological and technical side (avoidance of casuistry).

The directive on the universalization of protected category and synthetization of regulations penalizing hate speech is to lead to a more comprehensive implementation of the constitutional principle of equality. Apprehension of hate speech on the ground of universal protection, based on the principles of dignity and equality set out in Art. 30 and 32 of the Constitution of the Republic of Poland, and not in the perspective of political concepts of equalizing opportunities, repressive tolerance or positive discrimination, is to deprive the idea of penalizing hate speech of the odium of being an instrument of ideological confrontation.

The assessment of penalization of hate speech should focus not only on technical issues related to compliance with the rules of correct legislation, but, above all, should include a substantive assessment of individual revision proposals on the basis of constitutional regulations. Legal assessment must be based on normative, systemic, internal valuation criteria, above all, the axiology and the norms of the Constitution of the Republic of Poland. The outcome of any statistical research and other findings in the field of sociology, criminology, social psychology, etc. is important only if their conclusions comply with the axiology and norms of Basic Law.

The distinguishing regulation in terms of criminal law protection of certain categories of persons against hate speech, according to the proposed parliamentary draft amendments of the Penal Code, e.g. according to "gender identity" or "sexual orientation" criteria, would be kind of affirmation of ideology contradictory to constitutional anthropology and axiology on the ground of criminal law. Freedom of speech, as a constitutional freedom, may be limited on the statutory level only due to other

constitutional values, and not to social ideas diverging from the axiological settlings of the constitutional legislator.

The exclusion of persons with gender identity disorders, persons with homosexual, bisexual, etc. inclinations, or persons who commit homosexual acts from criminal-law protection against hate speech would be an unacceptable discrimination. These persons are protected, however, as are all others, on the basis of universal protection stemming from the principle of the dignity of the human being (Art. 212 and Art. 216 of the Penal Code). However, the prohibition of discrimination does not imply the obligation of being placed in a privileged position in terms of increased criminal law protection.

Pursuant to ECHR, the determination of prohibited acts and criminal sanctions essentially constitutes the authorisation of national institutions which enjoy wide discretionary power in this matter. This is defined as a national margin of appreciation. The ECHR control focuses on the legitimacy of limitations autonomously exercised by the state, and, above all, on the implementation of procedural guarantees. Individual states belonging to the Council of Europe define the scope of penalization of hate speech in a diversified way.

Legal norms of the European Union base the issue of penalization of specific behaviours in individual Member States on the principle of establishing an area of freedom, security and justice in respecting the fundamental rights of the EU and the different legal systems and traditions of the Member States. The Union makes every effort to ensure a high level of security through measures to prevent crime, racism and xenophobia and to overcome these phenomena, where appropriate, by approximating criminal laws. The Council Framework Decision 2008/913/JHA on countering certain forms and signs of racism and xenophobia by means of criminal law measures, states, however, that the decision is limited to opposing by means of criminal law only the particularly serious forms of racism and xenophobia. This, current normative regulations in Poland correspond with. The decision also states that the cultural and legal traditions of individual Member States differ, especially in this field, and full harmonization of criminal law is not currently possible.

A number of European states penalize hate speech and do so to a different extent. In French law, for example, the provisions of law that penalize

hate speech distinguish such features as sexual orientation or gender identity, while these types of categories are not specified in German law. The comparative legal analysis of normative solutions of individual states may lead both to the conclusion about the need to approximate Polish solutions to specific foreign concepts, and to maintain or increase discrepancies in this field. The content of the criminal law provisions of each state is nuanced by the diversity of its culture, tradition, and system of values expressed in a democratic society, above all in constitutional values, principles and norms. The theoretical and legal directive of axiological coherence of criminal law with the autogenic moral and cultural code of every nation prevents the normative argumentation in the light of comparative law. The outcome of the comparative legal analysis in this field is only a theoretical, non-binding *exemplum* that can become both a model, and, on the contrary, a counterpoint to Polish solutions and possible revision postulates.

REFERENCES

Bachmat, Paweł. 2011, Przestępstwo publicznego propagowania faszystowskiego lub innego totalitarnego ustroju państwa lub nawoływania do nienawiści (art. 256 § 1 k.k.), In: Stosowanie prawa. Księga jubileuszowa z okazji XX-lecia Instytutu Wymiaru Sprawiedliwości, Andrzej Siemaszko, ed., chap. IV. Warszawa: LEX.

Ciepły, Filip. 2019, Penalization of Hate Speech – Political and Normative Context, In: Freedom of Speech: A Comparative Law Perspective, Grzegorz Blicharz, ed., 405–458. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.

Commisioner for Human Rights. 2013, Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe. Council of Europe.

Consiliul National Pentru Combaterea Discriminarii. Comparative Study on Legislation Sanctioning Hate Speech and discrimination in member states of the European Union. Bucharest: 2014, http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf.

Finnis, John M. Law, Morality, and Sexual Orientation. Notre Damme Law Review 69 (1994): 11–39.

Johnson, Paul. *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*. Oxford University Press, 2016.

Johnson, Paul. *Homosexuality and the European Court of Human Rights*. Routledge, 2013.

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THE ROLE OF THE MARSHAL OF THE VOIVODSHIP IN THE PROTECTION OF TRAVELLERS IN THE EVENT OF THE INSOLVENCY OF TOUR OPERATORS AND RELATED TOURIST SERVICES

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ABSTRACT

The authors briefly present the issues of the protection of travellers in case of the insolvency of tour operators and related tourist services. The reflections are primarily focused on the analysis of the tasks of the Marshal of the Voivodship in this respect and their legal nature. The subject of the study is primarily to present the current legal status, the position of the judiciary, and a legal and comparative analysis of the EU regulations with Polish regulations. The analysis is carried out from the perspective of the legitimacy of entrusting these tasks to the Marshal of the Voivodship, and consequently ensuring the effective protection of travellers. The article uses the theoretical-dogmatic, historical, and legal-comparative method. The reflections are based on a comparison of selected institutions of law functioning in the system of Polish law and legal solutions in force in EU law.

Key words: traveller, tourist services, insolvency

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1. INTRODUCTION

In Poland, tourism plays an important role and enjoys unchanging popularity, which contributes to the development of economic activity in this sector. This popularity also forces entrepreneurs providing tourism services to undertake a number of activities related, not only to ensuring the attractiveness of the offer, but also safety for travellers. Their protection takes place at the level of EU and national law, the Polish Constitution, and legislation. This is achieved by means of both substantive and procedural regulations. Travellers' interests are protected by various bodies, including the President of the Office of Competition and Consumer Protection, the District (City) Consumer Ombudsman, governmental (central and local) and local government administration bodies, as well as judicial authorities. The rights of travellers are protected both in private and public law. The subject matter of the article will be primarily an analysis of public-legal institutional solutions for the protection of the rights of travellers in the field of tourism and related services, limited to the issue of protection of travellers in the situation of insolvency of tourist events operators and providers of related services. The issue of insolvency of entities providing tourism services is an extremely important problem, not only for the Polish legislator, but also in EU law. On 25 November 2015, the European Parliament adopted Directive 2015/2302[1]. The Polish legislator implemented this Directive in the Act of 24 November 2017 on Tourist Events and Related Tourism Services[2].

The aim of the study will be to present legal solutions in Polish law, to compare them with the solutions adopted in Directive 2015/2302, and to assess the legal nature of the tasks entrusted to the Marshal regarding the insolvency of entities providing tourism services in the context of typical public administration tasks. The key issue will be to answer the follow-

[1] Directive (EU) No. 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and related tourism services, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ EU.L 326, p. 1, hereinafter referred to as Directive 2015/2302.

[2] Consolidated text, Journal of Laws 2019, item 548, hereinafter referred to as TERTS.

ing questions: are these tasks within the scope of public administration or not, and should they really be entrusted to the Marshal of the Voivodship, and, if they are not tasks within the scope of public administration, what entity would be the right one, and do the implemented solutions really properly protect the interests of travellers?

2. TASKS IN CASES OF INSOLVENCY OF TOURISM SERVICE PROVIDERS AND ADMINISTRATIVE BODIES COMPETENT IN THESE CASES – THE ORIGIN OF POLISH AND EU REGULATION UNTIL THE IMPLEMENTATION OF DIRECTIVE 2015/2302

Under the Tourism Services Act 1997[3], the tasks relating to the protection of the rights of travellers where the tour operator, despite its obligation, did not ensure that their return home was entrusted to a licensing authority, i.e. the President of the Office for Sports and Tourism, who was authorised, on the basis of the contents of a guarantee or insurance contract, to issue instructions for the payment of funds for the return of travellers to their home country.

As a result of the amendment of the Tourism Services Act of 1999[4], these tasks were entrusted to the authority issuing the permit to conduct business activity consisting in organizing tourist events and acting as an intermediary at the request of the traveller in concluding contracts for the provision of tourist services, i.e. a Voivode. A Voivode or an entity designated by him or her has been authorised to issue an order for the settlement of an advance payment to cover the costs of the traveller's return to their home country on the basis of a guarantee or insurance contract (Article 5 (3)). Pursuant to the amendment to the Tourism Services Act of 2000, Article 5 (4)[5] was added, which authorised a Voivode to act for

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[3] Art. 5 (3) of the Act of 29 August 1997 on tourism services, Journal of Laws No. 133, item 884 in its original wording, currently not in force.

[4] The Act of 10 April 1999 amending the Tourism Services Act, Journal of Laws No. 40, item 401.

[5] Article 4 (4) of the Act of 8 December 2000 amending the Act on Higher Education, the Act on Higher Vocational Schools, the Act on Railway Transport, and the Act on Tourism Services, and the Act – Code of Civil Procedure, the Act – Law on the System

the benefit of travellers in cases of payment of funds under a bank guarantee agreement, insurance guarantee agreement or insurance contract, on the terms specified in the content of such agreements. As a result of this amendment also section 5 was added, which provided that from the sum specified in the bank guarantee agreement, insurance guarantee agreement, or insurance contract the costs of bringing the travellers to their home country are covered first. If the remaining amount of the guarantee is insufficient to return all payments made by the clients, payments are reduced in proportion to the remaining amount.

The Marshal of the Voivodship has been delegated the tasks previously vested in the Voivodship in terms of ensuring the return of travellers to their home country in a situation where the tour operator has not fulfilled the obligations incumbent on it, pursuant to Article 16 (1) of the Act of 29 July 2005 amending certain acts in connection with changes in the division of tasks and responsibilities of local administration[6]. At that time it was assumed that these tasks are tasks of government administration (Article 2a of the Tourism Services Act).

Another important change was introduced by an amendment to the Act of 12 June 2015[7], pursuant to which, in Article 5 of the Act, a section 5a was added specifying the tasks of the Marshal of the Voivodship in the event of the insolvency of a tour operator or tourist intermediary. The legislator decided that the Marshal of the Voivodship or an entity indicated by him or her is authorised to issue an advance payment order to cover the costs of travellers' return to their home country. Moreover, the legislator imposed an obligation on the body to carry out activities related to the organisation of the return of travellers from the tourist event to the place of departure or planned return from the tourist event, if the tour operator or tourist intermediary, contrary to the obligation, did not ensure such return. It should be noted that it was only in the June amendment of 2015 that the legislator used the concept of "insolvency" for the first time. This concept raises

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of Common Courts, and the Act on Government Administration Departments – in connection with the adjustment to the law of the European Union, Journal of Laws No. 122, item 1314.

[6] Journal of Laws No. 175, item 1462.

[7] Article 1 of the Act of 12 June 2015 amending the Tourism Services Act, Journal of Laws of 2015, item 1164.

a number of interpretative doubts in the doctrine[8]. Nevertheless, it is agreed that the notion of insolvency of the tourism services provider is not a concept identical to insolvency within the meaning of Article 11 (1) and (1a) of the BL[9], and, in fact, it refers to "a situation in which the tour operator has ceased to provide the services to which it has committed itself in its contract with the traveller"[10]. It should be stressed that the previous Tourism Services Act was an implementation of Directive 90/314/EEC[11]. Nevertheless, both the application of Article 7 of Directive 90/314/EEC[12] and Article 5 of the Tourism Services Act have raised a number of interpretative doubts in the doctrine[13]. In the case law, the doubts of interpretation concerned, e.g., the question of the extent of the protection of travellers, and in particular, what kind of expenses are to be reimbursed, the specification of the upper limit of liability, and the pursuit of these claims from the competent administrative authorities. Directive 90/314/EEC did not specify the amount of the cover, but nevertheless gave some indication that the organiser and/or

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[8] D. Szafran, Ochrona konsumenta w razie niewypłacalności biura podróży, Acta Erasmiana XIII (2016), M. Sadowski, ed., Wrocław: 101–103.

[9] The Act of 28 February 2003, Bankruptcy Law, consolidated text, Journal of Laws 2019, item 498, as amended, here in after referred to as BL. According to Article 11(1) of the BL, a debtor is insolvent if it has lost the ability to meet its due monetary obligations. In turn, in accordance with Article 11 (1a) of the BL it is presumed that the debtor has lost the ability to meet its due monetary obligations if the delay in meeting monetary obligations exceeds three months.

[10] K. Marak, Niewypłacalność organizatora turystyki i przedsiębiorcy ułatwiającego nabywanie powiązanych usług turystycznych – uwagi na tle nowych regulacji prawnych z zakresu turystyki, In: Restrukturyzacja przedsiębiorcy i jego przedsiębiorstwa, M. Kuźnik, A.J. Witosz, ed., Warszawa (2018): Legalis/el.; D. Szafran, Ochrona konsumenta w razie niewypłacalności biura podróży, Acta Erasmiana XIII (2016), M. Sadowski, ed., Wrocław: 101–103.

[11] Council Directive of 13 June 1990 on package travel, package holidays, and package tours, OJ EU.L 158, p. 59, currently not in force, hereafter as Directive 90/314/EEC.

[12] According to Article 7 of Directive 90/314/EEC, in the event of insolvency, the organiser and/or retailer being a party to the agreement should provide sufficient security to allow for the reimbursement of overpaid money and for the return of the consumer from the trip.

[13] P. Cybula, Usługi turystyczne. Komentarz (2012): LEX/el.; D. Szafran, Ochrona konsumenta w razie niewypłacalności biura podróży, Acta Erasmiana XIII (2016), M. Sadowski, ed., Wrocław: 104–108.

retailer was obliged to provide sufficient cover in the event of its insolvency to allow for the return of the money overpaid and the return from the trip (Article 7 of Directive 90/314/EEC). The Court of Justice of the EU has repeatedly stressed in rulings issued on the basis of Article 7 of Directive 90/314/EEC the need to protect travellers in the event of the organiser's insolvency. In the view of the CJEU, the scope of the protection of travellers in the event of the insolvency of travel agents includes ensuring the return of the traveller from the trip and the reimbursement of the amounts paid for the failed event, the reimbursement of the advance or full payment for the event, and ensuring return to the place of commencement of the event (if the organiser has failed to provide it owing to the insolvency) and in addition the cost of the necessary additional accommodation[14]. Travellers have been granted the right to seek individual compensation from the State Treasury[15]. In Polish judicature a problem has arisen in those situations where the required security funds were not sufficient to cover even the costs of return to their home country. It was assumed that there are no legal

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[14] Cf. the judgments of the CJEU of: 8 October 1996 on cases (Erich Dillenkofer and others v. the Federal Republic of Germany) C-178/94, C-179/94, C-189/94 i C-190/94, http://eur-lex.europa.eu, 14 May 1998, case (Verein für Konsumenteninformation v. Österreichische Kreditversicherungs AG) C-364/96, http://eur-lex.europa.eu, 15 June 1999, (Walter Rechberger and Others v. Republic of Austria) C-140/97, http://eur-lex.europa.eu. Decision of the CJEU of 16 January 2014, Ilona Baradics and Others v. Qbe Insurance (Europe) LTD MagyAroszàgiFióktelepe and Magyar Állam) C-430/13, http://eur-lex.europa.eu. This is also the case in the Polish judicature, the judgment of the District Court in Warsaw – 27th Civil Appeals Division of 28 April 2017, XXVII Ca 4173/16, Legalis Number 2132787. See also: A. Jurkowska-Gomułka, Glosa do wyroku TS z dnia 16 lutego 2012 r., C-134/11, LEX/el. 2012; P. Dzienis, Bezprawność legislacyjna w postaci niewłaściwej implementacji dyrektywy unijnej 90/314/EWG w polskiej judykaturze, EPS 7 (2018): 4–10; P. Cybula, P. Czubik, Pomoc finansowa konsula jako instrument ochrony klienta niewypłacalnego organizatora turystyki, EPS 12 (2014): 20–27.

[15] Resolution of the Supreme Court of 19 May 2016, III CZP 18/16, Legalis Number 1446707. In the quoted resolution, a client of an insolvent travel agency was granted a legal basis "to claim from the insurer obliged under the insurance guarantee the return of payments made as payment for a travel event". M. Sekuła-Leleno, Legitymacja procesowa czynna klientów niewypłacalnych biur podróży do samodzielnego dochodzenia roszczeń przed sądem. Glosa do uchwały SN z dnia 19 maja 2016 r., III CZP 18/16, Glosa 1 (2017): 123–132; M. Sondej, Klient niewypłacalnego biura podróży może samodzielnie dochodzić zwrotu dokonanych wpłat, LEX/el. 2017.

grounds to claim that "the Marshal of the Voivodship is obliged to organize the return of tourists to Poland regardless of the costs, i.e. also beyond the guarantee funds"[16]. This problem concerned, e.g., the question of who should cover these costs. In one of the judgments, the Supreme Court[17] stated that "the State Treasury is not obliged to reimburse the Marshal of the Voivodship for the costs of arranging for the clients of an insolvent tour operator to return to Poland on the basis of Article 49 (6) of the Act of 13 November 2008 on the income of local government units[18] in the event of an insufficient guarantee amount resulting from a bank or insurance guarantee agreement to cover these costs". In the quoted judgment, the Supreme Court indicated that "the Marshal may effectively initiate a civil law guarantee mechanism in order to obtain appropriate coverage of the said organisational expenses. However, there are no justified grounds for claiming that in the case of an insufficient guarantee amount resulting from the guarantee agreement, the Marshal has *ex lege* an independent legal obligation to undertake organisational activities aimed at bringing the tour operator's clients to their home country and the performance of this obligation also makes it necessary to mobilise appropriate funds from the local government budget. The provisions of the Act of August 29, 1997 did not create and still do not create, after the rejection of the above mentioned legislative attempts to introduce in this case subsidiary liability of the State Treasury, an additional legal instrument serving the legal protection of the tour operator's clients and supplementing the general model. In other words, the current model of protection, referring to safeguards provided for in Article 5 (1), item 2 of the Act, has not, however, been supplemented by the regime of organizing budgetary resources of voivodship local governments in case the tour operator is unable to fulfil the obligation to ensure return of its clients to their home country"[19].

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[16] Judgment of the Court of Appeal in Warsaw of 28 May 2015, I ACa 1768/14, Legalis Number 1349079.

[17] Judgment of the Supreme Court of 15 October 2015, II CSK 836/14, Legalis Number 1360063; K. Małysa-Ptak, Zwrot kosztów powrotu do kraju. Glosa do wyroku SN z dnia 15 października 2015 r., II CSK 836/14, PS 7–8 (2016): 171–181.

[18] Consolidated Text, Journal of Laws 2018, item 1530, as amended.

[19] Judgment of the Supreme Court of 15 October 2015, II CSK 836/14, Legalis Number 1360063.

Already then the doctrine called for the establishment of a special fund to cover travellers' claims against insolvent travel service providers[20]. Further changes, important from the point of view of protecting the rights of travellers in the situation of insolvency of entrepreneurs providing tourism services, were introduced in another amendment in July 2016[21]. As a result, it was decided to establish the Tourist Guarantee Fund. It is provided that in the event of insolvency, the tour operator or tourist intermediary is obliged to submit to the competent Marshal of the Voivodship: a declaration of insolvency[22] and a list of agreements limited to those which have not been or will not be performed together with information containing names and contact telephone numbers of persons covered by the agreement. It has been assumed that the Marshal may issue an instruction to withdraw funds from financial security schemes without obtaining the declaration of the insolvent entrepreneur if the circumstances clearly indicate that the tour operator or tourist intermediary is not able to fulfil the agreements on provision of tourist services concluded with the clients

[20] D. Szafran, Ochrona konsumenta w razie niewypłacalności biura podróży, Acta Erasmiana XIII (2016), M. Sadowski, ed., Wrocław: 108; E.J. Wanat-Połeć, G.A. Sordyl, Wzmocnienie ochrony konsumentów niewypłacalnych touroperatorów w Polsce a koncepcja utworzenia Turystycznego Funduszu Gwarancyjnego, Annales Universitatis Maria Curie-Skłodowska, Lublin, Vol. XLIX, 4 (2015), sectio H: 634–648, DOI: 10.17951/h.2015.49.4.633, http://oeconomia.annales.umcs.pl [date of access: 13 October 2019]: 633–648; H. Zawistowska, Systemy zabezpieczenia finansowego interesów nabywców imprez turystycznych na wypadek niewypłacalności ich organizatorów w państwach członkowskich UE, In: P. Cybula, J. Raciborski, ed., Turystyka a prawo. Aktualne problemy legislacyjne i konstrukcyjne, (2008) Wyższa Szkoła Turystyki i Ekologii w Suchej Beskidzkiej, Sucha Beskidzka–Kraków, http://wtir.awf.krakow.pl/pdf/rozne/zaklad_prawa/turystyka_a_prawo/21-hanna_zawistowska.pdf [date of access: 13 October 2019].

[21] Article 1 of the Act of 22 July 2016 amending the Act on Tourism Services and the Act on Compulsory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau, Journal of Laws 2016, item 1334, hereinafter referred to as an amendment of July 2016.

[22] According to Article 5 (3e), item 1 of the Tourism Services Act, the content of the statement was to read: "I declare that owing to insolvency I am not able to fulfil the contracts for the provision of tourism services concluded with clients in the period from... to... and to ensure that the costs of clients' return from the tourist event are covered and to ensure that clients are reimbursed for payments or parts of payments made as payment for the tourist event pursuant to Article 5 (1), item 2 of the Act of 29 August 1997 on tourism services".

and to ensure that the costs of clients' return from the tourist event are covered and to provide the clients with a refund of payments or parts thereof made as payment for the tourist event which has not been or will not be fulfilled (Article 5 (3f) of the Tourism Services Act). The competence of the Marshal of the Voivodship has been extended to include the right to apply for payment of funds from the Tourist Guarantee Fund (Article 5, Article 5b-5m of the Tourism Services Act).

3. TASKS AND ADMINISTRATIVE BODIES COMPETENT IN CASES OF INSOLVENCY OF TOURISM SERVICES PROVIDERS FOLLOWING IMPLEMENTATION OF DIRECTIVE 2015/2302

Another milestone in the protection of travellers' rights was the adoption of Directive 2015/2302 and the need to implement it into Polish law. According to Recital item 39 of Directive 2015/2302, Member States are obliged to ensure: (1) travellers purchasing a package holiday event are fully protected in the event of the organiser's insolvency, (2) organisers have a security to ensure that all payments made by or on behalf of travellers are reimbursed and, in so far as the package holiday involves the transportation of passengers, travellers are returned to their home country in the event of the organiser's insolvency, including the possibility of offering continuation of the package holiday to travellers, 3) the effectiveness of the protection, understood as the obligation to ensure the immediate activation of the protection when, as a result of the organiser's problems with liquidity, the travel services are not provided, will not be provided or will be provided only partially, or when service providers require the travellers to pay for them, 5) the possibility of requiring the organisers to provide the travellers with a certificate proving their right to receive benefits directly from the provider of insolvency protection[23]. Article 17 (1)

[23] More: M. Nesterowicz, Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży, Przegląd Sądowy 9 (2018): 44–57; P. Dolniak, Zakres ochrony finansowych interesów klientów biur podróży na wypadek niewypłacalności przedsiębiorcy w świetle prawa unijnego, Palestra 3 (2018): 12–18.

of Directive 2015/2302 provides that tour operators must have security for the reimbursement of all payments made by or on behalf of travellers to the extent that the services in question have not been provided as a result of the organiser's insolvency, including for the return of travellers to their home country, as well as for the continuation of the package holiday. This security must be effective and cover reasonably foreseeable costs, i.e. the amounts of payments made by or on behalf of travellers for the package holiday, taking into account the length of time between advance and final payments and the completion of the package holiday, as well as the estimated cost of return to their home country in the event of the organiser's insolvency. Protection of the organiser in the event of insolvency shall cover travellers regardless of their place of residence, place of departure, or place of sale of the package tour, and regardless of the Member State in which the insolvency protection provider is located. Where the implementation of the package tour is jeopardised by the insolvency of the tour operator, the protection shall be available free of charge to ensure return to their home country or, where necessary, to pay for accommodation before return to their home country. In the case of a tourism service not provided, refunds should be made without undue delay upon request of the traveller (Article 17 (5) of Directive 2015/2302).

In view of the need to implement the Directive, a law on tourist events and related tourism services was adopted, which entered into force on 1 July 2018. The previous title of the Act on Tourism Services under Article 64 (1) of the Act of 24 November 2017 on tourist events and related tourism services[24] became the Act on Hotel Services and the Services of Tour Leaders and Tour Guides. The legislator has decided to implement Directive 2015/2302 in a separate legal act, briefly referring in the justification of the project to novelties in the form of "related tourist services, facilitating the purchase of such services, standard information forms, and changes in the functioning system of financial security in the event of insolvency for tour operators and tour intermediaries, in particular as regards the process of liquidation of the consequences of the insolvency of tour operators and the possibility of reimbursement of contributions paid to

[24] Journal of Laws 2017, item 2361 in its original wording.

the Tourism Guarantee Fund"[25]. The question arises whether the legislator has legitimately separated the above regulations? Should the above issues not be regulated in one legal act? In the opinion of the authors, the regulations concerning the provision of tourism services, owing to the broadly understood definition of this notion covering (transportation of passengers, accommodation for purposes other than residential, which is not an integral part of passenger transportation, rental of cars or other motor vehicles and other service provided to travellers), should be included in a single legal act.

The main objective, apart from the transposition of Directive 2015/2302 into the Polish legal order, was, as follows from the content of the explanatory memorandum of the draft act, "improvement of already functioning legal solutions, in particular as regards the protection of travellers against the effects of insolvency of tour operators and entrepreneurs facilitating the purchase of tourist services"[26]. The question arises whether the new act introduced effective solutions to protect the rights of travellers against the insolvency of tourist entrepreneurs and the process of liquidation of the effects of insolvency.

4. THE ESSENCE OF THE PROBLEM – INSOLVENCY

From the perspective of the subject matter of the discussion, in order to initiate the tasks of the Marshal it is important to declare the organiser's insolvency. Only then should the Marshal, as a public administration body, initiate the appropriate procedures.

The issue of insolvency of tour operators and entrepreneurs facilitating the purchase of related tourism services has been regulated in chapter 3 of the TERTS. The view that it is not insolvency within the meaning of Article 11 (1) of the BL still seems to be valid[27]. In the light of Article 7 (1) of

[25] Form No. 1784 Governmental draft law on tourist events and related tourism services, http://sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1784 [date of access: 13 October 2019].

[26] Form No. 1784 Governmental draft law on tourist events and related tourism services, http://sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1784.

[27] This is also the case in the explanatory memorandum to governmental draft law No. 1784 on tourist events and related tourism services, http://sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1784 [date of access: 13 October 2019].

the TERTS it should be assumed that insolvency of a tour operator occurs when the tour operator and the entrepreneur facilitating the purchase of related tourism services is not able to provide travellers, in case of its insolvency, with the following:

a) covering the costs of continuation of the package holiday or return to their home country, including in particular transport and accommodation costs, as well as reasonable costs incurred by travellers where the tour operator or entrepreneur facilitating the purchase of related tourism services, despite its obligation, does not ensure such continuation or return,

b) reimbursement of payments made by way of payment for the package holiday or any service paid for by the entrepreneur facilitating the purchase of related tourism services, where, by reasons relating to the tour operator or entrepreneur facilitating the purchase of the related tourism services or persons acting on their behalf, the package holiday or any service paid for by the entrepreneur facilitating the purchase of the related travel services has not or will not be provided,

c) partial reimbursement of the payments made by way of payment for the event corresponding to the part of the package holiday or for any service paid to the entrepreneur facilitating the purchase of related tourism services corresponding to the part of the service which has not been or will not be provided by reasons relating to the tour operator or the entrepreneur facilitating the purchase of the related tourism services, or persons acting on their behalf.

The legislator has provided for rights for travellers regardless of when the tour operator becomes insolvent. These rights arise both if the insolvency occurred at the time of the tourist event, and if the insolvency occurred before or after the event.

The authors will analyse the legal regulations in order to determine what rights the travellers are entitled to in case of the insolvency of the tour operator and to establish the competent authority and the legal nature of these tasks in the context of tasks typical for public administration. Thus, it should be emphasized that the legislator decided that the Marshal of the Voivodship will be the competent authority in a situation of insolvency of the tour operator or entrepreneurs facilitating the purchase

of related tourism services. In a situation of insolvency, a tour operator or an entrepreneur facilitating the purchase of related tourist services is obliged to submit to the competent Marshal of the Voivodship a statement of relevant content[28], a list of agreements which have not been or will not be executed, together with information containing the names and contact telephone numbers of the travellers covered by these agreements and contact details of the tour leader or a person representing the tour operator who takes care of the travellers, if such a leader or such a person has been appointed. These documents shall be immediately forwarded by the Marshal to the entity providing financial security. If it is not possible to obtain a statement from the tour operator or the entrepreneur facilitating the purchase of related tourist services, the Marshal shall apply in writing to the entity providing financial security for the payment of funds directly to the travellers without obtaining this statement, provided that the circumstances clearly indicate, that the tour operator or entrepreneur facilitating the purchase of related travel services is not able to honour the contracts concluded with the travellers and to ensure that the costs of continuing the tour or of the return of the travellers to their home country are covered or that travellers are reimbursed for payments or parts of payments made for the tour or related travel services which have not been or will not be provided.

Moreover, the Marshal of the Voivodship or an entity authorised by him or her to issue an advance payment order to cover the costs of continuation of the tourist event or the costs of the return of the travellers to their home country has been authorised to carry out activities related to the organisation of the return of the travellers to their home country if the tour operator or an entrepreneur facilitating the purchase of related tourism

[28] According to Article 13 (1), item 1 of the TERTS, the content of the declaration shall include the following information: "I declare that owing to insolvency I am not able to fulfil the contracts referred to in art. 7 (1), item 3 of the Act of 24 November 2017 on tourist events and related tourism services, concluded with travellers from the date of... and ensure coverage of the costs of continuation of the tourist event or the costs of return of travellers to their home country or ensure that travellers are reimbursed for payments or parts there of made as payment for the tourist event or related tourism services, pursuant to the provisions of Article 7 (1), item 1 of the Act of 24 November 2017 on Tourist Events and Related Tourism Services".

services, despite its obligation, did not ensure this return (Article 14 (1) of the TERTS). To this end, they must be authorised, in the contents of the bank guarantee or insurance guarantee or insurance contract for the benefit of travellers, to issue instructions for the payment of an advance to cover the costs of the continuation of the package or of the return of the travellers.

The entity providing financial security, upon receiving each instruction of the Marshal of the Voivodship or an entity indicated by him or her, shall immediately, but not later than within 3 working days from the date of receiving the instruction, transfer the requested advance to cover the costs of the continuation of the tourist event or the costs of the return of the travellers to their home country (Article 15 (1) of the TERTS). The Marshal shall submit to the entity providing financial security a written settlement of the received advance to cover the costs of continuation of the tourist event or the costs of return of the travellers to their home country, within 60 days from the date of receipt of payment, under pain of the obligation to return this advance.

The question arises as to what if the financial security is not sufficient to cover the continuation of the tourist event or the returnof the travellers to their home country. The legislator has specified that in such situations the entity providing such security is obliged to immediately inform the competent Marshal of the Voivodship and the Insurance Guarantee Fund (Article 20 (1) of the TERTS). The Marshal or an entity indicated by him or her after receiving such information shall apply to the Insurance Guarantee Fund for payment of funds from the Tourist Guarantee Fund. The Insurance Guarantee Fund shall immediately pay the Marshal or an entity indicated by him or her the funds from the Tourist Guarantee Fund to the extent necessary to carry out the task related to the organization of the return of travellers to their home country. The Marshal shall present to the Insurance Guarantee Fund a written settlement of funds from the Tourist Guarantee Fund, within 60 days from the date of receipt of payment, under pain of obligation to return the funds.

According to Article 21 (1) of the TERTS, if the financial security is insufficient to cover the costs and return payments to the travellers, the entity providing such security, immediately after verification of the travellers' requests, shall provide the Insurance Guarantee Fund and the com-

petent Marshal of the Voivodship with: information on the amounts paid out to those travellers from the financial security, and a calculation of the amounts lacking in order to cover the costs and return payments in relation to each traveller. In addition, the entity providing financial security shall also provide the Insurance Guarantee Fund with requests from travellers who have not received full coverage of costs and reimbursement of payments for the tourist event or that part of the event which has not been or will not be carried out. The Insurance Guarantee Fund shall, immediately upon receipt of the travellers' requests together with information, pay out the amounts due to the travellers, notifying the competent Marshal of the Voivodship and the entity providing financial security of the fact.

5. LEGAL NATURE OF THE TASKS OF THE MARSHAL IN CASES OF INSOLVENCY OF ENTITIES PROVIDING TOURISM SERVICES

The analysis of Polish regulations in the scope of tasks and authorities competent in the situation of insolvency of entities providing tourism services leads to the following conclusions. Starting from 1997, the legislator treated tourism services as a licensed activity requiring a licence, a regulated activity requiring a permit or an entry in the relevant register, hence these tasks were entrusted to authorities competent in matters of licences for such activity (President of the Office for Sports and Tourism), or permits (Voivode), or entry in the register of tour operators and entrepreneurs facilitating the purchase of related tourism services (Marshal of the Voivodship)[29]. Starting from 2005, when the Marshal was entrusted with tasks in the event of insolvency of entities providing tourism services, until now it has been assumed that these are tasks in the field of government administration (Article 2 (1) of the TERTS). These tasks in fact boil down to providing financial security in the case of the insolvency of entities providing tourism services and the process of liquidation of the effects

[29] Art. 23 of the TERTS. More on the subject of development of the legal nature of the activity of tourist events operators: P. Cybula, O ewolucji warunków świadczenia usług turystycznych z perspektywy interesu konsumenta, iKAR 2(2019): 46–52.

of insolvency. Both in terms of initiating action before the entity providing financial security and before the Insurance Guarantee Fund.

Moreover, the tasks of the Marshal in a situation of insolvency of entities providing tourism services also include supervisory powers, as the Marshal has been authorised to control compliance with the conditions for carrying out activities specified in the Act, in particular as regards the amount of financial security and payment of contributions to the Tourism Guarantee Fund (Article 30 (1), item 3 of the TERTS). This authority may require the tourist entrepreneur to rectify the deficiencies found as a result of the inspection within a specified period of time (Article 30 (6a) of the TERTS). Moreover, it is also competent to issue a decision on removing the tourist entrepreneur from the register and prohibiting him or her from carrying out the activity included in the register for a period of 3 years – if a tourist entrepreneur is found to be in gross violation of the conditions for carrying out the activity (Article 30 (7), item 1c of the TERTS). The legislator deemed a gross breach of the conditions for carrying out the activity to be: 1) offering or selling tourist events or related tourism services without prior conclusion of a guarantee or agreement, or without conclusion of an agreement and submission of a declaration, 2) evading, despite a call, the obligation to submit a declaration in due time or to pay due contributions to the Tourist Guarantee Fund, 3) evading, despite a call, the obligation to maintain a list of agreements, 4) conclusion by the tourist entrepreneur of subsequent agreements on participation in the tourist event, or facilitating the purchase of related tourist services or accepting payments from travellers for these agreements, despite submitting a declaration of insolvency or in the event that the Marshal of the Voivodship applies for payment of funds from financial security without this declaration, 5) conclusion of agreements for amounts of financial security lower than the minimum amounts of bank or insurance guarantee sums or the minimum guarantee sums of insurance agreements for the benefit of travellers, 6) failure to submit, despite being summoned, a valid document to the Marshal of the Voivodship, 7) performance of activities outside the territorial scope specified in the entry in the register, 8) acceptance of payments from travellers with the omission of a tourist escrow account, despite submitting a declaration.

The Marshal's activities related to the organisation of the return of travellers to their home country are regulated in the provision of Article 14 (1) of the TERTS. In accordance with the above provision, in the event of the insolvency of the tour operator or the entrepreneur facilitating the purchase of related tourist services, the Marshal or an entity authorised by him or her to issue an instruction for the payment of an advance to cover the costs of the continuation of the tourist event or the costs of the return of travellers shall carry out activities related to the organisation of the return of travellers to their home country if the tour operator or the entrepreneur facilitating the purchase of related tourist services, despite its obligation, does not ensure such return.

Two aspects should be noted in this respect. The first one covers issues concerning particular entities and is related to answering the question of who is obliged to perform the tasks imposed by the legislator. The second aspect covers the subject matter issues related to the direct execution of the task. In this respect, one should specify what tasks result from the Act and in what legal form they will be performed.

In this respect, the answer to the questions posed only appears to be simple, as the legislator has imposed this task on the Marshal as a public administration body. There is also no doubt that on the basis of the provision of Art. 2 (1) of the TERTS, this is a governmental administrative task.

A certain problem, however, may be a case in which the Marshal delegates his or her competences to an organisational unit by statutory authority. This raises the question of how wide is the scope of statutory authority delegated by the legislator to the Marshal. It should be noted that the legislator has not limited the possibility of authorisation and uses the broad term of "authorised entity".

In the opinion of the authors, this is not a task to which the provisions of the Code of Administrative Procedure will apply[30]. The above conclusion means that the provision of Article 268a of the CAP together

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[30] The Act of 14 June 1960, Code of Administrative Procedure, i.e. Journal of Laws 2018, item 2096, as amended, hereinafter referred to as the CAP.

with the resulting restrictions does not apply within the scope of the authorisation in question. Within the scope of the provision of Article 268a of the CAP, the authorisation applies only to an employee, not to an entity, and as a rule it is connected with the issuance of acts of authority (decisions, provisions) or certificates. This leads to the conclusion that the authorisation contained in Article 14 (1) of the TERTS is an autonomous authorisation and its scope should be interpreted in the context of the tasks provided for in the Act.

The central problem concerning the issued authorisation is to define the scope of the term "entity". It should be stressed that the legislator has not restricted the above scope to organisational units, but has used this concept in the broadest possible sense, i.e. without indicating the characteristics of the entity that can be authorised.

Where a provision does not specify, it must be stated that, if the Marshal has made an authorisation, it is possible to delegate powers to any entity that fulfils the statutory requirements. This means that in the system of Polish law, the entities authorised by the Marshal may be both natural persons and legal persons, as well as organizational units without legal personality.

In this respect, it should be allowed to delegate powers to any entity if the Marshal considers such action to be justified. Obviously, in practice, the criterion to be used by the Marshal making the authorisation should respect the functional elements. The Marshal's task is in fact a public task which he or she is obliged to perform in an effective manner which will ensure the safe return of travellers to their home country.

Certainly, the solution adopted is flexible in nature, as it allows for granting permanent authorisation – for the benefit of a specific organisational unit which has been established, e.g., to achieve such an objective, but also allows for ad hoc authorisation in such a case, depending on the situation.

It should also be noted that the legislator has applied a combined alternative. The task should be performed by the Marshal of the Voivodship "or" a unit authorised by the Marshal, which means that despite granting the authorisation, the Marshal may perform the tasks him- or herself. This may even turn into an obligation to perform a statutory task in a situation where an authorised entity does not perform the entrusted task. It is

the responsibility of the Marshal acting as a public administration body to perform the task, as well as to take care of its performance.

The performance of the task consists of two parts. The first seems to be the most important from the point of view of the travellers who have not returned to their home country.

From the perspective of the form of activity of an administrative entity performing public administration tasks, these are activities of various natures. First of all, they are material and technical activities consisting in collecting information about travellers, as well as maintaining contact with them. In this respect, the informational activities consisting in providing information about the situation are also important. Further, activities consisting in concluding civil law agreements enabling the actual return of travellers to Poland are not excluded.

The way in which the legislator defines the implementation of the task deserves to be appreciated. In this respect, the act does not determine the way the task is to be performed, but focuses on its purpose, which is to bring travellers back to their home country. Such a solution makes it possible to adjust the form of action in relation to the current need. In this case, there is no statutory "muzzle" that would strictly regulate the form of action performed by the administrative entity. The advantage of the adopted solution is resignation from the traditional ruling forms of administration. In this respect, there is no possibility of shaping the legal relationship by means of an administrative decision.

The second part is financial and accounting activities. In this respect, these tasks are related to the proper flow of funds necessary to cover the task of returning the travelers to their home country. It follows from the statutory regulations that the entity responsible for the implementation of the task is obliged to issue an advance payment to cover the costs of the continuation of the tourist event or the costs of the travellers' return to their home country.

The disposition is addressed to the entity providing financial security, which unconditionally, immediately, but no later than within 3 working days from the date of receipt of the disposition, transfers the requested advance to cover the costs of continuation of the tourist event or the costs of the travellers' return to their home country (Article 15 (1) of the TERTS).

In the event that the financial security is insufficient to cover the costs of continuation of the tourist event or the costs of the return of the travellers, the Marshal or an entity designated by him or her shall apply to the Insurance Guarantee Fund for payment of funds from the Tourist Guarantee Fund (Article 20(2) of the TERTS).

Within the scope of financial and accounting tasks, the Marshal or the authorized entity are responsible for completing the activities related to the proper flow of financial resources necessary for the proper performance of the task.

The question is whether the new act has introduced effective solutions to protect travellers against the insolvency of a tour operator and the process of liquidation of its effects.

It should be noted that the solution adopted in the Polish system is based on the principle of de-concentration of powers and transferring them as a task outsourced to Voivodship Marshals, who may delegate the tasks to other units. In the opinion of the authors, these are tasks of a *strictly public* nature, although as a rule they are not carried out by means of authoritative forms of action.

It is difficult to take an unambiguous stance in this respect, establishing whether delegating tasks to a voivodship local government body such as its Marshal is a good solution. In the era of computerisation of administration processes, it would be easy to imagine one central public administration body or a central point (retaining the terminology of the Act), which would be responsible for carrying out activities related to the organisation of travellers' return to their home country. It seems that this would facilitate coordination and uniformity of activities with regard to travellers. In the opinion of the authors, such a solution would be a more effective guarantee of protection for travellers and would comply with Directive 2015/2302. Currently, travellers choose the operator regardless of the place of its seat, and ordering a tourism service is common; it is rather a rule than an exception to the rule.

Unfortunately, checking the existing solutions in practice will always involve the insolvency of the operator, which is in principle a situation that should be avoided.

7. COMMENTS DE LEGE FERENDA

As indicated above, the tasks in the field of protection in the event of insolvency have a public character. They are tasks within the competence of government administration. In order to ensure effective and operational protection of the traveler in the event of insolvency of travel agents, it is necessary that institutional solutions used in the new Act are improved. The authors postulate a change in this respect and propose to entrust these tasks to the government administration bodies, preferably to an existing central public administration body or a new central contact point. These authorities could be responsible for activities related to the organization of travelers' return to the home country and for the efficient coordination of activities bound to it. Some inspiring legal solutions are contained in Art. 18 clause 2 of Directive 2015/2302. In order to fulfil the above obligations, central contact points should be designated by the Member States. According to the Directive, the central contact points shall be responsible for administrative cooperation and the supervision of organizers, operating in different Member States. It seems that the central public administration authority or a specialised central contact point would ensure better legal protection in the event of insolvency of travel agents and would provide a full transposition of the Directive.

REFERENCES

Cybula, Piotr, 2012, Usługi turystyczne. Komentarz, LEX/el.

Cybula, Piotr, Czubik, Paweł, Pomoc finansowa konsula jako instrument ochrony klienta niewypłacalnego organizatora turystyki, EPS 12 (2014): 20–27.

Cybula Piotr, O ewolucji warunków świadczenia usług turystycznych z perspektywy interesu konsumenta, iKAR 2 (2019): 46–52.

Dolniak, Patrycja, Zakres ochrony finansowych interesów klientów biur podróży na wypadek niewypłacalności przedsiębiorcy w świetle prawa unijnego, Palestra 3 (2018): 12–18.

Dzienis, Paweł, Bezprawność legislacyjna w postaci niewłaściwej implementacji dyrektywy unijnej 90/314/EWG w polskiej judykaturze, EPS 7 (2018): 4–10.

Jurkowska-Gomułka, Agata, 2012, Glosa do wyroku TS z dnia 16 lutego 2012 r., C-134/11, LEX/el. 2012.

Małysa-Ptak, Katarzyna, Zwrot kosztów powrotu do kraju. Glosa do wyroku SN z dnia 15 października 2015 r., II CSK 836/14, PS 7–8 (2016): 171–181.
Marak, Katarzyna, Niewypłacalność organizatora turystyki i przedsiębiorcy ułatwiającego nabywanie powiązanych usług turystycznych – uwagi na tle nowych regulacji prawnych z zakresu turystyki, In: Restrukturyzacja przedsiębiorcy i jego przedsiębiorstwa, M. Kuźnik, A.J. Witosz, ed., Warszawa (2018): Legalis/el.
Nesterowicz, Mirosław, Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży, Przegląd Sądowy 9 (2018): 44–57.
Sekuła-Leleno, Małgorzata, Legitymacja procesowa czynna klientów niewypłacalnych biur podróży do samodzielnego dochodzenia roszczeń przed sądem. Glosa do uchwały SN z dnia 19 maja 2016 r., III CZP 18/16, Glosa 1 (2017): 123–132.
Sondej, Marek, Klient niewypłacalnego biura podróży może samodzielnie dochodzić zwrotu dokonanych wpłat, LEX/el. 2017.
Szafran, Dominika, Ochrona konsumenta w razie niewypłacalności biura podróży, Acta Erasmiana XIII (2016), M. Sadowski, ed.: 100–109.
Wanat-Połeć, Elżbieta Jadwiga, Sordyl, Grażyna Anna, Wzmocnienie ochrony konsumentów niewypłacalnych touroperatorów w Polsce a koncepcja utworzenia Turystycznego Funduszu Gwarancyjnego, Annales Universitatis Maria Curie-Skłodowska, Lublin, Vol. XLIX, 4 (2015): DOI: 10.17951/h.2015.49.4.633, http://oeconomia.annales.umcs.pl.
Zawistowska, Hanna, Systemy zabezpieczenia finansowego interesów nabywców imprez turystycznych na wypadek niewypłacalności ich organizatorów w państwach członkowskich UE, In: P. Cybula, J. Raciborski, ed., Turystyka a prawo. Aktualne problemy legislacyjne i konstrukcyjne, (2008) Wyższa Szkoła Turystyki i Ekologii w Suchej Beskidzkiej, Sucha Beskidzka–Kraków, http://wtir.awf.krakow.pl/pdf/rozne/zaklad_prawa/turystyka_a_prawo/21-hanna_zawistowska.pdf.

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REFERENCES TO COMMON LAW IN THE REASONS FOR JUDGMENTS BY POLISH COURTS

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ABSTRACT

The article presents the results of a study of the reasons for rulings of the Polish courts in terms of the presence in them of references to common law. The analysis of the title issue is mainly of a qualitative nature with descriptive, systematic, and explanatory features. The research has focused on determining the functions played by the references to common law in judgments and on recognizing the factors that rule or causally explain the practice of the courts referring to the given law system in their decisions. Some general regularities characterizing the discussed phenomenon have also been shown. Furthermore, quantitative findings on the scale, intensity, and dynamics of the references to common law in the reasons for judgments have been presented. Common law, which until now has been the subject of comparative studies of the Polish legal science, is increasingly drawing attention of the Polish courts as the law-applying bodies. Furthermore, the paper confirms the growing role of foreign law in the judicial decision-making process.

Key words: common law, Polish courts, reasons for judgments, comparative law method

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1. INTRODUCTORY REMARKS

Common law has repeatedly aroused the interest of Polish jurisprudence. Legal scientific considerations concerning it have usually been made in one of three contexts. Firstly, the domestic jurists presented in their studies the essence or specific features of the common law system[1]. Secondly, individual legal institutions both of substantive law[2] and procedural law[3], have been discussed in the legal literature, in their form known to common law. Thirdly, a number of scientific publications deal with comparative law, however, stopping at presenting similarities and differences of a particular legal institution in Polish law, or more broadly in the civil law system, and in the legal systems of common law states[4]. A lot of attention, especially in the last two decades, has also been devoted to the place of the precedent institution in the judicial decisions of the states belonging to the continental law system, including Polish courts' decisions[5] and the precedent nature of the sentences issued by the European Court of Human Rights and the Court of Justice of the European Union[6].

On the other hand, the practice of referring to common law by Polish courts in reasons for judgments has not been studied yet by the legal doctrine. This paper presents and systematises the results of the conducted research on Polish judicial decisions for the presence of references to com-

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[1] E.g. Ireneusz Cezary Kamiński, Źródła prawa w systemie common law, Rejent 3 (2016): 9–27.

[2] E.g. Monika Wałachowska, Macierzyństwo zastępcze w systemie common law, Państwo i Prawo 8 (2003): 97–107.

[3] E.g. Grzegorz Maroń, Przysięga i ślubowanie świadka w anglosaskim porządku prawnym, Przegląd Sądowy 11/12 (2015): 150–168.

[4] E.g. Bartosz Kołaczkowski, Kształtowanie się regulacji prawnych zgromadzeń w Polsce oraz w wybranych krajach o anglosaskiej tradycji prawnej, Warszawa: C.H. Beck, 2014.

[5] See: Leszek Leszczyński, Bartosz Liżewski, Aadam Szot, ed., Precedens sądowy w polskim porządku prawnym, Warszawa: C.H. Beck, 2018; Anna Śledzińska-Simon, Mirosław Wyrzykowski, ed., Precedens w polskim systemie prawa, Warszawa 2010; Maciej Koszowski, Anglosaska doktryna precedensu. Porównanie z polską praktyką orzeczniczą, Warszawa: Warszawska Firma Wydawnicza, 2009.

[6] E.g. Krzysztof Scheuring, Precedens w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej, Warszawa: Wolters Kluwer, 2010; Michał Balcerzak, Zagadnienie precedensu w prawie międzynarodowym praw człowieka, Toruń: Dom Organizatora, 2008.

mon law in such judgements. The findings are mainly of a qualitative, and at the same time, descriptive nature.

The title issue is part of the broader problem of using foreign law in the judicial process. The use of comparative law in giving reasons for judicial decisions by national and international courts is gaining more and more significance in comparative legal scholarship[7]. Legal scholars' exploration of the topic of making references to foreign law in judgments has intensified especially in the last two decades. While it has long been the case that the courts, in giving reasons for judgments, made use of foreign legal acts and judicial decisions of foreign courts, it has never occurred on such a large scale as it happens today. Taking foreign law into account in judicial reasoning and making references to it in court decisions is part of a developing legal phenomenon of modern times known as "judicial globalization"[8].

The place of foreign law in the judicial decision-making process is widely discussed in regards to the case law of the European Court of Human Rights and the Court of Justice of the European Union[9]. However, there are also numerous scientific papers on the application of foreign law by national – mainly constitutional – courts of different countries[10] and

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[7] See Guy Canivet, Mads Andenas, Duncan Fairgrieve, ed., Comparative Law before the Courts, London: British Institute of International and Comparative Law, 2004; Mads Andenæs, Duncan Fairgrieve, ed., Courts and Comparative Law, Oxford: Oxford University Press, 2015.

[8] E.g. Anne-Marie Slaughter, Judicial Globalization, Virginia Journal of International Law 40 (2000): 1103–1124. Compare: Elaine Mak, Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts, Oxford: Hart Publishing, 2015.

[9] See Christopher McCrudden, Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared, Cambridge Yearbook of European Legal Studies 15 (2012–2013): 383–415; Lee Faircloth Peoples, The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities, Syracuse Journal of International Law and Commerce 35 (2008): 219–273.

[10] E.g. Jerome Waldron, Partly Laws Common to All Mankind: Foreign Law in American Courts, New Haven: Yale University Press, 2012; Tania Groppi, Marie-Claire Ponthoreau, ed., The Use of Foreign Precedents by Constitutional Judges, Oxford: Hart, 2013; Michal Bobek, Comparative Reasoning in European Supreme Courts, Oxford: Oxford University Press, 2013. Fryderyk Zoll, Argumentacja komparatystyczna w polskich są-

different legal cultures[11]. The subject of this article falls under the given trend or field of contemporary comparative legal research.

The main intended addressee of the title study is the reader interested in comparative law's role in judicial decision-making process or/and concerned with the relationship and interactions between civil law and common law traditions. The study examined the practice of Polish courts resorting not to any foreign law but to common law. This research framework was dictated by the fact that common law for Polish courts is a law that belongs not only to another legal system but also to a separate type of legal culture. In other words, common law seems to be foreign law *par excellence*.

The purpose of the study is, in particular, to answer the following questions:

– What is the scale, intensity and dynamics of the cases where common law is referred to in the reasons for judgments by Polish courts with a division into particular types of courts?
– What types of references to common law can be distinguished in the Polish case law and what functions they perform in judicial argumentation?
– Can one see any regularities of the title practice of appealing to foreign law?
– What factors and processes affect and determine the practice of invoking common law as foreign law in Polish courts' decisions?

The research material has been the electronic database of judgments issued by common courts, administrative courts, the Supreme Court, and the Constitutional Court[12], included in the LEX Legal Information Sys-

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dach, In: Prawo obce w doktrynie prawa polskiego. Polska komparatystyka prawa, A. Wudarski, ed., Warszawa–Frankfurt nad Odrą: Stow. Notariuszy Rzeczypospolitej Polskiej, 2016, 119–132.

[11] E.g. Kiichi Nishino, The Use of Foreign Law by Courts in Japan, In: The Use of Comparative Law by Courts, U. Drobnig, S. van Erp, ed., The Hague–London–Boston: Kluwer Law International, 1999, 223–230.

[12] See Joanna Krzeminska-Vamvaka, "Courts as Comparatists: References to Foreign Law in the case-law of the Polish Constitutional Court", Jean Monnet Working Paper 5 (2012): 1–70.

tem[13]. The analysis has considered the judgments placed in the database until 30 June 2019.

The article covers the cases of references *expressis verbis* to common law in the reasons for judgments. The title concept of "common law" means "a type of law system present in the English culture" and "law made by courts of the English-speaking states in opposition to statute law". On the other hand, it was taken into account common law as "the total of the law system of individual English-speaking states"[14] insofar as references to the law of a particular country, e.g. American or Irish law, in the reasons for judgments are accompanied by the explicative assignment of a given national law into the common law type of legal system[15].

This research and conceptual assumption is dictated by the court operationalization of the common law category in domestic judicial decisions. Speaking generally about common law, courts have in mind a generalized or averaged form of the legal system in English-speaking countries, within the meaning of the whole legal culture distinct from civil law, or case law seen as its key distinctive feature[16]. In referring by the courts to a particular legal institution proper for common law understood in this way, the secondary issue is the fact of possible differences between the shape of this institution in individual Anglo-Saxon states. Occasionally, it happens that a court would combine the term "the common law legal order" with the law of one, but not another, state of the common law culture. For example, the District Court *(Sąd Okręgowy)* in Lublin in one of its decisions distinguished "the common law legal system" from the American legal system, reserving *implicite* the given term only for the law in the United Kingdom[17].

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[13] https://sip.lex.pl.

[14] Krzysztof Łokuciejwski, Common law, In: Leksykon współczesnej teorii i filozofii prawa, J. Zajadło, ed., Warszawa: C.H. Beck, 2007, 34.

[15] For a division into a specific legal system and a system type, see Grzegorz Maroń, Wstęp do prawoznawstwa, Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego, 2011, 121.

[16] Leszek Leszczyński talks about "the indisputable assumption that the category of court precedent is genetically and functionally related to the common law order". Leszek Leszczyński, Precedens w porządku prawa stanowionego. Ujęcia polskiej nauki prawa, In: L. Leszczyński, B. Liżewski, A. Szot, ed., Precedens…, 3.

[17] Judgment of the District Court in Lublin of 4 October 2013, I C 87/07.

2. THE PRACTICE OF REFERRING TO COMMON LAW IN QUANTITATIVE TERMS

References to common law[18] have been found in a total of 156 decisions, including 78 judgments of common courts, 46 judgments of administrative courts, 19 decisions of the Constitutional Court and 13 decisions of the Supreme Court. Although in proportionate terms, the decisions containing references to English law system constitute a very small percentage of all judgments and orders, the references of this type are not sporadic in the domestic judicial decisions.

A clear intensification of appealing to common law can be seen in the last decade. About 81% of all the analysed references come from the years 2010–2019. A total of 24 rulings (over 15%) with references to common law were issued in the first decade of this century, and only 5 in the 1990s (over 3%). In case of the decisions of common courts and the Supreme Court, it is difficult to determine reliably the dynamics of referring to the precedent legal order in reasons for judgments, due to the fact that the database of judgments by both types of courts, used in the research, is highly incomplete, especially if older judgments are concerned. The problems in access to the research material, however, do not relate to the judicial decisions of the Constitutional Court and administrative courts, which allows for a reliable determination of the dynamics of reference to common law by these courts. Out of 46 administrative court rulings containing direct references to common law, 35 come from the years 2010–2019, and the remaining 11 from the years 2000–2009 (and more precisely, 2006–2009). Prior to 2006, references to common law were absent in decisions of administrative courts. The title issue is different in the chronological order in relation to the decisions of the Consti-

[18] Common law in the aforementioned semantic framework is articulated by the Polish courts using over a dozen broadly synonymous terms: "common law", "prawo anglosaskie", "prawo precedensowe", "system prawa precedensowego", "system common law", "system prawa common law", "rodzina common law", "prawo common law", "prawo precedensowe (common law)", "anglosaski porządek prawny (common law)", "anglosaski system prawny", "system prawa anglosaskiego", "anglosaskie common law", "system anglosaski", "system precedensu", "system precedensowy", "kultura prawna państw anglosaskich", "model anglosaski", "model precedensowy".

tutional Court. Out of 19 of its rulings containing references to common law, 9 come from the years 2010–2019, 8 from the years 2000–2009 and 2 from the 1990s. In three cases, such references were made in separate opinions related to Constitutional Court judgments.

3. REFERENCES TO COMMON LAW DENYING THE PRECEDENTIAL ROLE OF POLISH COURT JUDGMENTS

Statistically, Polish courts most often refer in their reasons for judgments to common law legal order in the context of the institution of precedent. As a rule, the comments of the courts in this regard are a reaction to the claims of a party to the proceedings that the contested administrative decisions or first-instance judicial decisions are allegedly not complying with the previous court judgments issued in cases that are analogous in the party's belief. Courts questioning, from a procedural point of view, the relevance of the fact that the contested specific decision or judgment is inconsistent with other judgments made on the basis of a similar factual situation, usually do not go beyond mentioning that in the continental legal system, which includes Poland, precedents are not a source of law[19]. Additionally, the judicature has in mind precedents *de jure*, i.e. those of

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[19] Judgment of the District Court in Białystok of 14 December 2018, VIII Ka 594/18; judgment of the District Court in Rzeszów of 5 October 2018, VI GC 266/17; judgment of the Appellate Court in Szczecin of 19 July 2018, III AUa 756/17; judgment of the Regional Court in Bielsk Podlaski of 10 January 2018, VII W 418/17; judgment of the District Court in Siedlce of 23 June 2017, II Ka 357/17; Judgment of the District Court in Słupsk of 13 February 2017, I C 310/16; judgment of the Voivodship Administrative Court in Warsaw of 29 September 2016, V SA/Wa 3557/15; judgment of the District Court in Konin of 6 June 2016, I Ca 153/16; judgment of the Voivodship Administrative Court in Warsaw of 5 May 2016, V SA/Wa 2540/15; judgment of the Supreme Administrative Court of 15 May 2015, I OSK 986/14; judgment of the Voivodship Administrative Court in Poznań of 10 June 2014, II AKa 88/14; decision of the Supreme Administrative Court of 18 February 2014, II GZ 39/14; judgment of the Voivodship Administrative Court in Wrocław of 30 October 2013, I SA/Wr 1458/13; judgment of the Voivodship Administrative Court in Rzeszów of 22 October 2013, I SA/Rz 774/13; judgment of the Constitutional Tribunal of 14 February 2012, P 20/10; judgment of the Voivodship Administrative Court in Warsaw of 12 May 2010, II SA/Wa 330/10.

a formally binding and normative nature[20]. Since the Polish legal system is not a case law system, "even judgments of the Supreme Court in some cases do not bind courts in other cases, even with similar facts"[21], and therefore the courts are not obliged to follow "the theses expressed in previous judgments"[22]. The non-binding nature of earlier judgments for other courts has been justified by a closed system of law sources specified in Art. 87 of the Basic Law[23]. The court that has most often opposed the arguments of a party referring to previous judgments in similar cases, citing the fact that "in Poland there is no legal system based on precedents that is in force in the common law countries", has been the District Court in Gliwice[24].

The common law legal order that is distinguished by the institution of precedent is compared not only with the rulings of Polish courts. The Voivodship Administrative Court in Warsaw, determining the status of judgments by the Court of Justice of the European Union, has repeatedly invoked the doctrinal view, according to which such rulings "cannot be attributed the strict *de iure* precedent nature, characteristic of the common law system"[25].

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[20] Judgment of the Voivodship Administrative Court in Rzeszów of 20 October 2015, III AUa 79/15.

[21] Judgment of the Regional Court in Olsztyn of 6 June 2014, IX W 1005/14.

[22] Judgment of the Voivodship Administrative Court in Warsaw of 11 December 2012, IV SA/Wa 1427/12.

[23] Judgment of the Regional Court for Warszawa-Mokotów of 24 July 2017, I C 536/17; judgment of the Regional Court in Olsztyn of 9 October 2015, II K 135/15; judgment of the Appellate Court in Poznań of 30 April 2013, III AUa 61/13.

[24] See the sentences of this court of: 18 February 2019, V Ka 760/18; 4 February 2019, V Ka 752/18; 4 September 2017, V Ka 215/17; 23 October 2017, V Ka 415/17; 7 December 2017, V Ka 539/17; 7 December 2017, V Ka 566/17; 1 October 2018, V Ka 400/18; 25 October 2018, V Ka 449/18; 24 September 2018, V Ka 376/18; 12 July 2018, V Ka 223/18; 26 February 2018, V Ka 642/17; 22 November 2018, V Ka 316/18; 24 January 2019, V Ka 575/18; 18 June 2018, V Ka 569/17; 25 October 2018, V Ka 447/18; 2 August 2018, V Ka 243/18; 29 January 2019, V Ka 683/18; 11 March 2019, V Ka 576/18; 23 August 2018, V Ka 272/18; 4 October 2018, V Ka 339/18.

[25] Judgments of the Voivodship Administrative Court in Warsaw of: 15 April 2013, III SA/Wa 159/13; 1 February 2013, III SA/Wa 1206/12; 14 May 2013, III SA/Wa 457/13; 10 June 2015, IV SA/Wa 2057/14; 5 April 2013, III SA/Wa 160/13; 9 April 2013, III SA/Wa 207/13; 15 April 2013, III SA/Wa 144/13; 12 April 2013, III SA/Wa 551/12.

The description of the precedent institution presented in the reasons for some judgments raises reservations[26]. Even more serious objections arise from the way the courts respond to the arguments of a party to the proceedings referring to earlier judgments in similar cases[27].

For example, the District Court in Szczecin stated that it would not refer to the judgment of the District Court in Elbląg, indicated by a party to the proceedings, "as Polish law does not apply case law, and therefore the judgments issued by other equivalent courts are not binding on the courts examining similar cases"[28]. This observation mistakenly suggests that in the common law countries a decision of one court becomes a precedent for another court at the same level in the structure of the justice administration system. This claim is wrong. In the common law system, the ruling of a given court is a precedent *pro futuro* on courts subordinate to the court which issued the ruling, and – although this is a more disputable issue – that court itself. The Regional Court (*Sąd Rejonowy*) in Wałbrzych emphasized, however, that "there are no two identical cases and there is no case-law system in Poland ", and therefore the decision of the District Court in Legnica is not "binding in any way" on it[29]. This note, in turn, can suggest mistakenly that a precedent decision is in future applicable only to cases identical or same in terms of the facts and the legal issue as the original case, while in reality it may be applied to matters that are similar to a large extent to the case being the causal basis of the precedent.

The courts present wrongly a reference by a party to the proceedings to their earlier decision or a decision of another court as a call to make

[26] In the judicial decisions there are also relevant observations on the nature of the case-law system. For example, the District Court in Wrocław corrects the mistaken belief, though popular in the public opinion, about the insignificant role of statutory law in the English legal order. As it notes, "even in the common law system, the application of positive law provisions is not conditioned on the existence of precedent court rulings in this matter, although they are far more important in the process of adjudication by the subsequent courts that examine the same matter". Judgment of the District Court in Wrocław of 26 February 2019, XII C 1681/18.

[27] For insufficient weight attached by courts to earlier court decisions, see: Hanna Filipczyk, Postulaty pewności prawa w wykładni operatywnej prawa podatkowego, Warszawa: Wolters Kluwer, 2013, 273–275.

[28] Judgment of the District Court in Szczecin of 10 June 2015, VI U 378/15.

[29] Judgment of the Regional Court in Wałbrzych of 11 February 2014, II K 861/13.

this decision the legal grounds for a decision in the pending case[30]. For example, the Supreme Administrative Court in one of its rulings stated that the claim raised by the Head of the Tax Chamber that the first instance court did not refer to its another earlier judgment "was completely wrong, because the Court cannot be expected to refer to a judgment in another case as the legal grounds of the decision"[31]. The opinion of the Supreme Administrative Court presents unfair arguments as the "reference" to another judgment cannot be equated with making this judgment, the legal grounds for the decision. The parties do not expect that the court hearing their case will take a different judgement as a normative legal basis for its decision instead of the legal provisions, but, while pointing to other judgments, on the one hand, they refer to the argumentation provided in them, and on the other hand, they express their expectation of the decision consistency in terms of the coherence of operative legal interpretation results. In some circumstances, inconsistency of judicial decisions can be regarded as a violation of the party's right to a fair trial[32]. The position expressed in one of the judgments by the Appellate Court (*Sąd Apelacyjny*) in Rzeszów should be highly approved, and it states that "although the Polish legal order is not based on case law (common law) and is a system of statutory law, yet, the issuance in the claimant's case of a judgement other than the decisions in the above earlier cases would be in conflict with the sense of social justice, which should also be respected by a court adjudicating under the binding legal order"[33].

The categorical tone of some courts that disavow the utilitarian value of earlier rulings in analogous cases raises some objections. The District Court in Gliwice expressed its belief that "rulings of common courts in other similar cases... **do not and cannot have any effect** [emphasised by G.M.] on the outcome in this case. Each case should be examined individ-

[30] Judgment of the Appellate Court in Poznań of 30 April 2013, III AUa 61/13.

[31] Judgment of the Supreme Administrative Court of 17 December 2009, II FSK 1161/08.

[32] Judgment of ECHR of 31 March 2015, app. no. 43807/06, S.C. Uzinexport S.A. v. Romania. Cf. judgment of ECHR of 11 April 2019, app. no. 11260/10, Mariyka Popova and Asen Popov v. Bulgaria.

[33] Judgment of the Appellate Court in Rzeszów of 20 February 2019, III AUa 118/18.

ually. The common law system is alien to the Polish criminal procedure"[34]. The problem of earlier rulings' significance in other cases is not exhausted in a binary alternative: the lack of any role and being the legal grounds for the decision. Quite rightly, several courts have emphasized that although "in Polish law, a sentence is binding only in a given case, i.e. the one in which it was passed", yet at the same time "it is of course possible to use its content in other proceedings"[35] or to look for an "interpretive hint" in it[36].

The issue of best operationalization of arguments referring to other judgments in analogous cases, present in judicial decisions passed in a civil law country, goes beyond the scope of the study. It is enough here to indicate the complexity of it. Although it is not convincing to discredit *a priori* this type of arguments justifying it by the lack of a *de iure* precedent in the system of Polish law sources, yet, a court's reference to the decisions issued by other courts in similar cases as indicated by the parties to the current proceedings raises a number of questions and doubts[37]. Not without a good reason, the Supreme Administrative Court states that "the fact that a court of first instance does not refer to the content of a specific decision by another voivodship court does not mean that that court has not examined the essence of the case in a thorough, complete and proper manner. Particular court decisions, cited in support of specific positions, are only a reinforcement of their arguments. They are not the grounds for the decision. As the court of first instance rightly pointed out, regarding the content of decisions on individual interpretations of tax law, uniformity of judicial decisions, although a desirable feature, does not constitute a value in itself[38]. Each of the examined cases is a separate case and should

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[34] Judgment of the District Court in Gliwice of 8 March 2016, V Ka 55/16.

[35] Judgment of the Voivodship Administrative Court in Łódź of 19 November 2015, I SA/Łd 888/15; I SA/Łd 889/15; judgment of the Voivodship Administrative Court in Olsztyn of 18 February 2016, I SA/Ol 755/15; judgment of the Voivodship Administrative Court in Warsaw of 15 February 2017, III SA/Wa 568/16, III SA/Wa 567/16.

[36] Judgment of the Voivodship Administrative Court in Łódź of 20 April 2011, I SA/Łd 238/11.

[37] See: Leszek Leszczyński, Warunki korzystania z wcześniejszych decyzji sądowych w procesach stosowania prawa, In: L. Leszczyński, B. Liżewski, A. Szot, ed., Precedens…, 255–274.

[38] Similarly: decision of the Voivodship Administrative Court in Lublin of 13 April 2016, III SA/Lu 438/16.

be treated as such. It is impossible to refer to all rulings that have been issued in similar legal problems, and this is not the most important thing when examining a particular case.... A reference by a court of first instance to a decision of another, equivalent court would in fact be polemics with this decision, which would not have an impact on the result of the case in question“[39].

It can be mentioned that it is also common for a party to the proceedings to use the claim that "Poland does not belong to the common law system"[40] in order to base their criticism of quoting other previous decisions by a public administration authority or a court examining their case.

4. REFERENCES TO COMMON LAW HIGHLIGHTING DIFFERENCES BETWEEN POLISH AND ENGLISH LAW IN RELATION TO A SPECIFIC LEGAL ISSUE

A significant part of references to common law in the Polish judicial decisions shows the differences between the domestic and common law legal orders. Usually, these disparities boil down to the fact that the particular solutions of precedent law system do not exist in Polish law at all, or functionally corresponding regulations in both orders show significant discrepancies. Sporadically, the courts stop at a laconic mere observation of "differences between the English legal system and the continental system" without their exemplification[41].

As a rule, the differences signalled by the courts relate to a specific legal institution in the field of substantive or procedural law, less often in relation to systemic issues. An example of disparities from the second thematic

[39] Judgment of the Supreme Administrative Court of 30 August 2017, II FSK 1703/15.

[40] Judgment of the Voivodship Administrative Court in Bydgoszcz of 2 November 2010, II SA/Bd 941/10. Similarly: judgment of the Supreme Administrative Court of 25 June 2013, II OSK 757/12; judgment of the Supreme Administrative Court of 29 May 2013, I FSK 147/13; judgment of the Voivodship Administrative Court in Warsaw of 13 September 2012, I SA/Wa 2450/11; judgment of the Voivodship Administrative Court in Gliwice of 5 December 2007, IV SA/Gl 480/07.

[41] Judgment of the Appellate Court in Szczecin of 5 December 2013, I ACa 745/13.

area is the lack of legislative competence on the part of Polish courts, and whose decisions are not *de iure* precedents[42].

On the basis of one of the cases, the Constitutional Court noted that the binding provisions in Poland regarding the employment of public officials "are substantially an expression of the career system, i.e. they differ from the solutions in the common law and Scandinavian countries in which a system of official positions has been adopted"[43]. In another judgment, the Court argued that under Art. 341 § 3 of the Code of Criminal Procedure, the solution consisting in the possibility of postponing the court hearing regarding conditional discontinuance of proceedings in order to enable the accused to communicate with the injured party to repair the damages or to provide a compensation "is far from the process of negotiation and settlement in criminal matters (plea bargaining), known in the common law trial"[44]. The Supreme Court, in turn, drew attention to "the need for demarcation between the institution of 'acquisition' (taking over), occurring in the FIDIC contract conditions, which has its origin in common law, and the 'receipt of works' (acceptance) within the meaning of the civil law"[45].

The Appellate Court in Katowice has highlighted the differences between Polish law and common law several times. It pointed out that "a common court cannot independently review the constitutionality of statutory provisions, as it is the case in the common law system (the institution of judicial review)"[46]; "Polish law has not directly established a norm repealing the responsibility of a parliamentarian (a deputy and a senator) for violation of honour (good name) in parliamentary statements, as it

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[42] Judgment of the Voivodship Administrative Court in Bydgoszcz of 14 March 2018, I SA/Bd 45/18; judgment of the Supreme Administrative Court of 11 December 2009, II FSK 1204/08; judgment of the Supreme Administrative Court of 25 September 2007, II FSK 1017/06, II FSK 1018/06, II FSK 1019/06; judgment of the Voivodship Administrative Court in Wrocław of 16 December 2010, I SA/Wr 1233/10. Similarly: judgment of the Voivodship Administrative Court in Wrocław of 10 December 2010, I SA/Wr 1166/10, I SA/Wr 1165/10; judgment of the Voivodship Administrative Court in Wrocław of 29 November 2010, I SA/Wr 942/10.

[43] Judgment of the Constitutional Tribunal of 17 November 2015, K 5/15.

[44] Judgment of the Constitutional Tribunal of 16 May 2000, P 1/99.

[45] Judgment of the Supreme Court of 13 September 2017, IV CSK 578/16; judgment of the Appellate Court in Katowice in Łódź of 27 July 2018, I ACa 1544/17.

[46] Judgment of the Appellate Court in Katowice of 24 February 2011, II AKa 6/11.

is the case in the common law systems, in which the absolute privilege of a parliamentarian has been established"[47]; "in the Polish criminal trial, unlike the common law one, there is no... general rule, according to which any evidence obtained incorrectly becomes invalid immediately"[48], or that the category of "domicile" in common law countries "expresses a person's relationship with a specific legal area or legal system and not with a specific place, as it is the case with the place of residence"[49].

Several courts have stated in their rulings that, in contrast to the common law category of pure economic loss of use, in Polish civil law compensation is not due for the mere loss of the use possibility of a motor vehicle damaged or destroyed in a traffic accident. Only the consequence of deprivation of the use possibility of things may be pecuniary damage, e.g. caused by using a rented replacement car[50].

Among other differences between Polish law and common law recorded in the judicial decisions one can mention, for example, the fully adversarial criminal trial in the Anglo-Saxon countries[51], the admissibility of a bearer promissory note in common law countries[52], or non-identity of bail as security on property and bail as a condition of release imposed by a court warrant[53].

Some differences between Polish law and common law have been weakening over time, which is also noted by courts. For example, the Supreme Court in one of its rulings mentioned that although lien type mortgage, known to the English legal order, does not appear in the Polish legal order, yet, "after the entry into force of the new Maritime Code on

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47 Judgment of the Appellate Court in Cracow of 2 March 1994, I ACr 76/94.

48 Judgment of the Appellate Court in Katowice of 16 December 2004, II AKa 223/04.

49 Decision of the Appellate Court in Katowice of 5 June 2018, I ACz 423/18.

50 Judgment of the District Court in Częstochowa of 29 June 2016, V Ga 67/16; judgment of the Regional Court for Warszawa-Mokotów of 28 July 2016, XVI C 2904/15; judgment of the District Court in Kalisz of 19 October 2017, II Ca 352/17; judgment of the Appellate Court in Katowice in Warsaw of 15 April 2015, VI ACa 901/14.

51 Decision of the District Court of 10 March 2017, III Kop 2/17.

52 Judgment of the District Court in Koszalin of 11 October 2017, VII Ca 583/17.

53 Decision of the Appellate Court in Łódź of 24 July 1996, II AKz 275/96. On other differences see: judgment of the District Court in Warsaw of 20 July 2016, XXV C 1492/14; decision of the Regional Court in Włocławek of 9 November 2016, I Ns 2402/15; judgment of the Regional Court for Warszawa-Mokotów of 5 May 2015, XIV K 465/14.

5 June 2002, Polish maritime law already incorporated some provisions allowing the parties to establish a contractual mortgage corresponding to a lien type mortgage"[54]. In another judgment, the same court noted that *prima facie* evidence "used in the common law systems" is "carefully adapted in Polish law, with an indication of its normative source as Art. 231 of the Civil Procedure Code"[55].

Sometimes, when the courts signal the differences between civil law and common law, they oppose their exaggeration at the same time. They show that a different form of individual legal regulations in both types of legal systems does not have to be translated into significant disparities in the field of axiology and teleology. The Appellate Court in Krakow, on the one hand, called a "truism" "an indication that the procedural system of common law is different from the continental system". On the other hand, it stressed that although the common law system of court procedure is marked by the adversarial principle, almost in a pure form, yet, "despite the existing differences, that system implements the same goals and values as the Polish system of procedural law"[56].

Rarely, the courts have indicated some differences in approach to a given issue in Polish law and common law, not so much reporting them, but they have confronted both legal orders, clearly raising and at the same time justifying the inadequacy of Anglo-Saxon solutions for the domestic justice system. On several occasions in the judicial decisions there have been instances of cutting off from the common law standards of freedom of expression in the context of a relationship between the right to information and freedom of expression and the right to privacy of public figures. The courts justified their distancing from the Anglo-Saxon solutions regarding freedom of expression by saying that "the scope of the right to freedom of expression must be considered taking into account the tradition and sense of tolerance in a given society"[57]. In another ruling, the court,

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[54] Decision of the Supreme Court of 28 February 2014, IV CSK 202/13.

[55] Judgment of the Supreme Court of 11 April 2014, I CSK 291/13.

[56] Decision of the Appellate Court in Cracow of 25 September 2015, I ACz 890/15.

[57] Judgment of the Supreme Court of 11 October 2001, II CKN 559/99; judgment of the Supreme Court of 24 January 2008, I CSK 341/07; judgment of the Appellate Court in Gdańsk of 11 April 2014, I ACa 7/14; judgment of the Appellate Court in Warsaw of 29 April 2016, I ACa 665/15.

rejecting the adequacy of the limits for freedom of expression adopted in the common law system for the operative legal interpretation of a provision prohibiting discriminatory content in media communications, stated that the assessment of the facts of the case "must be made taking into account the national level of sensitivity to the statement"[58].

The Constitutional Court, justifying the constitutionality of the statutory regulation of the institution of legitim, argued that the solutions consisting in the use of "the criterion of equity defined in judicial decisions *a casu ad casum*..... and the criterion of closeness" are appropriate for the common law and not domestic legal order. It added that "an automatic transfer to the Polish order of legislation and law application of the concept of alimony protection of persons in a close relationship with the testator, known in the common law systems, always carries a risk of an excessive and disproportionate limitation of the constitutional basic right and of undermining trust in certainty and stability of law. Although these solutions undoubtedly allow adapting the decision to the actual conditions of each individual case, they, nevertheless, introduce an element of uncertainty and allow for varying degrees of interference in the freedom of making wills"[59].

In turn, in the early 1990s, the Appellate Court in Katowice disagreed with following the common law jurisdictions on liability of the stock exchange. In its opinion, "a transfer of foreign legal solutions in the absence of comprehensive legal solutions for the so-called commodity exchanges, is not justified at the current stage of their development"[60].

The characteristics of the differences in the compared legal orders, made in judicial decisions, sometimes stays controversial. The Voivodship Administrative Court in Warsaw, in one of the judgments, stated that "the obligation to respect the court decisions (orders) is accentuated especially in the common law legal systems, or the systems, in which a special attention is paid to the principle of the rule of law and the role

[58] Judgment of the District Court in Warsaw of 14 August 2013, XX GC 757/12; judgment of the Appellate Court in Warsaw of 20 August 2014, VI ACa 1740/13.

[59] Judgment of the Constitutional Tribunal of 25 July 2013, P 56/11.

[60] Judgment of the Appellate Court in Katowice of 30 April 1993, I ACr 115/93.

of independent courts in enforcing compliance with this rule"[61]. This quotation might suggest *a contrario* a smaller respect for court judgments and a smaller importance of the rule of law in the civil law culture. The court did not show, however, the evidence for making gradations of the weight of the rule of law because of the type of the legal culture.

Sporadically, the courts try to explain the source of differences in the regulation of certain issues in Polish (continental, European Union) law and in the common law systems. In one of the judgments the Constitutional Court assumed that Art. 42 sec. 1 and 3 of the Constitution does not prejudge the fact that imposing of criminal (repressive) measures, and even more of other sanctions, can be awarded only by criminal courts. It pointed out that in the countries of the common law system no separate administrative courts had been established to adjudicate in matters of public law, but these cases had been subjected to the jurisdiction of common courts. At the same time, it explained that "the question of the type of court that decides in specific cases is a matter of systemic and organizational choices, not of substantive law"[62].

5. REFERENCES REVEALING SIMILARITIES IN THE POLISH AND COMMON LAW REGULATIONS

Statistically, the courts less often show similarities between Polish law and the common law legal order in approaching a particular legal principle or institution. Sometimes they compare common law not so much with domestic law but with the continental legal system, possibly with international law and European Union law. In the reasons for judgments, sometimes the degree of regulation convergence in the compared systems is also determined. In this context, the courts most often speak of "similarity", "referring to", "identity", "equivalence". In this way, they indirectly expose a certain universality of particular legal solutions.

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[61] Judgment of the Voivodship Administrative Court in Warsaw of 19 September 2016, IV SA/Wa 1315/16.

[62] Judgment of the Constitutional Tribunal of 4 July 2002, P 12/01.

The Constitutional Court in one of the judgments found that the concept of objective civil and administrative responsibility "reminds the common law concept of strict liability", and therefore "it is not an absolute liability"[63]. In another ruling, it noted that in the light of the Court of Justice of the European Union's case law, "unnotified technical provisions may not be invoked against persons before authorities of the Member States, and in particular no obligations and penalties may be imposed on such persons. This is an expression of the Latin principle of *nemo auditur*, whose counterpart in common law is the doctrine of estoppel"[64]. In turn, Judge Wojciech Sokolewicz found the principle of democratic State of law as "a kind of equivalent of the common law principle of Rule of Law"[65].

The Supreme Court in several of its rulings noted that "the Code of Civil Procedure does not provide for the general presumption of the exclusive nature of the national jurisdiction of the courts of the state indicated in a prorogation agreement, similarly to "the common law legal systems"[66]; "the common law institution of legal professional privilege can be identified with the defence secret of a lawyer under Polish law"[67]; the requirement provided for in Art. 79 sec. 1 point 3 b of the copyright act, regarding compensation for caused damage by payment of a sum of money corresponding to the double amount of the due remuneration, "takes in reality the form of a civil penalty known in common law as civil punity"[68]; the institution of the will executor is also known in "the common law systems"[69].

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[63] Judgment of the Constitutional Tribunal of 4 July 2002, P12/01. Cf. judgment of the Voivodship Administrative Court in Warsaw of 17 August 2011, VI SA/Wa 744/11; judgment of the Voivodship Administrative Court in Warsaw of 31 January 2013, VI SA/Wa 2133/12; judgment of the Voivodship Administrative Court in Olsztyn of 7 February 2012, II SA/Ol 1020/11.

[64] Judgment of the Constitutional Tribunal of 11 March 2015, P 4/14.

[65] Dissenting opinion of judge Wojciech Sokolewicz to judgment of the Constitutional Tribunal of 28 May 1997, K. 26/96.

[66] Resolution of the Supreme Court of 7 September 2018, III CZP 38/18.

[67] Decision of the Supreme Court of 2 June 2011, SDI 13/11.

[68] Judgment of the Supreme Court of 10 November 2017, V CSK 41/14.

[69] Decision of the Supreme Court of 6 August 2014, I CSK 482/13, I CSK 483/13.

In the judicial decisions of the Supreme Court Polish law has not always been the reference point for common law. For example, in one of the judgments it was indicated that the Vienna Convention adopted "a common law-based guarantee model of contractual relationship", in which instances of non-performance and improper performance of the obligation are not separated[70].

The common courts in their judgments have turned attention, among others, to the fact that "Art. 3531 of the Civil Code stipulates in the Polish legal system the principle of contract freedom, which is one of the basic principles of contract law, also established in other legal systems, both in continental law and common law"[71], and the category of "a negligible degree of social harmfulness (Art. 1 § 2 of the Criminal Code) leads to similar results as the common law abandonment of prosecution of such acts based on the principle of opportunism"[72].

The similarities found in the judicial decisions between Polish (continental, European Union) law and common law have concerned not only individual substantive and procedural law regulations, but also rules of legal exegesis formed in the jurisprudence and judicial practice. On several occasions, the administrative courts have presented the principle of the priority of linguistic interpretation and the subsidiarity of the systemic and functional interpretation as being representative "on the grounds of our legal system ...as well as on the grounds of other legal systems belonging to the civil law and common law cultures"[73].

Sometimes, the judicial decisions have pointed out the fact that a legal institution or practice of law application known to the Polish legal system dates back to the common law system or has been borrowed from it. Sometimes, at the same time, some differences have also been signalled between the domestic regulation and its common law prototype. For ex-

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[70] Judgment of the Supreme Court of 11 May 2007, V CSK 456/06.

[71] Judgment of the District Court in Szczecin of 21 December 2015, VIII GC 458/14.

[72] Decision of the District Court in Radom of 7 June 2018, II K 143/17.

[73] Judgment of the Supreme Administrative Court of 15 May 2008, II OSK 548/07; judgment of the Supreme Administrative Court of 19 December 2008, I OSK 206/08; judgment of the Voivodship Administrative Court in Poznań of 24 September 2008, III SA/Po 348/08; judgment of the Voivodship Administrative Court in Poznań of 5 June 2009, III SA/Po 501/08.

ample, the Constitutional Court drew attention to the "common law origins of the popular version of VAT", also adding that "the common law legal systems do not know the concept of 'appearance in legal acts', and therefore the recognition consequences of legal acts (in trade) as 'apparent' acts"[74]. The Regional Court for the Capital City of Warsaw, in turn, argued that in a situation where the grounds for a claim for damages sought from a counsel were a charge that due to their fault the party had been unsuccessful, it is necessary to examine whether the outcome of the court proceedings could have been different if the counsel had been performing properly their duties. A positive answer to this question does not undermine the validity of the court decision. "This concept, derived from the American common law system, is referred to as 'process in process' and the burden of proof is on the plaintiff"[75].

The common law order has been shown as a reference point not only for Polish law, but also for foreign law of third countries and international law. For example, the Appellate Court in Warsaw noted that the Swedish legislation not providing for the division into limited liability companies and joint stock companies "is modelled on the common law system"[76]. In turn, the Constitutional Court found that the term "property" of Art. 1 of Protocol No. 1 of the European Convention on Human Rights "refers... to the common law institution of 'property' construed as ownership and not as proprietary right being *ius in rem suam*, a real right"[77].

Sometimes the approach to the relationship between Polish law and common law in the context of a particular legal institution raises reservations. The District Court in Krakow stated that Art. 335 or 387 of the Code of Criminal Procedure "are an expression of reception by [Polish law], to some extent, of the common law concept of 'plea bargaining'"[78]. The court's use of the category "reception of law" is an abuse[79].

There are also cases where the judgments of courts note some postulates, known to the legal scholarship, to reach for the adjudicatory stand-

74 Judgment of the Constitutional Tribunal of 5 November 2008, SK 79/06.

75 Judgment of the Regional Court for Warsaw of 3 June 2015, II C 1671/13.

76 Judgment of the Appellate Court in Warsaw of 29 June 2017, I ACa 585/16.

77 Judgment of the Constitutional Tribunal of 19 December 2002, K 33/02.

78 Judgment of the District Court in Cracow of 10 September 2018, IV 1Ka 83/2018.

79 Grzegorz Maroń, Wstęp…, 52.

ards, developed in the system of common law, e.g. verification of material invasion of privacy under Art. 190a § 1 of the Penal Code by means of a reasonable bystander test[80], or applying the definition of a dangerous product under Art. 4491 § 3 of the Civil Code to a particular case by means of a consumer expectations test[81].

In three judgments, the Voivodship Administrative Court in Poznań drew attention to the progressive and – in its opinion – inevitable convergence phenomenon of the civil law and common law systems determined by the process of European integration and the case law of the Court of Justice of the European Union[82]. In one of these judgments, the convergence phenomenon of both systems served the court to justify the judicial activism – literally referred to as "the creative approach" – consisting in issuing "precedent rulings *praeter legem*" when tax law is considered "bad" in a particular case[83].

6. REFERENCES TO COMMON LAW AS PART OF A BROADER COMPARATIVE LAW ANALYSIS

In the case of the judicial decisions of the Supreme Court, and in particular the Constitutional Court, exposing differences and /or similarities between Polish law and common law in relation to an issue has often been combined with the use by a court of the comparative method. Both courts then compared the domestic law with other legal orders, which also included the generalized common law legal order, or presented different models or standards for solving a particular issue, specific to these orders.

The Constitutional Court in a series of its rulings has pointed out, for example, that identical functions as deduction provided for in Polish

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[80] Judgment of the Regional Court in Łuków of 27 October 2017, II K 973/16.

[81] Judgment of the District Court in Gliwice of 11 March 2015, III Ca 618/14.

[82] Judgment of the Voivodship Administrative Court in Poznań of 1 June 2006, I SA/Po 809/05; judgment of the Voivodship Administrative Court in Poznań of 16 February 2006, I SA/Po 826/04 (I SA/Po 827/04, I SA/Po 828/04).

[83] Judgment of the Voivodship Administrative Court in Poznań of 25 January 2006, I SA/Po 2626/03.

law "is fulfilled by the set-off institution known to the common law system"[84]; a broad material scope of the right to court in the Constitution of the Republic of Poland is "an approach encountered... also in the common law countries"[85]; "in common law, succession of the Treasury is referred to as escheat and is generally treated as exceptional"[86]; the common law states have adopted a system of solutions that "allows entrusting judicial functions to non-judicial bodies, i.e. various agencies, tribunals, arbitration bodies whose procedures provide for the possibility of appealing to a court, which is not, however, constitutionally obligatory"[87]; the common law model of the right to rectification "performs similar functions as in the continental law system, but it is based on self-regulatory acts such as codes of journalistic ethics and publisher agreements"[88]; the common law system "does not know the legal institution of prescription"[89].

In turn, the Supreme Court in its comparative study noted that in the common law system, the main centre of the debtor's basic activity under the COMI (Centre of main interests) is determined based on "the theory of the place of making strategic control decisions, assuming that the fundamental importance… has the way of organization of the enterprise's management functions (the mind of management)"[90]. In another ruling, the court pointed out that the possibility of limiting temporarily the impact of law interpretation is also known to "courts of common law states in the form of prospective overruling, i.e. changes in the current line of case law, with an effect for the future"[91].

Much less often the comparative law method, covering references to foreign law, including common law, is used by the common and adminis-

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[84] Judgment of the Constitutional Tribunal of 31 July 2014, SK 28/13.

[85] Judgment of the Constitutional Tribunal of 20 December 2017, SK 37/15.

[86] Judgment of the Constitutional Tribunal of 4 September 2007, P 19/07.

[87] Judgment of the Constitutional Tribunal of 13 March 1996, K 11/95.

[88] Judgment of the Constitutional Tribunal of 1 December 2010, K 41/07.

[89] Judgment of the Constitutional Tribunal of 23 May 2005, SK 44/04. Similarly: judgment of the Constitutional Tribunal of 25 May 2004, SK 44/03; judgment of the Constitutional Tribunal of 15 October 2008, P 32/06.

[90] Judgment of the Supreme Court of 16 February 2011, II CSK 425/10.

[91] Resolution of the Supreme Court of 28 January 2014, BSA I-4110–4/2013.

trative courts. For example, the judgment of the Appellate Court in Warsaw, in which it was pointed out that "the institution of 'the crown witness' has been developed primarily in the countries belonging to the common law family, especially in the U.S."[92]

7. GENERAL CHARACTERISTICS OF REFERENCES TO COMMON LAW IN THE REASONS FOR JUDGMENTS

In most cases, references to the common law system, present in the reasons for judgments, have a form of not very extensive and synthetic mentions. This state of affairs should be assessed approvingly. In this way, the courts show awareness that the reasons for a judicial ruling are not a monograph or a scientific article in which a more extensive and multifaceted considerations on common law would be appropriate. In this respect, the judicature avoids unnecessary academic inquiry obscuring the procedural functions of the reasons for judgments.

This does not mean that in the judicial decisions there are no more thorough and extensive scrutiny of the common law system. Sometimes an in-depth study of various legal institutions, specific to common law, is dictated by the subject of the case examined by the court. For example, the District Court in Krakow recognizing a request of the public prosecutor's office on the extradition of a Polish citizen to the United States made an extensive analysis of resolving cases under the plea bargaining procedure, characteristic for the common law countries, with an indication of partial similarities and significant differences in relation to Polish law (Art. 335, 338a, 387 of the Code of Criminal Procedure)[93].

It rarely happens that courts overlook the distinction between common law and the English legal doctrine, e.g., the Regional Court for Warszawa-Śródmieście in Warsaw, once described "legal harassment" as "a sociologically identified phenomenon known even to the common law

[92] Judgment of the Appellate Court in Warsaw of 29 April 2005, II AKa 90/05.
[93] Decision of the District Court in Cracow of 30 October 2015, III kop 14/15.

jurisprudence”[94], and on another occasion it called the same phenomenon as recognized under “common law”[95].

Few references to common law in the reasons for judgments play the role of a means of linguistic expression. In one of the rulings of the Supreme Administrative Court and two judges of the Constitutional Court, in separate opinions, referred to the legal maxims derived from the “common law systems” or “the legal culture of the common law countries”, i.e. respectively, “delayed justice is denied justice”[96], and “justice is not enough to be administered; people have to see it with their own eyes”[97]. It would be unauthorized, however, to assign them only an ornamental character, which consists in giving them a speech colour. In both cases, the cited legal maxims expressed some axiologically marked postulates on the judicial practice, namely, the need to examine cases without an undue delay and in an open court.

References to common law in the reasons for judicial decisions are the result of several intersecting agents. Firstly, a reference of a court to common law may be dictated by the subject or circumstances of the examined case with participation in it of a so-called “foreign element”. In such an event, references to common law are expected and awaited, and their absence in the reasons for the judgment could be seen as a failure to hear the case comprehensively. For example, the Supreme Court in a case regarding a declaration of enforceability of a US court decision awarding,

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[94] Decisions of the Regional Court for Warszawa-Śródmieście of: 17 January 2019, XI W 4083/18; 18 December 2018, XI W 1805/18; 3 December 2018, XI W 4672/17; 29 November 2018, XI W 1660/18.

[95] Judgment of the Regional Court for Warszawa-Śródmieście of 8 May 2019, XI W 484/19. Cf. judgment of the Appellate Court in Katowice of 24 October 2017, V ACa 38/17 and judgment of the Appellate Court in Poznań of 21 May 2015, III AUa 1453/14. The courts correctly indicated that the individual names of insurance occurrences (trigger) originate from the “doctrine of common law system”, and the principle of protection of legitimate expectations has been “taken to the Polish doctrine from the common law doctrine”.

[96] Decision of the Supreme Administrative Court of 16 October 2015, I OSK 1992/14.

[97] Dissenting opinion of judge Andrzej Rzepliński to decision of the Constitutional Tribunal of 7 January 2016, U 8/15; Dissenting opinion of judge Julia Przyłębska to judgment of the Constitutional Tribunal of 11 August 2016, K 39/16.

inter alia, punitive damages in the amount of 4 million dollars, while explaining the essence of this type of compensation, known to common law countries, drew attention to its incompatibility with the compensatory functions of damages in Polish civil law[98]. In relation to a succession case, the Regional Court in Włocławek raised, in turn, that "the procedure of inheritance in the case of a person holding the citizenship of the United Kingdom is governed by the applicable law in a country that is the domicile (a country of permanent residence) of the deceased at the time of their death. According to common law, a person's real place of residence is less important"[99].

Secondly, the court refers to common law in response to the arguments of a party to the proceedings who may either invoke the given legal order directly or implicitly, pointing some legal solutions known to that order, without its nominal designation. An example of a court referring to the common law as a result of the party's reasoning may be the case regarding punishment of a radio broadcaster by the President of the National Broadcasting Council for inclusion in the broadcast of a content discriminating on the grounds of nationality and sex. In the reasons for the ruling, the court wrote that "the view of the appellant regarding the common law system and the limits of freedom of expression adopted therein cannot be taken into account"[100]. Another exemplification of this situation is the reasons for the ruling, which dismissed the claim for compensation against the stock exchange for the actions of a stockbroker. The plaintiff referring to common law claimed that the broker accredited at the stock exchange is its representative, and therefore the stock exchange is responsible for the choice of contractors. The court did not agree with this claim, pointing out that "any comparison on the background of solutions of the stock exchange liability for brokers in common law cannot withstand criticism"[101]. An example of the court referring to common law in response to a party's implied reference to the precedent legal order are those numerous judg-

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[98] Decision of the Supreme Court of 11 October 2013, I CSK 697/12.

[99] Decision of the Regional Court in Włocławek of 9 November 2016, I Ns 2402/15.

[100] Judgment of the District Court in Warsaw of 14 August 2013, XX GC 757/12; judgment of the Appellate Court in Warsaw of 20 August 2014, VI ACa 1740/13.

[101] Judgment of the Appellate Court in Katowice of 30 April 1993, I ACr 115/93.

ments in which the courts questioned the need to take into account other judgments issued in analogous cases, explaining that the Polish law system is not a case law system. Invoking by the court of common law was of the same provenance as it was to clarify that the concept of the so-called corporate veil, recalled by a party, is known to this law, but not to the Polish legal system[102].

Thirdly, some references to common law in judgments are part of the typical comparative law analysis by the court. Precedent law system is then only one of the legal orders compared with the domestic law. Usually, common law in this context is mentioned by the Constitutional Court and the Supreme Court. It is beyond the scope of this paper to analyse the legitimacy issue of taking common law as a reference point for the court in its comparative reflection in a particular case[103]. Point 4 of this study provides examples of the use of common law by the courts as part of comparative and legal inquiry.

Fourthly, references to common law in the reasons for judgments may be contingent in nature in the sense that they are a certain unnecessary addition to the court's arguments which are not casually related to the claims of a party to the proceedings, the circumstances of the case itself, and they do not fall within a broader comparative reasoning. Their unnecessity does not mean redundancy, objectlessness or uselessness. A court mentions common law because in a particular case it recognizes that such a mention is useful for its argumentation, i.e. it contributes to the fulfilment of the clarification (explanatory) function and/or the persuasive function for the reasons for the judgment. However, this does not change the fact that the reference to the common law is of a subsidiary nature. References of this type are diverse thematically and functionally. For example, courts justifying the need to be guided by the meaning of a legal norm established in the linguistic interpretation noticed that the priority of the linguistic interpretation is also known to "other legal systems belonging to the civil law and common law cultures"[104].

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[102] Judgment of the District Court in Nowy Sącz of 16 January 2014, III Ca 785/13.

[103] Piotr Chybalski, Wykładnia komparatystyczna w orzecznictwie konstytucyjnym – zarys problemu, Temidum 2 (2019), 36.

[104] See note No. 67.

In many cases of references to common law in judicial decisions, one can trace elements of the discursive style of giving reasons for the judgments. In the legal scholarship discursive justification is presented as associated with "an indication of different possible decisions of individual particular issues, quoting arguments in favour of each of the possible decisions, a substantiated choice of the optimum decision"[105]. A judge uses "the widest range of interpretative arguments"[106], formulates "arguments for and against in relation to competing alternative interpretative solutions"[107]. In this way they communicate "that they have a room for manoeuvres and that they have a choice among several possibilities, all of which 'can be defended' against the background of the text which has served them as the basis for the decision"[108].

References to common law are part of the discursive style of providing reasons for judgments especially if they are a reaction to some arguments of the parties to the proceedings or are a part of a comparative law analysis. In the first case, the court, wanting to strengthen the persuasive power of its own reasoning and the issued decision, refers to each of the parties' claims. The degree of discursiveness depends on how carefully and comprehensively the court addresses the party's arguments. This discursiveness is limited, whenever the court, for example, stops only at a laconic observation about the incompatibility of the party's arguments to the circumstances of the examined case, because of the fact that the solutions relied on by the party are representative of common law, but they do not fit the realities of Polish law.

Even a greater potential for discursiveness of the reasons for judgments is associated with comparative law considerations of the court. The discursive style is not coincidently attributed in the legal science to the judicial decisions of the Supreme Court and the Constitutional Court, i.e.

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[105] Maciej Zieliński, Wykładnia prawa. Zasady, reguły, wskazówki, Warszawa: LexisNexis, 2010, 264–65.

[106] Leszek Leszczyński, Uzasadnienie sądowej decyzji stosowania prawa a walidacyjno-derywacyjne ujęcie wykładni operatywnej, In: M. Grochowski, I. Rzucidło-Grochowska, ed., Uzasadnienia decyzji stosowania prawa, Warszawa: Wolters Kluwer, 2015.

[107] Krzysztof Płeszka, Wykładnia rozszerzająca, Warszawa: Wolters Kluwer, 2010, 167.

[108] Ewa Łętowska, Pozaprocesowe znaczenie uzasadnienia sądowego, Państwo i Prawo 5 (1997): 4.

the courts, which most often reach for the comparative method[109]. However, using this method *per se* does not guarantee the discursive nature of the reasons for the judgment. It depends on the representativeness of the sources selected for the comparative analysis and basing on these sources in their adequate (true) form, as well as on the reliability of the analysis itself in the sense of, above all, an objective statement of reasons for or against the solutions known to foreign law.

8. SUMMARY

References of Polish courts to common law in judgments are part or an exemplification of at least several court processes that mark the form of the domestic legal order, including its judicial decisions. Firstly, in the described judicial practice, one can detect some signs of formulating reasons for decisions with some elements of the discursive style with which is also correlated with the issue of legal argumentation or judicial rhetoric. Secondly, this practice is to some extent related to the aforementioned process of convergence of the civil law and common law cultures, although estimating the scale of the convergence phenomenon itself is an issue highly evaluative. Thirdly, the presence of the institution of precedent in the citizens' legal consciousness is translated into reference by them, as parties to the proceedings, to earlier judgments, which in turn forces courts to remind that this institution – in the sense of the *de iure* precedent – is governed by common law. Fourthly, in referring to common law by courts, one can see, if not necessarily the application of the classically understood comparative law method, at least a rudimentary form of comparative reasoning considering foreign law. Finally, along with the progressing processes of Europeanization and globalization, there are more and more court cases with the participation of the so-called "foreign element" whose examination with consideration of common law becomes justified and even necessary due to the subject matter of the case or the parties involved.

[109] Jerzy Leszczyński, O charakterze dyrektyw wykładni prawa, Państwo i Prawo 3 (2007): 41; Stanisław Czepita, Łukasz Pohl, Glosa do uchwały SN z dnia 29 października 2012 r., I KZP 12/12, Państwo i Prawo 10 (2014): 132–140.

A clear intensification of references to common law in the reasons for judicial decisions in the last decade, especially in the judgements of administrative courts and common courts, shows the fact that the distance between the orders of positive law and case law is not as great as it might seem *prima facie*. On the other hand, however, it would be an abuse and exaggeration, only because of the above-analysed practice of courts, to ignore still significant differences and distinctions between the civil law culture that is characteristic of Poland, and the common law culture.

Until recently, common law in Poland has been mainly of interest to domestic jurisprudence. The study of the judgments shows that the given legal system draws increasing attention and is the subject of an analysis and interpretation of Polish courts. At the same time, the article confirms the growing role of foreign law in the judicial decision-making process in European countries. Common law, being outside the Polish legal system, cannot act as the normative basis for a judgment, but it is a useful comparative reference point for judicial argumentation.

REFERENCES

Andenæs Mads, Fairgrieve Duncan, ed., 2015. Courts and Comparative Law, Oxford: Oxford University Press.

Balcerzak Michał. 2008. Zagadnienie precedensu w prawie międzynarodowym praw człowieka, Toruń: Dom Organizatora.

Bobek Michał. 2013. Comparative Reasoning in European Supreme Courts, Oxford: Oxford University Press.

Chybalski Piotr. 2019. Wykładnia komparatystyczna w orzecznictwie konstytucyjnym – zarys problemu, Temidum 2: 33–36.

Canivet Guy, Andenas Mads, Fairgrieve Duncan, ed., 2004. Comparative Law before the Courts, London: British Institute of International and Comparative Law.

Czepita Stanisław, Pohl Łukasz. 2014. Glosa do uchwały SN z dnia 29 października 2012 r., I KZP 12/12, Państwo i Prawo 10: 132–140.

Faircloth Peoples Lee. 2008. The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities, Syracuse Journal of International Law and Commerce 35: 219–273.

Filipczyk Hanna. 2013. Postulaty pewności prawa w wykładni operatywnej prawa podatkowego, Warszawa: Wolters Kluwer.
Groppi Tania, Ponthoreau Marie-Claire, ed., 2013. The Use of Foreign Precedents by Constitutional Judges, Oxford: Hart.
Kamiński Ireneusz Cezary. 2016. Źródła prawa w systemie common law, Rejent 3: 9–27.
Kołaczkowski Bartosz. 2014. Kształtowanie się regulacji prawnych zgromadzeń w Polsce oraz w wybranych krajach o anglosaskiej tradycji prawnej, Warszawa: C.H. Beck.
Koszowski Maciej. 2009. Anglosaska doktryna precedensu. Porównanie z polską praktyką orzeczniczą, Warszawa: Warszawska Firma Wydawnicza.
Krzeminska-Vamvaka Joanna. 2012. Courts as Comparatists: References to Foreign Law in the Case-Law of the Polish Constitutional Court, Jean Monnet Working Paper 5: 1–70.
Leszczyński Jerzy. 2007. O charakterze dyrektyw wykładni prawa, Państwo i Prawo 3: 28–44.
Leszczyński Leszek, Warunki korzystania z wcześniejszych decyzji sądowych w procesach stosowania prawa, In: Precedens sądowy w polskim porządku prawnym, Leszek Leszczyński, Bartosz Liżewski, Adam Szot, ed., Warszawa: C.H. Beck, 255–274.
Leszczyński Leszek, Precedens w porządku prawa stanowionego. Ujęcia polskiej nauki prawa, In: Precedens sądowy w polskim porządku prawnym, Leszek Leszczyński, Bartosz Liżewski, Adam Szot, ed., Warszawa: C.H. Beck, 3–20.
Leszczyński Leszek. 2015. Uzasadnienie sądowej decyzji stosowania prawa a walidacyjno-derywacyjne ujęcie wykładni operatywnej, In: Uzasadnienia decyzji stosowania prawa, M. Grochowski, I. Rzucidło-Grochowska, ed., Warszawa: Wolters Kluwer, 87–101.
Łętowska Ewa. 1997. Pozaprocesowe znaczenie uzasadnienia sądowego, Państwo i Prawo 5: 3–17.
Łokuciejwski Krzysztof. 2007. Common law, In: Leksykon współczesnej teorii i filozofii prawa, J. Zajadło, ed., Warszawa: C.H. Beck, 34–36.
Elaine Mak. 2015. Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts, Oxford: Hart Publishing.
Maroń Grzegorz. 2015. Przysięga i ślubowanie świadka w anglosaskim porządku prawnym, Przegląd Sądowy 11/12: 150–168.
Maroń Grzegorz. 2011. Wstęp do prawoznawstwa, Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego.

McCrudden Christopher. 2012/2013. Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared, Cambridge Yearbook of European Legal Studies 15: 383–415.

Nishino Kiichi. 1999. The Use of Foreign Law by Courts in Japan, In: The Use of Comparative Law by Courts, U. Drobnig, S. van Erp, ed., The Hague–London–Boston: Kluwer Law International, 223–230.

Płeszka Krzysztof. 2010. Wykładnia rozszerzająca, Warszawa: Wolters Kluwer.

Scheuring Krzysztof. 2010. Precedens w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej, Warszawa: Wolters Kluwer.

Slaughter Anne-Marie. 2000. Judicial Globalization, Virginia Journal of International Law 40: 1103–1124.

Śledzińska-Simon Anna, Wyrzykowski Mirosław, ed., 2010. Precedens w polskim systemie prawa, Warszawa.

Waldron Jerome. 2012. 'Partly Laws Common to All Mankind': Foreign Law in American Courts, New Haven: Yale University Press.

Wałachowska Monika. 2003. Macierzyństwo zastępcze w systemie common law, Państwo i Prawo 8: 97–107.

Zieliński Maciej. 2010. Wykładnia prawa. Zasady, reguły, wskazówki, Warszawa: LexisNexis.

Zoll Fryderyk. 2016. Argumentacja komparatystyczna w polskich sądach, In: Prawo obce w doktrynie prawa polskiego. Polska komparatystyka prawa, A. Wudarski, ed., Warszawa–Frankfurt nad Odrą: Stow. Notariuszy Rzeczypospolitej Polskiej, 119–132.

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PURSUIT OF NON-PECUNIARY LOSS AND PECUNIARY DAMAGE COMPENSATION FOR SPOILED HOLIDAY

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ABSTRACT

Since 1st July, 2018, the provisions of the 24th November, 2017 Act on package travel and linked travel arrangements, which deals with the rights of wronged tourists under the so-called spoiled holiday have been in force. The Act on package travel replaced the previous regulation, resulting from the 29th August 1997 Act on hotel tour leaders and tourist guides services, introducing a much broader scope of liability for entrepreneurs operating in the tourism industry, which was to facilitate the pursuit of claims. The article presents the method of repairing damage for the loss of pleasure from vacation in the previous and applicable legal status. Then, the author presents the course of court proceedings, both when the traveller decides to take group proceedings, as well as when he/she individually brings an action. The author draws attention to the need for the traveller to properly prepare for the civil proceedings due to the burden of proof on him/her, and also discusses the advantages and disadvantages of certain legal solutions.

Key words: wasted holidays, loss of vacation pleasure, lost leisure, compensation, damages, the pursuit of claims, compensation for non-pecuniary damage, improper performance of the contract

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1. INTRODUCTION

The current 24th November 2017 Act on package travel and linked travel arrangements[1] implements into national law the provisions of Directive (EU) on package travel and linked travel arrangements 2015/2302 of the European Parliament and of the Council of 25th November 2015, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC[2]. The new law deals with the tour operator's liability for the provision of travel arrangements, at the same time setting out the claims vested in the traveller for "spoiled holidays" or else *verba legis* for non-compliance with the contract, which shall be understood as the failure to perform or improper performance of travel arrangements covered by the package travel (Article 4 point 16).

From the point of view of current regulations, it is hard to believe that no more than two decades earlier, there occurred many legal problems against the background of the so-called travel contracts, among other things, linked to compensation claims for non-performance or improper performance of the contract. Difficulties were caused by pursuing claims for compensation of damage referred to as "loss of holiday pleasure", "lost leisure time" or "spoiled (lost) holiday", and in more detail, their legal qualification. Regardless of the travel damage which could arise – as a result of failure or improper performance of the travel contract by the tour operator – non-pecuniary loss has occurred also nearly in every case. The legal classification of pecuniary damage, resulting from the irregular performance of the travel contract raised no doubt, however, the juridical recognition of non-pecuniary loss, whose claims were focused on various facts was doubtful.

The purpose of the paper is to outline the procedural and substantive law aspects of claims for damages for spoiled holidays. Substantive law issues were presented only to the extent necessary to present the title issue.

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1 J. of L. of 2019, item 548 referred to hereinafter as Act on package travel.

2 Official Journal EU L 326 of 11.12.2015, p. 1.

2. COMPENSATION OF NON-PECUNIARY LOSS AND DAMAGE OF SPOILED HOLIDAYS

2.1. Claims for spoiled holidays

Compensation claims for non-performance or improper performance of a travel contract include both a claim for pecuniary damage compensation and for compensation of non-pecuniary loss. The qualification of individual forms of damage can give rise to doubts.

A claim for compensation of pecuniary damage includes the real damage to property (*damnum emergens*) and lost profits (*lucrum cessans*). On principle, a pecuniary damage is accompanied by a non-pecuniary loss. As an example, costs can be calculated e.g. lower standard of accommodation, cancellation of one of trips while package stay, purchase of airline tickets in other airlines, so as to return to the country as soon as possible, or purchase of clothes when the luggage does not reach the place of destination whose refund will not compensate for the loss of holiday pleasure[3]. The provision which allows to seek compensation of contractual liability was Art. 471 of the C.C., however, it was not easy to deal with non-pecuniary loss[4].

In the doctrine, there was ongoing discussion whether the lost holiday pleasure shall be classified as pecuniary damage or non-pecuniary loss. Including a spoiled holiday to the second of these categories raised further questions, namely, is the traveller entitled to compensation of non-pecuniary loss? Depending on the legislation, this legal issue was solved differently[5].

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[3] M. Ciemiński (2005), Naprawienie uszczerbku polegającego na utraconej przyjemności z podróży [Redress of detriment consisting in loss of pleasure at spoiled holiday], Kwartalnik Prawa Prywatnego [Quarterly], No. 2: 359 *et seq.*

[4] Confer: M. Nesterowicz (1988), Glosa do uchwały z dnia 25 lutego 1986 r., III CZP 2/86, [Gloss to resolution of 25th Febr. 1986], Nowe Prawo, No. 9: 114; M. Ciemiński, Naprawienie…, 364 *et seq.*

[5] I. Kuska-Żak (2008), Odpowiedzialność organizatora turystyki za szkodę niemajątkową powstałą na skutek niewykonania lub nienależytego wykonania umowy o imprezę turystyczną [Tourism organizer's liability for non-pecuniary compensation in case of non-performance or improper performance of travel package contract], In: P. Cybula, J. Raciborski, ed., Turystyka a prawo. Aktualne problemy legislacyjne i konstrukcyjne

Compensations of non-pecuniary loss were paid in those countries where the courts are free to decide on compensation (France, Belgium, Spain), while in other legal systems, as Poland for instance, where compensation of non-pecuniary loss can only be claimed in the cases laid down in the Act, such travellers' claims have never been taken into consideration (Germany, Austria, Greece, the Netherlands)[6].

In German jurisprudence, this problem was solved in such a way that it was assumed that the claim for spoiled holiday is of a pecuniary nature. Since acknowledging the non-pecuniary nature of this claim would close the way for travellers to pursue claims, as pursuant to § 253 Abs. 1 Bürgerliche Gesetzbuch (BGB)[7] compensation of non-pecuniary loss/damage (immaterieller Schaden) can be granted only in the cases specified in the Act, and before the implementation of EU Council Directive 90/314/EEC of 13 June 1990 such a basis did not exist[8]. In Austria, it was only after the implementation of Council Directive 90/314/EEC that it was recognized admissible to claim for non-pecuniary loss, arising from spoiled holidays. The judgment of the Court of Justice of 12th March 2002 in the case of *Simone Leitner v. TUI Deutschland GmbH & Co. KG* rendered as a result of a pre-judicial question from the Linz Regional Court (Landesgericht Linz) was a breakthrough for the proper interpretation of Art. 5 of the Directive. In answer to the question, the Court of Justice stated that Art. 5 of Directive 90/314/EEC granted consumers the right to compen-

[Tourist travels and law. Current legislation and construction issues], Sucha Beskidzka–Kraków, 125 *et seq*.; M. Nesterowicz (2011), Odpowiedzialność cywilna biura podróży za "zmarnowany urlop" w prawie polskim i porównawczym [Liability of travel agencies for *spoiled holiday* in Polish and comparative law] [at the background of the Supreme Court's resolution of 19th Nov. 2010], Przegląd Sądowy, No. 5: 5 *et seq*.; M. Nesterowicz (2011), Odpowiedzialność cywilna biur podróży w prawie francuskim [Liability of travel agencies in French law], Państwo i Prawo, No. 2: 34 *et seq*.

[6] Confer: M. Nesterowicz, Gloss…, 114. Confer also M. Nesterowicz (2002), Zadośćuczynienie pieniężne za "zmarnowany urlop" podczas wycieczki turystycznej [Pecuniary compensation for *spoiled holiday* at a package travel], Państwo i Prawo, No. 10: 73.

[7] German Civil Code of 18th August 1896 (Bürgerliche Gesetzbuch).

[8] More, confer: M. Nesterowicz, Zadośćuczynienie…, 73, 75.

sation of non-pecuniary loss, resulting from non-performance or improper performance of the service in the form of package holidays[9].

There have been no restrictions in the contractual liability regime in French law. Therefore, any damages resulting from debtor's breach of contract, regardless of their material or non-pecuniary nature, were subject to compensation. As a result of the implementation of Directive 90/314/EEC, the French legislator, in lieu of liability of a travel agency on the basis of fault, introduced liability on a risk basis *(le responsabilité de plein droit)*[10].

Currently, in the literature on the subject matter, the non-pecuniary nature of damage in the form of "spoiled holidays" does not give rise to doubt any more[11]. As is rightly emphasized in the doctrine, there is no detriment to the property of the wronged party caused in this respect; it is also obvious that the pleasure anticipated in connection with the travel (spoiled holidays), and not obtained as a result of non-performance or improper performance of the concluded contract, remains only in the sphere of the traveller's sensations and feelings, so it is a purely mental phenomenon, devoid of any material or commercial element[12].

The essence of compensation of non-pecuniary loss is to compensate the non-pecuniary damage, consisting in the loss of pleasant moments anticipated in connection with the conclusion of the contract, usually associated with travel, relaxing and leisure. The amount of compensation of non-pecuniary loss is an individual matter and each time depends on the assessment of the impact of the inconvenience suffered on the traveller's mental sphere and well-being, because just like every traveller has different

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[9] Judgement of the Court of Justice of the European Union of 12th March 2002, case No. C–168/00, Legalis No. 61534.

[10] M. Nesterowicz, Odpowiedzialność cywilna biur podróży w prawie francuskim, Państwo i Prawo 2011, No. 2: 40; K. Kryla-Cudna, Zadośćuczynienie pieniężne za szkodę niemajątkową powstałą wskutek niewykonania lub nienależytego wykonania umowy, Warszawa 2018, 220 *et seq*.

[11] J. Luzak, K. Osajda (2005), Odpowiedzialność za zmarnowany urlop w prawie polskim [Liability for spoiled holiday in Polish law], Kwartalnik Prawa Prywatnego, No. 2: 306 *et seq*.; M. Botiuk-Filip (2019), Problematyka odpowiedzialności turystycznych biur podróży za poniesione przez podróżnych szkody majątkowe i niemajątkowe [Problems of travel agencies' liability for pecuniary and non-pecuniary damage incurred by travellers], Przegląd Ustawodawstwa Gospodarczego, No. 3: 16 *et seq*.

[12] SC's resolution of 19.11.2010, III CZP 79/10, Legalis No. 260723.

expectations for the holiday, thus also other circumstances can ruin their holiday. In some cases, the damage to non-pecuniary goods estimated in this way, translated into the amount of compensation of non-pecuniary loss can go beyond the value of the services purchased.

2.2. Compensation of spoiled holiday damage in previous and current legal status

In consequence of the view, which was well-established under Art. 157 § 3 of the Code of Obligations[13] that compensation of non-pecuniary loss can be demanded only in the cases set out in the Act[14], originally, the legal basis for compensation of non-pecuniary loss for "spoiled holiday" was sought in Art. 56 of the C.C., and then, the existing instruments for the protection of personal rights were applied so that after fulfilling the other prerequisites of liability, it was possible to award damages pursuant to Art. 445 or 448 of the C.C.[15] In the literature on the subject, attempts to construe the right to undisturbed rest as a personal good have been made[16]. In its jurisprudence, the Supreme Court has repeatedly emphasized that the protection of personal rights is unique and the artificial extension of the catalogue of these goods is unjustified[17]. In the opinion of the Supreme Court, the right to peaceful rest (holiday) is not a personal good that falls within the catalogue of goods contained in Art. 23 of the C.C., although the conduct of the tourism organizer, leading to "spoiled holiday", can

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[13] L. Peiper (1934), Kodeks zobowiązań [The Law of Contracts], Kraków, 206, 208.

[14] Similar solutions function in Germany (§ 253 Abs. 1 BGB), Austria (§ 1293 Abs. 1 ABGB), Greece, the Netherlands. As to France, Belgium and Spain, their courts are free to allow non-pecuniary loss compensation which depends on the court's discretion. More, confer: M. Nesterowicz, Zadośćuczynienie [Pecuniary], 73.

[15] Thus S.C. in its resolution of 19.11.2010, III CZP 79/10, Legalis No. 260723.

[16] Confer: G. Siedlecki (2014), Zadośćuczynienie za zmarnowany urlop [Non-pecuniary loss compensation for spoiled holiday], Studenckie Zeszyty Naukowe, No. 24: 42 *et seq*.; P. Zasuwik (2016), Odpowiedzialność organizatora turystyki za szkodę niemajątkową klienta w postaci tzw. zmarnowanego urlopu [Tourism organizer's liability for non-pecuniary loss in form of so-called spoiled holiday) – gloss – III CZP 79/10, Monitor Prawniczy, No. 24: 1329 *et seq*.

[17] SC's resolution of 19.11.2010, III CZP 79/10, Legalis No. 260723.

breach personal rights, for example, listed in Art. 24 of the C.C., including in particular health, integrity or personal freedom[18].

The situation changed after the entry into force of the 29th August 1997 Act on hotel tour leaders and tourist guides services[19]. Article 11a introduced by this Act was the equivalent of art. 5 subparagraphs 1 and 2 of Directive 90/314/EEC[20], which laid down the tour operator's liability for damage caused to a traveller as a result of non-performance or improper performance of the contract[21]. Pursuant thereto, in its 19th November 2010 resolution, the Supreme Court decided that Art. 11a subparagraph 1 of the Act on package travel may make up the grounds for the tour operator's liability related to non-pecuniary loss of the traveller in form of the so-called spoiled holiday[22]. The tour operator's liability has its source in the contractual liability, which means that it includes not only the obligation to compensate the pecuniary damage[23]. In accordance with Art. 11a subpara. 1 of the Act on package travel, the tour operator is liable for the non-performance or improper performance of the contract related to the provision of package travel, unless the non-performance or improper per-

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[18] Thus SC in judgement of 24.03.2011, I CSK 372/10, Legalis No. 354220. Confer also Warsaw Appellate Court's judgement of 29.04.2013, VI ACa 1357/12, Legalis No. 1049404.

[19] J. of L. of 2017, item 1553, referred to hereinafter as the Act on package travel.

[20] Directive of the Council No. 90/314/EEC of 13th June 1990 on package travel, package holidays and package tours [Official Journal of EU L 158, p. 59). More, confer: M. Nesterowicz (1996), Dyrektywa Rady Wspólnot Europejskich o podróżach turystycznych a prawo polskie [Directive of the Council of the European Communities on package travel and Polish law], Kwartalnik Prawa Prywatnego, No. 3: 435 *et seq.;* E. Bagińska, A. Osowska-Kowalska (2013), Dyrektywa 90/314/EWG o podróżach turystycznych – perspektywy zmian [Directive on package travel 90/314/EEC – prospects of changes], In: M. Nesterowicz, ed., Odpowiedzialność biur podróży a ochrona klientów w prawie polskim i Unii Europejskiej [Travel agencies' liability and protection of travellers in Polish and European Union Laws], Toruń, 23 *et seq*.

[21] Confer: M. Nesterowicz, Zadośćuczynienie…, 73.

[22] SC's resolution of 19.11.2010, III CZP 79/10, Legalis No. 260723. See also: the SC's judgement of 24.03.2011, I CSK 372/10, Legalis No. 354220.

[23] The SC's 19.11.2010 resolution expresses (by the pro-Union interpretation which allows to achieve the intermediate effect of the directive's application) the idea of mitigating the result of non-full implementation by Polish legislator of all regulations, arising from Directive 90/314 – thus P. Zasuwik, Odpowiedzialność…, 1332.

formance is caused exclusively by the customer's acting or omission to act, acting or omission to act of others, not participating in the performance of the services provided for in the contract, if this acting or omission to act could be neither forecast nor avoided or in the case of force majeure[24].

The exclusion of liability for non-performance or improper performance of the contract, however, did not release the tour operator from the obligation to assist the wronged customer during the package travel. Article 11a of the Act on package travel, to the extent that it permitted compensation of damage caused by non-performance or improper performance of a package travel contract, was a special provision in relation to Art. 471 of the C.C. The provisions of the C.C. applied to the liability for non-performance or improper performance of travel contract only to the extent not dealt with in the Act on package travel[25].

The 19th November, 2010 resolution of the Supreme Court[26] dispelled doubts that arose with regard to the Polish legislator having implemented incompletely the regulations, resulting from Directive 90/314/EEC[27]. In Art. 11a of the Act on package travel, the legislator created an independent, autonomous basis for contractual liability, based in the regulation of EU law[28].

Since 1st July, 2018, the provisions of the 24th November, 2017 Act on package travel and linked travel arrangements[29], which deals with the rights of wronged tourists under the so-called spoiled holiday have been in

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[24] Due to the implementation of Directive (EU) on package travel and linked travel arrangements 2015/2302 of the European Parliament and of the Council of 25th November, 2015, similar legal solutions regarding compensation for wasted holidays will operate in the Member States. Para. 651n BGB, effective since 1st July, 2018, may be an example.

[25] Confer: M. Nesterowicz, Zadośćuczynienie…, 72.

[26] SC's resolution of 19.11.2010, III CZP 79/10, Legalis No. 260723.

[27] The recognition that the relevant regulation which would allow to pursue claims for spoiled holiday is missing in Polish legislation would give rise to the liability of the State for the damage incurred as effect of non-implementation or faulty implementation by the Member State of Directive 90/314/EEC. Thus: M. Ciemiński, Naprawienie…, 358; E. Bagińska, A. Osowska-Kowalska, Dyrektywa…, 25 *et seq*.

[28] SC's resolution of 19.11.2010, III CZP 79/10, Legalis No. 260723. Confer: also the statement of reasons for a draft bill to amend the 29th August 1997 Act on tourist services, Parliament of Tenure of Office III, published in print No. 2089.

[29] J. of L. of 2019, item 548.

force. The Act in force transposes into the national legal order the provisions of 25th November, 2015 2015/2302/EU Directive of the European Parliament and of the Council on package travel and linked travel arrangements, amending Regulation (EC) No. 2006/2004 and the Directive of the European Parliament and of the Council 2011/83/EU and repealing Council Directive 90/314/EEC[30]. The Act on package travel have replaced the previous regulation, resulting from the Act on package travel[31], introducing a much broader scope of liability for entrepreneurs operating in the tourism industry, which was to facilitate the pursuit of claims. Pursuant to Art. 50 subpara. 2 of the Act on package travel, the traveller is vested with the right to compensation for any damage or harm sustained as a result of non-compliance. The tour operator can be released of their liability if they prove that: 1) the traveller is at fault for the non-compliance; 2) another party, unrelated to the provision of travel services covered by the contract for the package travel is at fault and the non-compliance was unforeseeable and unavoidable; 3) the non-compliance was caused by unavoidable and extraordinary reasons.

Mirosław Nesterowicz rightly draws attention to the incorrect implementation of the Directive[32]. As he notes, points 1 and 2 of Art. 50 subpara. 3 of the Act on package travel, introduce the fault of the traveller and the fault of a third party as conditions to exclude the responsibility of the tour operator, in breach of Directive 2015/2302. Article 14 subpara. 3 of the Directive refers to a non-compliance which may be attributed to a traveller or a third party unrelated to the provision of travel services covered by the contract, not to their fault[33]. Thus, if Art. 14 subpara. 3 of the Directive does not mention fault, in this case, while interpreting the

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[30] More: M. Nesterowicz (2018), Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży [Directive of the European Union on package travel and linked travel arrangements its implementation into Polish law and liability of travel agencies], Przegląd Sądowy, No. 9: 44–57.

[31] J. of L. of 2017, item 1553.

[32] M. Nesterowicz (2018), In: Prawo zobowiązań – część szczegółowa [The Law of Contracts – special part], System Prawa Prywatnego [Private Law System). Vol. 7, J. Rajski, ed., Warszawa, 1181 *et seq*.

[33] Thus M. Nesterowicz, In: Prawo zobowiązań…, 1181 *et seq*.

Directive strictly, the act or omission of the traveller or a third party does not need to be at fault. In such a situation, examining a particular case the court shall apply the Directive, not Polish law, or refer to the Court of Justice a question for a preliminary ruling on the interpretation of Art. 14 subpara. 3 of this Directive in conjunction with Art. 50 subpara. 3 of the Act on package travel[34].

3. PURSUIT BY TRAVELLERS OF CLAIMS FOR SPOILED HOLIDAY

3.1. General comments

In practice of applying the law, the legal basis for pursuing non-pecuniary claims for spoiled holiday raises no doubt any more. The traveller does not have to be afraid that the court will dismiss their action, considering that their claim has no legal justification[35], however, this does not mean that obtaining non-pecuniary loss compensation or even pecuniary damage compensation in this respect is an easy task.

It needs to be kept in mind that the pursuit of claims in a civil trial, which is adversarial, is primarily related to demonstrating evidence. Regardless of the need to prove the reasons for the claim pursued, first of all, the traveller shall decide which claim they want to assert, whether they want to claim damages, or compensation of non-pecuniary loss, as well as who is the defendant in case of their claims. When deciding to file a claim for compensation of non-pecuniary loss for spoiled holiday, the choice remains between out-of-court proceedings, mediation included[36], and judicial trial proceedings. The traveller may bring an action individually or decide to participate in group proceedings. The traveller can choose group proceedings, if they find out that pursuing a claim in such proceedings is

[34] M. Nesterowicz, In: Prawo zobowiązań…, 1182.

[35] Confer: M. Nesterowicz, Gloss…, 113 *et seq*.

[36] More thereon: K. Gajda-Roszczynialska (2012), Sprawy o ochronę indywidualnych interesów konsumentów w postępowaniu cywilnym [Cases for protection of individual consumers' rights], Warszawa, 408 *et seq*.

more favourable than an individual action, for instance because of court costs, e.g. when suing the tour operator for very small claims[37].

Since 1st July, 2018, i.e. since the Act on package travel entered into force, the traveller has had three years to seek redress, without the need to apply the complaint procedure (Article 50 subpara. 4 of the Act on package travel). Under the previously applicable Act on package travel, it was necessary, notwithstanding immediate notification of defective performance of the contract, to file a complaint within 30 days of the end of the package travel (Article 16 b)[38]. It was a strict time limit and as a consequence, the failure to comply therewith resulted in the dismissal of the claim[39].

3.2. Claims in group proceedings

Group proceedings are civil proceedings, although the provisions of the Code of Civil Proceedings apply thereto accordingly only to the extent not covered by the Act on claims pursuing in group proceedings of 17th December, 2009[40].

Group proceedings have several significant differences from the so-called ordinary civil proceedings. First of all, group proceedings are admitted, if the conditions for these proceedings admissibility are cumulative, both as to their subject and object. These prerequisites include the same type of claims of group members, the identity or the sameness of factual grounds for the group members' claims, the number of the group members (minimum 10 people), the unification of monetary

[37] Thus M. Sieradzka, Dochodzenie roszczeń w postępowaniu grupowym [Claims pursuit in group proceedings], Warszawa 2018, 33.

[38] P. Piskozub (2015), Reklamacja imprezy turystycznej [Claim against a package travel], Edukacja Prawnicza, No. 1: 22 *et seq*.; K. Maciąg (2018), Ochrona podróżnego na tle ustawy o imprezach turystycznych i powiązanych usługach turystycznych oraz ustawy o usługach turystycznych – analiza porównawcza [Traveller's protection at the background of the Act on package travel and linked travel arrangements – comparative analysis], IKAR, No. 4, Legalis.

[39] More: M. Nesterowicz, Prawo turystyczne [Tourist Law], Warszawa 2016, 117 *et seq*.

[40] J. of L. of 2018, item 573, hereinafter referred to as group proc.

claims, and the features of claims which allow them to be cognized in group proceedings[41].

In group proceedings, different in their course from the so-called ordinary civil proceedings, three phases can be distinguished: the first one starts when the claim is filed and ends when the decision to examine the case in group proceedings (Article 6, Article 10 of the Act on-group proc.) is taken, the second phase initiated by the announcement of the group proceedings being started, consists in the final setting out the composition of the group (Article 11, Article 17 of the Act on-group proc.), while the third phase of the proceedings focuses on the examination of the case and ends, awarding a judgment which, after becoming of force of law, has effect towards all members of the group (Article 21 subpara. 3 of the Act on-group proc.)[42]. Cases that qualify for consideration in group proceedings are heard by the regional court composed of three professional judges (Article 3 of the Act on-group proc.).

Cases for compensation of non-pecuniary loss and damage of spoiled holiday belong to subject matters of group proceedings (Article 1 subpara. 2 of the Act on-group proc.), however, at least 10 people are required to file the group proceedings and pursue together one type of claims based on the same or on the same kind of factual basis. While meeting the admissibility conditions for group proceedings of the same type claims of group members, the identity or the sameness of the factual basis would not be difficult to be met for travellers who took part in the same travel, it could be difficult to make the amounts of group members' claims uniform. The simplest way to make the claims of group or subgroup (with a minimum of 2 people) members equal is to reduce their value, which would generally mean giving up a part of the claims by those whose claims are higher. The value of group proceedings is undoubtedly their lower cost (Article 13d of the ACCCC), which additionally is spread out over a larger number of people pursuing

[41] Thus the Warsaw Regional Court in decision of 24.7.2013, XX GC 1004/12, Legalis No. 1559969.

[42] M. Asłanowicz (2019), Ustawa o dochodzeniu roszczeń w postępowaniu grupowym [Act on claims pursuit in group proceedings]. Komentarz, Warszawa, commentary to Art. 1, theses 8–11.

their claims[43]. In addition, a group representative and the barrister, acting on behalf of the group (Art. 4 of the Act on-group proc.), along with the other group members not being active in group proceedings, which may also be an incentive to use this form of pursuing the compensation[44].

In cases of monetary claims, it is also possible to bring a group action in which the claim is limited to setting out the defendant's liability for a specific event or events. In this case, the claimant need not prove their legal interest to establish the right. The court, allowing the claim to determine the defendant's liability for a given event or events, establishes the circumstances common to the members of the group which make up the prerequisites for the claims they pursue (Article 2 subpara. 3 and 4 of the Act on group proc.). Such a judgment, determining the liability of the defendant, facilitates the claimants to pursue claims in individual proceedings[45].

3.3. Claims in so-called ordinary proceedings

If the traveller decides to pursue compensation in court proceedings, the compensation of non-pecuniary loss or of pecuniary damage for spoiled holiday qualifies to be cognized in a civil proceedings court trial.

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[43] Pursuant to Art. 13d of the 28th July 2005 Act on court costs in civil cases (J. of L. of 2019, item 785 hereinafter referred to as ACCCC) in cases for pecuniary rights pursued in group proceedings, the standing fee or value-related fee amounts to one half of the fee set out pursuant to Art. 13, Art. 13a and Art. 13b, however, to not less than PLN 100 and to not more than PLN 200 000. In cases heard in group proceedings, the group representative who initiates the action shall request the court to set out a temporary fee from the action. In accordance with Art. 15 subpara. 2 of the ACCCC, the temporary fee is set out, ranging from PLN 300 to PLN 20 000. Such a request missing, this shall have such an effect that every change within the group members will require paying a supplementary fee on the action when new members join the action. Thus D. Szostek, In: J. Gołaczyński, D. Szostek, ed., (2019), Kodeks postępowania cywilnego [The Code of Civil Proceedings]. Komentarz do ustawy [Commentary to the 4.7.2019 Act on amendments to the Law – The Code of Civil Proceedings and some other laws], Warszawa, commentary to Art. 13d of the ACCCC thesis 4.

[44] A. Tomaszek (2010), Pełnomocnik powoda w polskim postępowaniu grupowym [Claimant's representative in Polish group proceedings], Monitor Prawniczy, No. 12: 667 *et seq*.

[45] Judgement of Poznań Appellate Court of 12th December 2017, I ACa 632/17, Legalis No. 1717465.

The civil proceedings are divided into ordinary proceedings and separate proceedings. As a rule, cases are heard in proceedings run on general principles, called ordinary proceedings, to distinguish them from separate ones dealt with in the CCP.

A traveller can make claims for spoiled holiday on their own, although the most common in the case law of common courts are the claims for compensation filed by several travellers, which is understandable, as the claim for compensation is most frequently filed by family or friends who spent their holidays together. Then, owing to one action being filed against the organizer of tourism, formal joint co-participation takes place on behalf of the claimant. In accordance with Art. 72 § 1 point 2 of the CCP the formal joint co-participation occurs when one type claims or obligations are based on the same factual and legal basis, if, moreover, the court's jurisdiction is justified for each claim or liability separately, as well as for all of them jointly (formal joint co-participation). In this case, each traveller claims exclusively their pecuniary or non-pecuniary claim or else both of them at the amount laid down by them. This is undoubtedly a convenient solution owing to the chance of cooperating between the claimants and although each of the co-participants bears the process costs related to their participation in the proceedings, some of the costs, spread over several claimants, will be obviously lower, such as expenditure on evidence of an expert opinion or remuneration for one barrister retained by all formal participants.

The course of civil proceedings with regard to compensation of spoiled holiday does not differ from other compensation processes, however, the specificity of the subject matter of the travel contract has it that it requires the process to be prepared with due care, in particular in the field of evidence.

4. THE COURSE OF SO-CALLED ORDINARY PROCEEDINGS

4.1. Court jurisdiction

When initiating an action for material claims, one of which is the claim of pecuniary compensation, or non-pecuniary loss compensation

the court *ratione materiae* jurisdiction depends upon the value of the dispute subject-matter, and thus the amount claimed. The value of the dispute subject-matter is counted without interest and costs demanded in addition to the main claim (Article 20 of the CCP), so depending on the amount of the main claim, the district court is competent to hear the case at first instance when the value of the subject-matter of the dispute does not exceed PLN 75,000 but if it is higher, then, the case belongs to the jurisdiction of the regional court.

Starting the proceedings, the travellers may choose between general local venue and bring their action, according to the defendant's place of residence or seat (Art. 27, Art. 28 and Art. 30 of the CCP) or apply the alternate court competence, bringing the claim against an entrepreneur before the court in whose region the main plant or branch is located, if the claim is related to the operation of this plant or branch (Art. 33 of the CCP). In turn, an action for the conclusion of a contract, establishing its content, for its amending and for establishing the existence of a contract, for its performance, termination or annulment, as well as for compensation of non-performance or improper performance of the contract may be initiated before a court of the place of contract performance (Article 34 § 1 of the CCP). On the other hand, an action for a claim, arising out of tort may be brought before the court in whose region the event which caused the damage occurred (Article 35 of the CCP).

4.2. Formal and fiscal conditions of the action

To initiate an action successfully, it is necessary to meet the formal conditions of the lawsuit, including the general formal conditions of the procedural writ under Art. 126 of the CCP and elements characteristic for this very writ, i.e. precisely specified pleadings and an indication of the facts on which the claimant bases their pleas (Article 187 § 1 of the CCP). The claim pleadings set out the scope of legal protection sought by the claimant, which the court is bound by when examining the case (Art. 321 § 1 of the CCP)[46]. A claim must be paid, depending on the value of

[46] K. Weitz (2011), Związanie sądu granicami żądania w procesie cywilnym [The court being bound by the pleadings in the civil proceedings], In: Aurea Praxis Aurea

the subject of the dispute, which in the event of a claim for damages is the amount of money claimed by the claimant (Article 13 of the C.C.). A party that is not able to bear the costs without prejudice to themselves and the family may, of course, request an exemption from court costs by submitting a property declaration form that will allow the court to assess the justification of the application submitted by the claimant (Article 102 of the ACCCC).

4.3. Subjective and objective scope of proceedings

A passenger bringing an action shall decide against whom they are pleading, e.g. claiming a delayed flight – against the tour operator or against the carrier. The correct identification of the defendant, its organizational and legal form included, is necessary, from the point of view of the formal prerequisites of the statement of claims, assessment of the defendant's legal and procedural capacity, as well as, for the assessment of the defendant's capacity to be a party to proceedings. Incorrectly identifying the defendant an entity which is not the addressee of the traveller's claims will cause dismissal of the action.

Regardless of which of the claims the traveller chooses, they shall specify the pleadings which shall be binding for the court. The court may not adjudge on an object not covered by the pleadings nor judge above the pleadings (Article 321 § 1 of the CCP)[47]. To set out the amount of one or the other compensation is only seemingly easy. It is known that the compensation includes real damage to property (*damnum emergens*) and lost benefits (*lucrum cessans*), but what does this mean in practice? A traveller who was accommodated in a room of a lower standard shall determine the difference between the price of the room he was given and the room he had booked. This task seems feasible. However, it will be more

Theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego [Commemorative book devoted to the memory of prof. Tadeusz Ereciński], vol. 1, K. Weitz, J. Gudowski, ed., Warszawa, 679 *et seq*.

[47] J. Misztal-Konecka (2012), Zakaz wyrokowania ponad żądanie strony ('Ne eat iudex ultra petita partium') – rzymskie tradycje i współczesne regulacje polskiego procesowego prawa cywilnego [Prohibition to allow more than claimed by the party – Roman traditions and contemporary regulations of Polish civil law], Zeszyty Prawnicze, No. 12.4: 41 *et seq*.

difficult if, for example, the event organizer did not carry out one of the trips that were on the package travel programme. Of course, the cost shall be determined, but in practice, it means that this information is held by the event organizer, and bringing an action, the traveller must specify the amount of the claim for compensation already at this stage, and therefore, in the content of the statement of claims. Without an obligation imposed on the defendant, the event organizer, to submit to the court pursuant to Art. 248 § 1 of the CCP the information about the cost of the trip not effected, it is very difficult to set out precisely the loss suffered. When setting out the amount of compensation of non-pecuniary loss, a traveller will often be guided by their subjective feelings about the extent of harm, resulting from a spoiled holiday. The analysis of the case law of common courts in cases, concerning compensation of non-pecuniary loss, even if only for detriment to health, shows far-reaching differences, not so much in the evaluation of the prerequisites, affecting setting out the size of the damage, but its amount[48]. Similarly, in respect of a claim for non-pecuniary compensation of spoiled holiday, the loss of rest, the loss of pleasure from holiday, the harm suffered by the traveller will be evaluated by the court *ad causam*[49].

The scope of the claims pursued is also under the impact of the traveller's decision whether they assert claims against the event organizer or the carrier. In the case, the traveller gets compensation or a price reduction for cancelled or delayed flights, train travel or boat voyage, the amounts of compensation claims or price lowering for spoiled holiday shall be correspondingly reduced (Article 50 subpara. 7 of the Act on package travel).

Theoretically, there are no restrictions, so the traveller can sue parallelly the carrier for a delayed or cancelled flight, and additionally the tour operator for "spoiled holiday", but they shall be aware that compensation obtained from one title affects the amount of the other claims asserted.

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[48] M. Nesterowicz, In: Prawo zobowiązań…, 1178. Confer also: SC's judgements of 18th December 1975, I CR 862/75, LEX No. 7781 and of 5th December 2006, II PK 102/06, OSNP 2008, No. 1-2, item 11.

[49] With reference to difficulties to prove the amount of non-pecuniary loss confer: A. Koronkiewicz-Wiórek (2009), Zmarnowany urlop w praktyce – kilka uwag na tle orzecznictwa sądów wrocławskich [Spoiled holiday in practice, a few comments at the background of Wrocław courts' judgements], Rejent, No. 6: 69 *et seq*.

Article 50 subpara. 7 of the Act on package travel is consistent with the general rules, arising from the C.C., that damage, resulting from one event cannot be a source of enrichment.

Therefore, to assert non-pecuniary and pecuniary compensation for a delayed or cancelled flight or voyage included, against the tour operator seems a much better solution for the traveller. The tourism organizer is entitled to a recourse claim against any third party that has contributed to the event, causing a price reduction or resulting in the necessity to pay compensation referred to in Art. 50 subpara. 1 and 2 of the Act on package travel.

4.4. Proceedings to take evidence

Taking evidence is a very important stage for the outcome of the civil trial. The burden of proof (*onus probandi*) charges the claimant – they must prove the premises of the defendant's liability for damage, i.e. failure to perform or improper performance of the contract, occurrence of damage and an adequate causal link between the damage and the event that has caused it[50]. The court may, despite the damage suffered by the traveller, dismiss the action if the claimant fails to prove that the claim for pecuniary or non-pecuniary compensation is justified, i.e. when the damage is not in an adequate causal link with the non-performance or improper performance of the contract or when the claimant has not proved the damage or its amount[51]. This means that the traveller must try to gather evidence,

[50] Confer: M. Wałachowska (2013), Odszkodowanie za niewykonanie lub nienależyte wykonanie umowy o podróż i zadośćuczynienie za "zmarnowany urlop" [Compensation for non-performance or improper performance of a travel contract and non-pecuniary loss compensation of *spoiled holiday*], In: Odpowiedzialność biur podróży a ochrona klientów w prawie polskim i Unii Europejskiej [Travel agencies' liability and protection of travellers in Polish and European Union Laws], M. Nesterowicz, ed., Toruń, 66.

[51] The system of compensation liability shall also influence the shape of evidence-taking proceedings along with the range of liability of the tourism organizer. The same event may constitute the reason for tort and contract liability. More on the liability concurrence: M. Nesterowicz (2013), Podstawy i granice odpowiedzialności cywilnej biur podróży [The grounds and boundaries of travel agencies' liability], In: M. Nesterowicz, ed., Odpowiedzialność biur podróży a ochrona klientów w prawie polskim i Unii Europejskiej [Travel

photos, videos, documents, and data of witnesses able to confirm the facts, justifying the claim, already during their spoiled holiday, for instance services of a lower standard accommodation, poorer quality of food, of service or other types of inconvenience associated with getting the so-called substitute benefits to replace those granted in the contract. Owing to the open catalogue of evidence, it is possible to demonstrate the validity of the claim by means of all available evidence. Given the nature of compensation claims, the recordings, photos and, of course, testimonies of witnesses in a position to confirm that the recordings of image and sound are those exactly showing the tourist event in question will be of great importance.

4.5 Decision concluding the case

In civil proceedings, the court rules in the form of a judgment on the substantive matters. It is also possible to render an order for payment in order proceedings, proceedings by writ of payment for minor amounts or electronic writ proceedings, if the claimant chooses to use one of these expedited proceedings and the case qualifies to be examined in these proceedings[52]. The order for payment is always a decision, granting the claim in full. By judgment, the court may allow the claim in whole or in part, dismiss the remainder or dismiss the claim in its entirety. An action may be dismissed not only when the action is unfounded, because the traveller failed to prove either the reasons for the claim, or its amount or did not justify the premises for liability for damage, or else the court was of the opinion that the damage suffered by the traveller was not in an adequate causal link with the damage event which had occurred. The court will also dismiss the action when the right to be sued is missing, i.e. when the action was addressed against the wrong person or the claimant's claim is time-barred.

Allowing the claim, the court will encounter the same doubts that the traveller themselves had to face while trying to set out the amount

agencies' liability and protection of travellers in Polish and European Union Laws], Toruń, 12 *et seq.*; M. Wałachowska, Odszkodowanie…, 69 *et seq*.

[52] With the exception of the proceedings by writ for a lesser value on the application of which the court decides (Art. 201 § 1 of the CCP).

of damage. While the property claim is measurable, the harm suffered is invariably difficult to be valued. The jurisprudence of common courts has not yet developed a way to calculate non-pecuniary loss compensation that could provide travellers or their barristers with *sui generis* reference point to facilitate to establish its amount.

Analyzing the solutions adopted in the laws of other countries, it can be noticed that each time the general question of how the courts could compute damages for disappointment and loss of comfort was an issue. Common law damages are limited to consequences that are not too remote and damages will only be recoverable for losses that arise naturally from the breach or are actually contemplated as a probable result of the breach[53]. In common law countries, just as in countries with a continental legal system, determining the amount of compensation is also of an evaluative nature[54].

The judgment in *Jarvis v Swans Tours* had a breakthrough significance for the case law in common law states. The Court of Appeal in London awarded the traveller a compensation for wasted holidays which exceeded the value of the trip. From now on, it has been recognized that if the subject of the contract was to provide pleasure, relaxation and rest during the holidays, then the feeling of discomfort, inconvenience and nervousness should be considered as damage. It is treated as a breach of contract. Nowadays at common law, violations of contract are usually remedied by an award of damages[55]. This decision affected case law in other countries, e.g. Australia[56].

In Germany, attempts to calculate the amount of compensation in appointment by the amount of remuneration were made by dividing the average monthly net income of the injured party by 30 days. The day rate was multiplied by the number of days of wasted vacation, thus obtaining the amount of compensation. Not all courts used this method of counting

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[53] Confer: Philip J. Evans, Spoiled Holidays: Damages for Disappointment or Distress, The Tourism Industry 2004, Vol. 6: 1; https://researchonline.nd.edu.au/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1012&context=law_article [date of access: 20.03.2020]; M. Nesterowicz, Prawo…, 113.

[54] Philip J. Evans, Spoiled…, 4.

[55] Philip J. Evans, Spoiled…, 1; https://researchonline.nd.edu.au/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1012&context=law_article [date of access: 20.03.2020].

[56] Philip J. Evans, Spoiled…, 3.

because it made the amount of compensation for damages suffered during the same trip dependent on the amount of remuneration, leaving the issue open to those who are not employed[57].

When trying to set out the amount of claim, the so-called Frankfurt Table[58] could be used as a help. The table, commissioned by the Frankfurt am Main Court (Frankfurter Landgericht), is not binding even in Germany, but it is a *sui generis* benchmark how to calculate the amount of travellers' claims against German travel agencies. The table, in four sections, contains an open catalogue of benefits, in which were calculated per cents of hypothetical breaches with regard to, among other services, accommodation, meals, transport[59]. The Frankfurt table is also increasingly used in other countries, for instance in Austria and Poland[60].

The court assesses the validity of claims for non-pecuniary loss and pecuniary damage compensation of a spoiled holiday, based on the facts of the given case analysed with the use of their knowledge and experience.

The proceedings for non-pecuniary loss or pecuniary damage compensation can also be concluded by the decision to discontinue the proceedings. This occurs either when the parties succeed in reaching a settlement in court or when the claimant successfully withdraws the lawsuit. The court's decision, concluding the case in an instance also contains a decision on the costs of the trial (Article 108 of the CCP). As a rule, in accordance with the principle of responsibility for the outcome of the trial, the losing party pays the costs of proceedings (Article 98 of the CCP), but if the action has been allowed in part, the court may correspondingly divide the costs of the process between the parties (Article 100 of the CCP), guided by the proportion of losing to winning.

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[57] More, confer: M. Nesterowicz, Prawo…, 110 *et seq*.

[58] https://www.rechtspraxis.de/frankfurt.htm [date of access: 3.02.2020].

[59] A. Chambellan (2013), Tabela frankfurcka jako wzorzec rozstrzygania sporów pomiędzy biurami podróży a klientami w Niemczech [The Frankfurt table as a benchmark to solve problems between travellers and travel offices], In: M. Nesterowicz, ed., Odpowiedzialność biur podróży a ochrona klientów w prawie polskim i Unii Europejskiej [Travel agencies' liability and protection of travellers in Polish and European Union Laws], Toruń, 126 *et seq*.

[60] A. Chambellan, Tabela…, 130 *et seq*.

6. CONCLUSIONS

Holidays, travel and leisure breaks are no longer the privilege of a limited group of people, but become a consumer product for a growing number of travellers. Nowadays holidays play an important role in life and effective enjoyment is value in its self, worth protecting. Due to the implementation of the Directive (EU) on package travel and linked travel arrangements 2015/2302 of the European Parliament and of the Council, similar legal solutions regarding compensation for wasted holidays will operate in the Member States. The Court of Justice of the European Union provides consistent interpretation of the EU law in all EU countries and its appliance by EU countries and institutions. The judicial decisions of the Court of Justice of the EU contributed to the gradual internalization of common values by domestic legal systems.

The polish Act on package travel and linked travel arrangements has been in force only since 1st July, 2018, and it is too early to evaluate whether new legal instruments will facilitate travellers' claims for compensation of spoiled holidays. Transitory provisions provide that proceedings initiated and not concluded by the date of entry into force of the Act, i.e. by 1st July, 2018, shall be conducted on the basis of the existing principles, i.e. in accordance with the solutions of the previous Act on tourist services (Article 73 of the Act on package travel). The case law in this area is relatively modest. Theoretically, the new regulation shall allow tourists to pursue at least some claims without having to go to court. There are appropriate legal instruments therefor. However, if it becomes necessary to pursue claims before a court, the traveller must properly prepare for this step by choosing an individual or group action. Certainly, the choice shall be preceded by an analysis of the costs of proceedings, the value of the evidence gathered, because the burden of proof charges the traveller who asserts claims for spoiled holiday, both in terms of evidence to prove the prerequisites for their right to compensation from the person responsible for the damage and its amount. Difficulties in proving the justification or amount of the claims, if any, have a direct impact on the outcome of the proceedings, the obligation to pay the costs of the trial or at least share them in a part included.

At the moment, despite the existence of a clear substantive law basis to claim for compensation of spoiled holidays, the courts take into account the actions of those wronged, granting compensation, but these amounts are relatively low. It shall be expected that the amounts awarded by courts for non-pecuniary compensation of spoiled holidays will keep growing each year until they reach average European compensation rates. We will be looking forward to see the courts' approach to awarding the amount of non-pecuniary loss compensation, which may, after all, exceed the value of the trip itself.

REFERENCES

Asłanowicz M. (2019), Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz, Warszawa: C.H. Beck.

Bagińska E., Osowska-Kowalska A. (2013), Dyrektywa 90/314/EWG o podróżach turystycznych – perspektywy zmian, In: M. Nesterowicz, ed., Odpowiedzialność biur podróży a ochrona klientów w prawie polskim i Unii Europejskiej, Toruń: Wyższa Szkoła Bankowa w Toruniu, 23–40.

Botiuk-Filip M. (2019), Problematyka odpowiedzialności turystycznych biur podróży za poniesione przez podróżnych szkody majątkowe i niemajątkowe, Przegląd Ustawodawstwa Gospodarczego, No. 3: 15–18.

Chambellan A. (2013), Tabela frankfurcka jako wzorzec rozstrzygania sporów pomiędzy biurami podróży a klientami w Niemczech, In: M. Nesterowicz, ed., Odpowiedzialność biur podróży a ochrona klientów w prawie polskim i Unii Europejskiej, Toruń: Wyższa Szkoła Bankowa w Toruniu, 125–135.

Ciemiński M. (2005), Naprawienie uszczerbku polegającego na utraconej przyjemności z podróży, Kwartalnik Prawa Prywatnego, No. 2, 356–391.

Evans P.J. (2004), Spoiled Holidays: Damages for Disappointment or Distress, The Tourism Industry 2004, Vol. 6: 1–7.

Gajda-Roszczynialska K. (2012), Sprawy o ochronę indywidualnych interesów konsumentów w postępowaniu cywilnym, Warszawa: Wolters Kluwer Polska SA.

Gołaczyński J., Szostek D., ed. (2019), Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw, Warszawa: C.H. Beck.

Koronkiewicz-Wiórek A. (2009), Zmarnowany urlop w praktyce – kilka uwag na tle orzecznictwa sądów wrocławskich, Rejent, No. 6: 53–83.

Kryla-Cudna K. (2018), Zadośćuczynienie pieniężne za szkodę niemajątkową powstałą wskutek niewykonania lub nienależytego wykonania umowy, Warszawa: C.H. Beck.
Kuska-Żak I. (2008), Odpowiedzialność organizatora turystyki za szkodę niemajątkową powstałą na skutek niewykonania lub nienależytego wykonania umowy o imprezę turystyczną, In: Turystyka a prawo. Aktualne problemy legislacyjne i konstrukcyjne, P. Cybula, J. Raciborski, ed., Sucha Beskidzka–Kraków: Wyższa Szkoła Turystyki i Ekologii, 123–138.
Luzak J., Osajda K. (2005), Odpowiedzialność za zmarnowany urlop w prawie polskim, Kwartalnik Prawa Prywatnego, No. 2: 305–353.
Maciąg K. (2018), Ochrona podróżnego na tle ustawy o imprezach turystycznych i powiązanych usługach turystycznych oraz ustawy o usługach turystycznych – analiza porównawcza, IKAR, No. 4, Legalis.
Misztal-Konecka J. (2012), Zakaz wyrokowania ponad żądanie strony ('Ne eat iudex ultra petita partium') – rzymskie tradycje i współczesne regulacje polskiego procesowego prawa cywilnego, Zeszyty Prawnicze, No. 12.4: 41–56.
Nesterowicz M. (1988), Glosa do uchwały z dnia 25 lutego 1986 r., III CZP 2/86, Nowe Prawo, No. 9: 108–114.
Nesterowicz M. (1996), Dyrektywa Rady Wspólnot Europejskich o podróżach turystycznych a prawo polskie, Kwartalnik Prawa Prywatnego, No. 3: 435–445.
Nesterowicz M. (2002), Zadośćuczynienie pieniężne za "zmarnowany urlop" podczas wycieczki turystycznej, Państwo i Prawo, No. 10: 72–76.
Nesterowicz M. (2011), Odpowiedzialność cywilna biur podróży w prawie francuskim, Państwo i Prawo, No. 2: 34- 46.
Nesterowicz M. (2011), Odpowiedzialność cywilna biura podróży za "zmarnowany urlop" w prawie polskim i porównawczym (na tle uchwały Sądu Najwyższego z 19 listopada 2010 r.), Przegląd Sądowy, No. 5: 5–15.
Nesterowicz M. (2013), Podstawy i granice odpowiedzialności cywilnej biur podróży, In: M. Nesterowicz, ed., Odpowiedzialność biur podróży a ochrona klientów w prawie polskim i Unii Europejskiej, Toruń: Wyższa Szkoła Bankowa w Toruniu, 7–22.
Nesterowicz M. (2016), Prawo turystyczne, Warszawa: Wolters Kluwer Polska SA.
Nesterowicz M. (2018), Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży, Przegląd Sądowy, No. 9: 44–57.
Nesterowicz M. (2018), In: Prawo zobowiązań – część szczegółowa. System Prawa Prywatnego, Vol. 7, J. Rajski, ed., Warszawa: C.H. Beck.
Peiper L. (1934), Kodeks zobowiązań, Kraków: Leon Frommer.

Piskozub P. (2015), Reklamacja imprezy turystycznej, Edukacja Prawnicza, No. 1: 22–25.
Siedlecki, G. (2014), Zadośćuczynienie za zmarnowany urlop, Studenckie Zeszyty Naukowe, No. 24: 39–45.
Sieradzka M. (2018), Dochodzenie roszczeń w postępowaniu grupowym. Komentarz, Warszawa: Wolters Kluwer Polska SA.
Tomaszek A. (2010), Pełnomocnik powoda w polskim postępowaniu grupowym, Monitor Prawniczy, No. 12: 666–670.
Wałachowska M. (2013), Odszkodowanie za niewykonanie lub nienależyte wykonanie umowy o podróż i zadośćuczynienie za "zmarnowany urlop", In: M. Nesterowicz, ed., Odpowiedzialność biur podróży a ochrona klientów w prawie polskim i Unii Europejskiej, Toruń: Wyższa Szkoła Bankowa w Toruniu, 65–86.
Weitz K. (2011), Związanie sądu granicami żądania w procesie cywilnym, In: Aurea Praxis Aurea Theoria. Księga Pamiątkowa ku czci Profesora Tadeusza Erecińskiego, Vol. 1, K. Weitz, J. Gudowski, ed., Warszawa, 679–715.
Zasuwik P. (2016), Odpowiedzialność organizatora turystyki za szkodę niemajątkową klienta w postaci tzw. zmarnowanego urlopu – glosa – III CZP 79/10, Monitor Prawniczy, No. 24: 1329–1333.

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GLOSS TO THE JUDGEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C 129/18, SM *VERSUS* ENTRY CLEARANCE OFFICER, UK VISA SECTION[1]

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ABSTRACT

The right of family members of Union citizens to live with them in the host Member State has always been considered essential for an effective freedom of movement of citizens. However, the provisions of Directive 2004/38/EC[2] contain a different description of the scope of authority of Union citizens family member, taking advantage of the freedom of movement of persons as to the possibility of accompanying or joining EU citizens taking advantage of the freedom of movement of persons, depending on whether they belong to the circle of "closer" or "distant" family members. This issue acquires particular significance in the context of family members who are not citizens of any Member State of the Union. For individuals belonging to the circle of "closer" family members, the EU legislator grants the subjective right to accompany or join a Union citizen exercising the right of the freedom of movement of persons. In the latter case, the legislator only obliges the host Member States to facilitate entry and residence for such individuals in accordance with their national legislation. The glossed judgment, by

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[1] Judgment of the Court of Justice of the European Union of 26 March 2019, C 129/18, SM *versus* Entry Clearance Officer, UK Visa Section, OJ C 134 of 16th April 2018; hereinafter: judgment C 129/18.

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [Text with EEA relevance], OJ L 156 of 30 April 2004; hereinafter: Directive 2004/38/EC.

determining the status of individuals under legal guardianship within the framework of the Algerian *kafala* system as a "distant" family member of a Union citizen, clearly touches upon a significant issue in the context of the Union's freedom of movement of persons.

Key words: family members, *kafala*, free movement of persons, citizenship of the European Union, direct descendants

THESIS:

1. The concept of a "direct descendant" of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38/EC of the European Parliament, and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC must be interpreted as not including a child who has been placed in the permanent legal guardianship of a citizen of the Union under the Algerian kafala system, because that placement does not create any parent-child relationship between them.

2. It is for the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union pursuant to Article 3(2)(a) of that directive, read in the light of Article 7 and Article 24(2) of the Charter of Fundamental Rights of the European Union, by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play, and, in particular, of the best interests of the child concerned. In the event that it is established, following that assessment, that the child and its guardian, who is a citizen of the Union, are called to lead a genuine family life and that the child is dependent on its guardian, the requirements relating to the fundamental right to respect-family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that child is granted a right of entry and residence in order to enable it to live with its guardian in his or her host member state.

1. INTRODUCTION

The glossed judgment was issued in response to the questions referred for a preliminary ruling addressed to the Court of Justice of the European Union[3] by the Supreme Court of the United Kingdom in the proceedings SM *versus* Entry Clearance Officer, UK Visa Section. The interpretation by the Court of Justice referred to the provisions of Article 2(2)(c) and Article 3(2)(a) of Directive 2004/38/EC, which define specific categories of family members of European Union citizens. Whether a person pertains to the circle of "closer", or "distant" family members[4], determines the scope of his or her rights as to the possibility of accompanying or joining a Union citizen exercising the right of the freedom of movement of persons. This issue acquires particular significance in the context of family members who are not citizens of any Member State of the Union.

In accordance with Article 2(2) of Directive 2004/38/EC, the status of a family member of a Union citizen, in addition to a spouse, partner with whom the Union citizen has contracted a registered partnership[5] and dependent direct relative in the ascending line[6], is also held by direct descendants who are under the age of 21 or are dependants, or those of the spouse or partner with whom a Union citizen has contracted a registered partnership. They have the right of free movement and residence on the basis of their status as family members of Union citizens[7]. Their

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[3] Hereinafter: the Court of Justice.

[4] In the literature on the subject, the division of family members of a Union citizens into "closer" and "distant" is proposed by Dominika E. Harasimiuk, Skuteczne korzystanie z prawa pobytu przez obywateli UE i członków ich rodzin [Effectively exercising the right of residence by UE citizens and their family members], Ius Novum 1(2016): 65.

[5] Pursuant to Article 2(2)(b) of Directive 2004/38/EC, a family member is the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host Member State.

[6] In accordance with Article 2(2)(d) of Directive 2004/38/EC, family members are also the dependent direct relatives in the ascending line and those of the spouse or partner with whom the Union citizen has contracted a registered partnership.

[7] Jolanta Bucińska, Status prawny członka rodziny obywatela Unii Europejskiej [The legal status of a family member of a European Union citizen], Roczniki Nauk Prawnych 2(2009): 66.

rights are acquired automatically and are equal to the rights of Union citizens[8].

Also, pursuant to Article 3(2) of Directive 2004/38/EC, the host Member States are obliged, in accordance with their national legislation, to facilitate entry and residence of any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 of this Directive who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen, as well as the partner with whom the Union citizen has a durable relationship, duly attested.

The family members indicated in Article 3(2)(a) do not enjoy directly the right, established in Directive 2004/38, to accompany or join the EU citizen[9]. The rights of "distant" family members of a Union citizen only involve the obligation of Member States to facilitate their entry and residence as per their national legislation[10]. However, the provisions of Directive 2004/38/WE do not specify how the Member States realise the obligation to facilitate entry and residence, at the same time leaving the Member States freedom in this field. Whereas, the Court of Justice decided that in the case of "distant" family members this obligation demands to treat their application more "favourably" than entry and stay applications of all other third-country nationals[11]. This means that they have no subjective right to entry and residence in the territory of a Member State. The rights vested in them in relation to such a Member State are only procedural safeguards connected with the possibility of appealing to the court against a negative

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[8] Dominika E. Harasimiuk, Skuteczne korzystanie…, 65.

[9] Valeria Di Comite, New Trends Concerning the Right of Residence of Familiars of EU Citizens, Cogito. Multidisciplinary Research Journal 3(2016): 27.

[10] Francesca Strumia, The family in EU Law After SM Ruling: Variable Geometry and Conditional Deference, European Papers 1(2019): 391.

[11] Judgment of the Court (Grand Chamber) of 5 September 2012, C 83/11, Secretary of State for the Home Department v. Muhammad Sazzadur Rahman and Others, ECLI:EU:C:2012:519.

decision[12]. The conclusion expressed in the literature on the subject that the rights of family members covered by the scope of Article 3(2) of Directive 2004/38/EC are considerably smaller than those applicable to "closer" family members is therefore justified[13].

2. THE FACTS OF THE CASE

The basis for the issue by the Court of Justice of the glossed judgment was the situation of spouses M., French citizens, who are guardians of the plaintiff in the main proceedings, under the Algerian *kafala* system. Mr M. is a French citizen of Algerian descent who has a permanent residence in the United Kingdom. Mrs M. is a French citizen by birth. The couple married in the United Kingdom in 2001 and cannot have children of their own. In 2009 the spouses M. travelled to Algeria in order to be assessed as to their suitability to become guardians of a child under the Algerian *kafala* system. They were assessed positively, and as a result they were declared "suitable" to adopt a child under that system. The plaintiff SM. is a minor citizen of Algeria who was abandoned by her biological parents at birth. By force of the act issued on 22nd March 2011 by the President of the Court in Bufariku (Algeria), SM. was placed under the guardianship of the spouses M., who were assigned parental responsibility under Algerian law. In October 2011, Mr M. returned to the United Kingdom for professional reasons, where he has a permanent right of residence[14]. For her part, Ms M. remained in Algeria with SM. After that SM. applied for

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[12] Magdalena Gniadzik, Ewolucja statusu obywateli Unii wobec państwa przyjmującego i państwa pochodzenia w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej [The evolution of the status of Union citizens in relation to the host country and country of origin in the context of the case law of the Court of Justice of the European Union], Warsaw: C.H. Beck, 2018 direct access via System Informacji Prawnej Legalis [date of access: 12.02.2020).

[13] Dominika E. Harasimiuk, Skuteczne korzystanie…, 69.

[14] It is worth stressing that the cost to Britain of mass immigration is £16.8 billion every year, whereby for migrants from outside the EEA, the bill was £15.6 billion. On the expenditure for migrants in the United Kingdom see more: https://migrationobservatory.ox.ac.uk/resources/.

entry clearance for the United Kingdom as the adopted child of an EEA national. Her application was refused by the Entry Clearance Officer on the grounds that guardianship under the Algerian *kafala* system was not recognised as an adoption under United Kingdom law and that no application had been made for intercountry adoption[15]. The action brought by SM. against this decision was dismissed by the First-tier Tribunal (Immigration and Asylum Chamber). In specifying the grounds for its decision, the Tribunal argued that SM. did not satisfy the conditions to be regarded as an adopted child under the United Kingdom rules on immigration or as a family member, extended family member or the adopted child of an EEA national within the meaning of the 2006 Regulations on immigration. The position of the First-tier Tribunal (Immigration and Asylum Chamber) was upheld by the Upper Tribunal to the extent that it concerned the lack of grounds to consider SM. a "family member". That court argued, however, that in that situation, SM. should be treated as an "extended family member" as provided for in Article 8 of the Regulations on migration. As a result of the appeal made by the Entry Clearance Officer, the Court of Appeal considered that SM. was not a "direct descendant" of a citizen of the Union for the purposes of Article 2(2c) of Directive 2004/38/EC, given that she had not been adopted in a form recognised by United Kingdom law. The Court of Appeal also concluded that SM. could not come within the scope of Article 3(2a) of that directive as one of the "other family members" of a citizen of the Union either.

According to the Supreme Court of the United Kingdom, before which the plaintiff eventually pursued her rights to obtain permission to enter the United Kingdom, SM. must, at the very least, be regarded as one of the "other family members". However, that court was of the view that Article 3(2)(a) of Directive 2004/38/EC applies only if SM. does not have the right to enter the United Kingdom as a "direct descendant" of a citizen of the Union as referred to in Article 2(2)(c) thereof.

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[15] An interesting review of case-law on the free movement of persons, the immigration and asylum law in the United Kingdom was presented by Sadat Sayeed, David Neale, Immigration and Asylum Case Law in 2018 (Part 2): Developments in Free Movement, Economic Migration, Nationality and Statelessness, Judicial Review 24:2(2019): 93–106, DOI: 10.1080/10854681.2019.162228.

Due to this, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. "Is a child who is in the permanent legal guardianship of a Union citizen or citizens, under *kafala* or some equivalent arrangement provided for in the law of his or her country of origin, a 'direct descendant' within the meaning of Article 2(2c) of Directive 2004/38?
2. Can other provisions in the Directive, in particular Articles 27 and 35, be interpreted so as to deny entry to such children if they are the victims of exploitation, abuse or trafficking or are at risk of such?[16]
3. Is a Member State entitled to enquire, before recognising a child who is not the consanguineous descendant of [a citizen of the Union] as a direct descendant under Article 2(2)(c), into whether the procedure for placing the child in the guardianship or custody of that [citizen of the Union] was such as to give sufficient consideration to the best interests of that child?".

4. THE ASSESSMENT OF THE COURT'S OF JUSTICE POSITION

In the context of the relevant elements of fact in case C 129/18, the position of the Court of Justice to the extent in which it concluded that the specific nature of the relationship established under the Algerian *kafala* systembetween the child and its guardian does not provide grounds to consider the former as a direct descendant as referred to in Article 2(2)(c) of Directive 2004/38/EC, should be assessed negatively.

Article 2(2)(c) of Directive 2004/38/EC does not directly specify who should be granted the status of a direct descendant, but only indicates which

[16] Distress highlighted by a national court, such as becoming a victim of abuse or human trafficking, or exposure to such a risk is an issue which is significant not only in the context of guardianship of a child under the *kafala* system, but also in the context of adoption, in particular international adoption.

conditions (age, dependence) should be met by a person to be considered as such. By custom, it is assumed that a descendant is a person directly related to a person from a previous generation. As a consequence, not only children, but also grandchildren, great grandchildren etc. are considered descendants. This interpretation is also referred to by the Court of Justice of the European Union in its judgment of 26th March 2019[17]. It seems, however, that the precise modifier "direct" used in Article 2(2)(c) of Directive 2004/38/EC demands that we refer not only to lineal kinship, but also to the degree of kinship. This means that, in accordance with Article 2(2)(c) of Directive 2004/38/EC, family members of Union citizens include their children and those of the spouse or partner with whom the Union citizen has contracted a registered partnership. As unequivocally confirmed by the Court of Justice in its judgment, a child adopted by a Union citizen or his or her spouse or partner should be considered in the same manner[18].

Bearing in mind the essence of adoption, this conclusion should be considered correct. The purpose of adoption is to accept a child into one's family and create better conditions for both its mental and physical development than it had in its previous environment. The rights and responsibilities that arise between the adopted and the adoptive parent are the same as for the relationship between a child and its birth parents[19]. This means that adoption creates a legal "parent-child relationship" between the adoptive parent and the child.

Furthermore, as indicated by the communication from the Commission of 2009 on better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[20], also foster children and foster parents having temporary custody of the child may

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[17] Recital 52 of the judgment C129/18.

[18] Recital 54 of the judgment C129/18.

[19] Helena Ciepła, In: Kodeks rodzinny i opiekuńczy. Komentarz [The Family and Guardianship Code. Comments], K. Piasecki, ed., Warsaw: C.H. Beck, 2011, 832.

[20] Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009)313 final.

claim the rights vested in them pursuant to the Directive, depending on the strength of the relationship in a given case.

The Koran clearly prohibits adoption within the meaning adopted by the legal systems of European states[21]. In Islamic states there are different forms of guardianship of a child, which include: *tabanni*, *kafala* and *wisayeh*[22]. The regulations concerning these forms of guardianship of a child are not identical across different Islamic states.

It is indicated in the literature on the subject that *kafala* has a function similar to adoption, while preserving the principles pertaining to Islamic culture[23]. It is also indicated that it does not result in such a strong relationship between the child and the guardian's family as adoption does[24]. In principle, guardianship under the *kafala* system does not lead to the acquisition of rights of children considered legitimate, including rights to inheritance, and is not an obstacle in contracting a marriage. In this context, the lack of grounds to consider *kafala* as equal to adoption should be seen as obvious[25].

In the analysed matter, the Court of Justice failed to analyse the circumstance that the minor SM. was abandoned by her birth parents, as well as the fact that under a judgment of the Algerian court, the plaintiff has borne the name of the spouses M. since 2011. Furthermore, the spouses M. undertook to give an Islamic education to the child, keep her fit morally

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[21] Wiesław Bar, Pochodzenie dziecka i władza rodzicielska w prawie rodzinnym państw islamskich [Parentage and parental responsibility in the family laws of Islamic countries], Studia z Prawa Wyznaniowego 7(2004): 224.

[22] More on the forms of child guardianship in Islam e.g. in Nadjma Yassari, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, American Journal of Comparative Law 4(2015): 927–962.

[23] Wiesław Bar, Pochodzenie dziecka…, 224.

[24] Anna Ślęzak, Adopcja w świetle regulacji prawa muzułmańskiego a zachodnie rozumienie tej instytucji [Adoption in the context of the regulations of Islamic law vs. the Western understanding], In: Zachód a świat islamu – Zrozumieć innego [The West and Islam. Understanding the Other], Izabela Kończak, Marta Woźniak, ed., Łódź: Katedra Bliskiego Wschodu i Północnej Afryki Uniwersytetu Łódzkiego, 2012, 132.

[25] To *kafala*, as a form of guardianship of a child, Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption cannot be applied. In accordance with its Article 2(2) regards only to those adoptions which create "parent-child relationship" between the parent and the child.

and physically, supplying her needs, looking after her teaching, treating her like natural parents, protecting her, defending her before judicial instances, [and] assuming civil liability for detrimental acts. They are also entitled to obtain family allowances, subsidies and benefits, to sign any administrative and travel documents, and to travel with SM. outside Algeria. As Advocate General noticed in his opinion of 26 February 2019, the present case has nothing to do with the private *kafla,* which does not have strict principles, administered in front of *adul* (notary), but with judicial *kafala*, which is established and approved by the competent court, through the participation of the prosecutor, after prior affirmation of minor desertion[26].

The scope of rights and obligations of the spouses M. is therefore identical to the scope of parental responsibility in European states. Through an Algerian *kafāla* arrangement, the *kāfil* will become not only the custodian of the *makfūl*, but also her legal guardian (*walī*)[27]. The spouses M. perform the same functions in relation to the plaintiff as should be performed by her biological parents. It is clear that a relationship characteristic of a family has been established and is being developed between spouses M. and the plaintiff. These persons are emotionally close, support each other in difficult moments, care about each other and share the joys and challenges of everyday life. Such behaviour is a consequence of living and spending time together. Such efforts are characteristic of the social entity that is family, even though in the circumstances of the case they do not result in the establishment of a parent-child relationship.

In the context of the relevant elements of fact such as in the analysed case, due to the specific nature of the forms of guardianship of a child functioning in Islamic culture, it seems that a child under guardianship under the *kafala* system may be considered a direct descendant. However, that assessment should not be automatic, but it must take into consideration, in every case, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship

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[26] Recital 39 of the opinion of Advocate General Campos Sánchez-Bordona delivered on 26 February 2019 in case C-129/18; http://curia.europa.eu/juris/document/document.jsf;jsessionid=7CDF92C9F8B970FFBA8A3A867A5CD915?text= &docid=211051&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=969259 [date of access: 4.04.2020].

[27] Nadjma Yassari, Adding by Choice…, 952.

which has developed between the child and its guardians and the extent to which the child is dependent on its guardians, inasmuch as they assume parental responsibility and legal and financial responsibility for the child.

In considering the case, the Court of Justice completely disregarded the fact that granting the plaintiff only the status of a "distant" family member of a Union citizen, may lead to a situation in which a citizen of a Member State will be forced to choose between the possibility of living in the territory of the European Union and being a guardian of a child, leading a family life. Being forced to make such choices may in turn lead to discrediting the essence of Union citizenship[28]. It cannot be omitted, therefore, that giving SM. the status of "distant" family member, and thus accepting the possibility of refusal of granting the permission to entry and reside in the United Kingdom, can prevent the marriage from taking advantage of freedom of movement of citizens, which is the fundamental right of Union citizens[29].

5. CONCLUSIONS

In conclusion, it should be stated that the glossed judgment is an attempt at reconciling the interests of Member States with those of individuals in the context of the current migration crisis. Although the position of the Court of Justice on case C 129/18 might be considered coherent with the previous rulings of the Court of Justice of the European Union regarding guardianship of a child under the *kafala*[30] system, given the circumstances of the analysed case, it should be assessed as too conservative.

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[28] Compare e.g.: judgment of the Court of Justice of 8 March 2009, C-34/09, Gerardo Ruiz Zambrano *versus* Office national de l'emploi [ONEm],OJ C 2011.130.2/1.

[29] Mark A.M. Klaassen, Annotatiebij HvJ 26 maart 2019, Zaak C-129/18 (SM), AB Rechtspraak Bestuursrecht, 30(2019): 4; https://openaccess.leidenuniv.nl/handle/1887/82817 [date of access: 4.04.2020].

[30] The issue of guardianship of a child under the *kafala* system has already been the subject of consideration by the European Court of Human Rights in the following matters: the judgment of 4 October 2012, Harroudj *versus* France, CE:ECHR:2012:1004JUD004363109 and judgment of 16 December 2014, Chbihi Loudoudi and Others *versus* Belgium, CE:ECHR:2014:1216JUD005226510.

It may be assumed with a high degree of probability that if the subject of the questions referred for a preliminary ruling were the situation of a child under a foster relationship, which is known to the systems of European states, the position of the Court of Justice would be different.

Due to all these reasons, the glossed judgement should be assessed negatively.

REFERENCES

Bar, Wiesław, 2004, Pochodzenie dziecka i władza rodzicielska w prawie rodzinnym państw islamskich, Studia z Prawa Wyznaniowego, No. 7: 221–232.

Bucińska, Jolanta, 2009, Status prawny członka rodziny obywatela Unii Europejskiej, Zeszyty Nauk Prawnych, no 2: 57–74.

Di Comite, Valeria, 2016, New Trends Concerning the Right of Residence of Familiars of EU Citizens, Cogito. Multidisciplinary Research Journal, No. 3: 21–36.

Gniadzik, Magdalena, 2018, Ewolucja statusu obywateli Unii wobec państwa przyjmującego i państwa pochodzenia w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, Warsaw: C.H. Beck.

Harasimiuk, Dominika E., 2016, Skuteczne korzystanie z prawa pobytu przez obywateli UE i członków ich rodzin, Ius Novum, No. 1: 63–78.

Klaassen, Mark A.M., 2019, Annotatiebij HvJ 26 maart 2019, Zaak C-129/18 (SM), AB RechtspraakBestuursrecht, 30: 1–5; https://openaccess.leidenuniv.nl/handle/1887/82817.

Piasecki, K., ed., 2011, Kodeks rodzinny i opiekuńczy. Komentarz, Warsaw: C.H. Beck.

Sayeed Sadat, Neale David, 2019, Immigration and Asylum Case Law in 2018 (Part 2): Developments in Free Movement, Economic Migration, Nationality and Statelessness, Judicial Review, No. 24:2: 93–106, DOI: 10.1080/10854681.2019.162228.

Strumia, Francesca, 2019, The Family in EU Law After SM Ruling: Variable Geometry and Conditional Deference, European Papers, No. 1: 389–393.

Ślęzak, Anna, 2012, Adopcja w świetle regulacji prawa muzułmańskiego a zachodnie rozumienie tej instytucji, In: Zachód a świat islamu – Zrozumieć innego, Izabela Kończak, Magdalena Woźniak, ed., 132- 137, Łódź: Katedra Bliskiego Wschodu i Północnej Afryki Uniwersytetu Łódzkiego.

Yassari, Nadjma, 2015, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, American Journal of Comparative Law, No. 4: 927–962.

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REVIEW OF VINCENT CHETAIL, *INTERNATIONAL MIGRATION LAW* (OXFORD UNIVERSITY PRESS, 2019)

*Alan Desmond**

International migration law is the "set of international rules and principles governing the movement of persons between states and the legal status of migrants within host countries" (p. 7), which provides a migrant-centred holistic frame of analysis (p. 8). In *International Migration Law*, one of the discipline's luminaries, Vincent Chetail, provides a comprehensive account of this specific set of international rules which is as eminently readable, deeply researched and prodigiously referenced as those familiar with his work have come to expect.

Following a brief but thoughtful and wide-ranging introduction, the first chapter, logically enough, deals with the history of international migration law with the second chapter detailing the founding principles of this branch of international law. The next three chapters each address a specific category of international migrant, namely, refugees, migrant workers, and trafficked and smuggled migrants. These chapters involve a close analysis of the treaty regimes regulating the movement of people across international borders. The final two substantive chapters address the evolving role of soft law in global migration governance and contain important and timely discussion of the roles and functions of IOM and UNHCR.

While available space constraints preclude detailed discussion of each individual chapter, some of the book's elements must be highlighted. Chetail is to be commended for the lengthy and in-depth analysis conducted in respect of the UN Migrant Workers Convention in chapter 4, on migrant workers. The chapter opens with the observation that migrant workers constitute the largest portion of international migrants. Converse-

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ly, the UN Migrant Workers Convention, one of the core international human rights instruments, has been described as the best kept secret in the UN and has been blighted by a debilitating lack of endorsement from states and a concomitant academic neglect. The 31 pages of chapter 4 dedicated to this human rights treaty go some way to redressing such neglect.

Chetail rehearses in detail the many reasons advanced in explanation of the failure of states in the Global North to ratify the Migrant Workers Convention but his identification of the "decisive reason" as being Western states' reluctance to recognise migrant workers as a vulnerable group entitled to a specific form of protection (p. 245) is open to question. No mention is made of the fact that there is relatively little political capital to be made by politicians who are seen to be keen to promote the protection of migrants' rights. It is arguably this disincentive which lies at the root of political aversion to ratification, something the author to all intents and purposes recognises elsewhere in the book (p. 400).

Non-ratification in the Global North is not, however, fatal. While the 55 states which have so far ratified the Convention are largely to be found in the Global South, Chetail astutely observes that in 2015 South-South migration exceeded South-North migration (p. 239), thereby highlighting the value of the Convention. Similarly, with the effortless insight which is typical of the work under review, Chetail draws attention to the way in which the Convention may be deployed to the benefit of forced migrants who have not yet qualified, or fail to qualify, as refugees under the 1951 Refugee Convention (pp. 224–227).

Some of the most interesting content is to be found in the book's final six pages in which the author presents his concluding thoughts on the future of international migration law. The chief challenges identified to effective application of international migration law are, at the normative level, states' poor track record of implementation of the relevant international rules and, at the institutional level, the difficulty inherent in efficiently managing "the complex and heteroclite array of nested institutions" (p. 399) involved in international migration governance. As a partial answer to the latter difficulty, Chetail proposes a reform of the funding system of IOM and UNHCR and, more ambitiously, a more coherent division of labour between the two with IOM assuming responsibility for international migration and UNHCR focusing on internal displacement.

While such a radical re-structuring might make sense on paper, Chetail concedes that it is politically unfeasible.

In relation to possible future developments, Chetail identifies the capacity-building potential of the UN system to ensure states' implementation of international law, the deployment of international criminal law to tackle large-scale abuses, as well as the untapped potential of existing international migration law mechanisms such as complaint procedures under general human rights treaties, and diplomatic protection. The author highlights the recently adopted Global Compact for Migration as, *inter alia*, providing a robust and balanced framework for the development of the international agenda on labour migration. Failure to bring this potential to fruition "will be remembered as yet another missed opportunity in the long and turbulent history of migration" (p. 403).

Every book, however impressive, leaves room for improvement. One might have expected, for example, the topic of nationality and citizenship, so intimately connected to the phenomenon of international migration, to have been addressed. Similarly, despite the deficiency of scholarly analysis of the UN Migrant Workers Convention mentioned above, there is no reference to some of the more recent academic work concerning this human rights instrument. Such quibbles, however, in no way eclipse the impressive feat of scholarship represented by *International Migration Law* which achieves far more than its author's stated chief objective of demonstrating what current international migration law is and how it operates (p. 12). The book has the rare attribute of being all things to all people. For undergraduate and postgraduate students it provides an accessible and authoritative introduction to international migration law; for the policymaker, practitioner and migration law expert it represents a cornucopia of essential information, insightful observations and thought-provoking propositions. It is an indispensable addition to the bookshelf of anyone concerned with international migration.

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REVIEW OF SIMONE PAOLI, *FRONTIERA SUD. L'ITALIA E LA NASCITA DELL'EUROPA DI SCHENGEN (SOUTHERN FRONTIER ITALY AND THE BIRTH OF SCHENGEN'S EUROPE)*, FLORENCE, LEMONNIER, 2018, PP. 343

*Elena Calandri**

In the current period of heated debates over rules and practices governing migrations in Europe, the scientific community and the public at large are in the urgent need for relevant historical research, to place events, policies and issues in a correct perspective. The historical process leading to the Schengen agreements has captured a lot of attention, with major scientific analyses – those by Andrew Moravcsik, scholarly Didier Bigo and Ruben Zaiotti – proposing diverse appreciations of the actors and moving forces behind the current political and juridical regime. Simone Paoli enters this ongoing debate taking the standpoint of a country which had had little or no role in the setting up of the EU rules collectively referred to as "Schengen" that is Italy. Its role and policies he argues, had been a core preoccupation of the entire political process leading to that regime; and Italy is now, also for those reasons, on the front line of the European migrations crisis Paoli's thesis is bold and clear: the design and implementation of the Schengen regime, from the 1984 Franco-German Saarbrücken agreement to the latest negotiations leading to Italy's April 1998 accession to the Schengen system, was expressly, if not exclusively, geared at forcing Italy to abandon its *laissez-faire* cum humanitarian policy regarding Mediterranean migrants; and to create a set of rules designed to make Italy adopt the Northern European culture

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and legislation of migration limitation, but also to shoulder the political and economic burden of the Southern European border checkpoints. The Italian case was particularly important also because it set a precedent for all peripheral countries in the South and, later on, in the East. This process literally forced Italy into a severe learning process to the extent of the migration policy. Such an Europeanisation was then in deep contrast with the view of the great majority of Italian political parties, economic interests, and societal actors.

Based on a plurality of national and international archival and other documentary sources, therefore full of evidences and "*Zeitgeist*", the book is divided into three chapters set in a chronological order. The first part analyses the genesis of the Schengen system within the broader framework of the historical evolution of the Community policy of free movement of persons. It explains the reasons for the 1984 Saarbrücken and 1985 Schengen Agreements – intergovernmental agreements among a limited number of the EC Member States that were experiencing their own national migrant crisis, and that refused, except for Benelux countries, to develop a proper EC policy – and those of the Italian exclusion from both agreements. It also highlights the main internal and international initiatives that the Italian Government had put in place in reaction to both treaties, before requesting for its accession to the Schengen Area on the basis of an important change in the internal political phase and in the development of international relations.

The strength of the anti-Italian resistance in Europe and, above all, the breadth, articulation and radicality of the opposition to Schengen in Italy are highlighted. The Italian leader of that period was Socialist Minister Claudio Martelli, the author of a bill expressing the Italian projects of Euro-Mediterranean integration, who took note of the demographic dynamics of North Africa, expressed a strong spirit of solidarity typical for almost all Italian parties and in particular of the major ones, the Christian Democrats and the Communist Party, of the Church, of NGOs, of trade unions. Italy then did not need and therefore did not lack the legislation and structures to deal with phenomena of immigration, in which a spirit of international solidarity dominated while many turned a blind eye on the deteriorating living conditions of the domestic migrant population. It found itself, however, restricted in

the choice between its own orientation and its willingness to be part of the European epochal dismantlement of internal border checkpoints. The renunciation of such an essential dimension of the integration process was not conceivable to leading political leaders like Giulio Andreotti, Gianni De Michelis, Giorgio La Malfa, and Italy therefore adhered to the system. In terms of South Europe, it was used for extending to the countries of Southern Europe rules tailored to the objectives of the countries of Northern Europe receiving migration, and to transform the states of Southern Europe in a buffer area able to stop and bear the economic and political costs, to be the borderline of Northern Europe. Even French President Mitterrand and Chancellor Helmut Kohl were directly involved in negotiations and political pressures. This is to say that migration rules, visa and asylum policies, police cooperation, information exchange, etc., far from being "low politics" engaged the highest political leadership and filtered down apparatuses and societal sectors, showing how they were perceived to be affecting the core of national sovereignty.

The book then analyses Italy's difficult acquisition of the European mentality in terms of the management of migratory flows, even after the first Albanian exodus in 1991, when Italy perceived, for the first time in a broad and clear manner, that it had become a country of immigration. As pointed out, at the time when the main European countries were facing the dramatic consequences of the end of the Cold War and the explosion of a new Mediterranean issue, the Italian difficulty in complying with the Schengen system caused particular concern. In the same chapter, Paoli discusses how the general situation contributed to complicating the construction of the Schengen Area and how, following the traumatic transition from the First to the Second Italian Republic in 1992–1994, Italy lost its place in the group of countries that had founded the area. This meant that a few years later, Italy had to face a new set of tests and passages of foreign and domestic policy to attain the conditions of entry, with a particular emphasis on the "Turco-Napolitano Law" on immigration, a restrictive law that was the key step for the final Italian participation in the Schengen Area.

According to Paoli, the process of developing the Schengen acquis was initially inspired mainly by France, the recipient of massive migration flows and the first country on the Continent to have recorded the phe-

nomena of xenophobia and, with the Front National, a politicisation of the migration issue, but was later largely dominated and determined by Germany's interests: after 1990 Berlin was able to shape the juridical regime in accordance with the dual objective of opening the eastern borders of the EU and closing the southern ones.

The insight into the domestic conditions in the Members States, their loss of control over the changing domestic socio-cultural attitudes, emerging dangerous feeling and political opposition, had to be balanced against their urge to protect diplomatic relations with sending countries. In this balanced picture there is no innocence in the European failure to face the novel and huge difficulties of mass migration from the South, but there are no real culprits either in the historical process that nobody has seemed able to contain, even if some were more able than others to protect their own interests, they hardly accounted for the shared European interest.

Although the migration phenomenon has occupied a fundamental space in the construction of the Schengen acquis from the Saarbrucken agreement in 1984 to the implementation agreements in 1995, the paper shows how other aspects and serious challenges – terrorism, drug trafficking, international mafias, etc. – have motivated the acquis governing the free movement of persons and the rules and management of external borders and checkpoints. It underlines how numbers of governmental, political, economic, social, institutional actors have been involved in the elaboration of the new juridical system, policy and culture of the Schengen acquis in European countries; that Schengen acquis has been an intergovernmental diplomatic process, a community policy, an issue in the domestic consensus among the Member States and the response from governments to the politicisation of the migration issue; it has been a clash of cultures, interests and power policy. This is why this book, whether one shares its conclusions or not, is an excellent and inspiring sample of history of international relations.